REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 451 OF 2006

CHRISTOPHER INSAUNI ISABWA.....APPELLANT

VERSUS

REPUBLIC….....RESPONDENT

(From original sentence and conviction in Criminal Case No.1831 of 2005 of the Chief Magistrate's court at Makadara by Miss Karani (Senior Resident Magistrate)

JUDGMENT

The appellant, **CHRISTOPHER ISAUNI ISABWA**, was convicted for the offence of robbery with violence contrary to **section 296 (2) of the Penal Code.** Thereafter, the trial court sentenced him to suffer death, as per law prescribed.

In his appeal to the High Court, the appellant raised four issues, which can be summarized as follows;

(i)The evidence was contradictory.

(ii)The trial court erroneously applied the caution on the danger of relying on the evidence of identification by a single witness.

(iii)**Section 214 of the Criminal Procedure Code** was flouted.

(iv)The formidable defence was wrongly rejected.

As regards contradictions, the appellant points out that the complainant gave different versions of what allegedly happened. He talked about 4 police officers, and then changed to 3 police officer.

The said officers are said to have arrested the appellant, when the appellant was wearing the jacket which he had just stolen from the complainant.

If that were the position, the appellant wonders why the police who booked him into the police station did not indicate that he had any jacket.

The appellant also said that the version of **PW 1** was different from that of **PW 2**, who is one of the police officers who had arrested the appellant.

He contends that whilst **PW 1** said that he found when the police had already arrested some suspects, the officer told the court that it was the complainant who pointed out the appellant as a suspect before he was arrested.

Another contradiction, as pointed out by the appellant was that **PW 2** told the court that he booked in the appellant, with the complainant's jacket. But the complainant said that he had remained with the jacket, because it was a cold night.

The complainant testified that he took the jacket to the police station on the following morning.

As regards identification, the appellant submitted that although the trial court cautioned itself about the reliance on the evidence of a single identifying witness, the court failed to note that there was no positive identification.

It is the appellant's position that it must have been dark at 8.30p.m. When the robbery took place.Therefore, in the absence of an established source of light, the appellant submitted that there could not have been positive identification of a stranger.

The appellant also faulted the prosecution for failing to exhibit the jacket which was the basis for his alleged identification.

On the issue of **Section 214 of the Criminal Procedure Code,** the appellant submitted that the trial court erred when it failed to take a fresh plea, after the original charge was amended.

Finally, the appellant submitted that the trial court was wrong to have rejected his defence. He reiterated that the only reason for his arrest was that he did not have his Identity Card.

In answer to the appeal, Mr. Kadebe, learned state counsel, submitted that the contradiction between **PW 1** and **PW 2** could not have prejudiced the appellant. The said contradiction was in relation to the appellant's mode of arrest.

The Respondent's position was that the conviction was based on the doctrine of recent possession, as the appellant was found wearing the complainant's jacket.

On the issue of identification, the respondent pointed out that the appellant was arrested very close to the scene of crime; and that the complainant identified both the appellant and his jacket, which the appellant was wearing.

On the question of the provisions of **section 214 of the Criminal Procedure Code**, Mr. Kadebe conceded that the court did not have the appellant take a fresh plea after the charge sheet was amended.

However, as the amendment was only in changing from the amount of Ksh.1,200/- to Kshs.700/-, the respondent submitted that the appellant suffered no prejudice.

Consequently, submitted the respondent, the failure to comply with **section 214 of the Criminal Procedure Code** was curable under **Section 382** of the same code.

Finally, it was the respondent's contention that the appellant's defence was duly considered by the trial court. The respondent pointed out that the trial court even commented that the defence would have been relied upon if the alibi was called by the appellant.

Being the first appellate court we have re-evaluated all the evidence on record. We have drawn our won conclusions from the evidence on record.

PW 1 is the complainant. He used to work at a casino, where he provided security.

On 3rd February 2005, he was on his way to work, when he met 3 boys. They stopped him, and one of the boys pointed a gun at him.

One boy took a wallet from **PW 1's** trouser pocket. That boy is the one whom **PW 1** identified.

After being robbed **PW 1** met 4 police officers and 3 other people. One of those 3 people is the appellant, said **PW 1.**Therefore, he told the police that the appellant had just robbed him of his wallet and jacket.

The appellant was wearing the jacket.

As the jacket in issue was not before the court when **PW 1** was testifying, When **PW 1** resumed his testimony, he told the court that when he met the police officers who were on patrol, the said officers were with 4 other persons.

It is because of that change in the evidence of **PW 1**, that the appellant submitted that the complainant gave contradictory evidence.

Strictly speaking, the difference in the number of persons is not contradictory *per se*. It can be more accurately described as inconsistent.

If there is an inconsistent piece of evidence, the court would weigh the weight of the said inconsistency within the broader context of the whole evidence that had been tendered. It is then that the court could verify the impact of any such inconsistency on the case.

In this case, we also note that **PW 1** had first testified that;

"I told the police that the accused had robbed me right there and then, and that he was earing my jacket, so that he had 2 jackets. Asked for my wallet he said the colleague had gone with my wallet. I told the police he had my jacket.They removed my Jacket and toldme to go write a statement next day.I left the jacket at Police Station."

To our minds, that means only one thing. The appellant was still wearing the complainant's jacket at the time **PW 1** found him under arrest.

The police removed the jacket from the appellant. They, presumably, gave the jacket to **PW 1**, as he later handed over the jacket at the police station, on the next morning.

But when **PW 1** was recalled, he appears to have told the trial court a different story. This is what he said;

"After about 15 minutes I met police with 4 accused persons and accused in my jacket. I told police the accused had stolen from me. He was wearing my jacket.

I asked accused where my wallet was.He responded,and in the presence of police, thecolleagues had taken my jacket.I would stillhave recognized him as he had a sleeveless grey jacket underneath."

Surely, if the appellant's colleagues had gone away with **PW 1's** jacket, then the appellant would not have still been wearing it.

But then again, **PW 1** appeared to be insisting that although his colleagues went away with his jacket, the appellant was still wearing it.

We deemed it prudent to peruse the original hand-written record of the proceedings, to verify whether or not there had been a typographical error. We verified that the typed record, as produced above, reflected a true picture of the original hand-written record.

In effect, there appears to be some confusion in the record, as the appellant could not have been wearing a jacket if he had also said that his colleagues had gone away with it.

The question which the appellant was responding to was in relation to the whereabouts of the

complainant's wallet, not his jacket.

Therefore, it is our considered opinion that it was the learned trial magistrate who made an error when recording the appellant's answer, by incorporating the word “jacket” into an answer to a question about a “wallet”

Assuming that we are right, it would mean that the appellant was wearing the jacket when **PW 1** found him already under arrest.

The next question is, what happened to the jacket? Was the appellant booked into the police station with the jacket, or did **PW 1** go away with the jacket, so that he only took it to the police station on the next morning?

PW 1 said that it is he who delivered the jacket to the police. That means that when the police booked in the appellant at the police station, they did not have the jacket.

But **PW 2**, who is one of the police officers who arrested the appellant, said that he had booked the appellant into the Police Station, with **PW 1's** jacket.

When faced with the questions concerning how a jacket which **PW 1** still had, was also booked into the station with the appellant, **PW 2** said.

“It is the same one the complainant brought. The complainant came and must have been with a policeman carrying the exhibit. Its true you were booked with jacket”

Of course, if the appellant was not booked into the police station until the next morning when **PW 1** delivered the jacket to the station, then **PW 2's** explanation would hold water.

However, **PW 1** made it crystal clear that he was not at the station when the appellant was being booked in.

In fact, **PW 1** told the court that after the appellant was arrested, he **(PW 1)** proceeded to his place of work.

Another issue of serious concern is that whilst the arresting officer testified that it is the complainant who pointed out the appellant to the police officers, before arrest; the complainant testified that he found that the appellant had already been arrested. Indeed, the complainant said that he did not even know where the appellant was arrested.

We have serious inconsistencies in the evidence tendered by the two prosecution witnesses. In the circumstances, we hold that it would be unsafe to sustain the conviction.

Secondly, the learned trial magistrate appeared to suggest that the appellant should have adduced evidence to support his defence If that be the case, then we must emphasize that an accused person has no obligation to prove his innocence. The burden of proof in criminal cases rests, at all times, on the prosecution. It is for them to prove beyond any reasonable doubt that the accused was guilty.

The accused could choose to remain silent or to give unsworn evidence. His choice cannot be construed against him. He can only be convicted if the prosecution proves the case against him beyond any reasonable doubt.

Having concluded that it would be unsafe to sustain the conviction, we now allow the appeal, quash the conviction and set aside the sentence.

We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 25th day of July, 2013.

…..... ….....

A. MBOGHOLI MSAGHA FRED A. OCHIENG

JUDGE JUDGE