REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 92 OF 2009

SOLOMON NJOROGE KAMAU.....….....APPELLANT

VERSUS

REPUBLIC….....RESPONDENT

(From original sentence and conviction in Criminal Case No.1674 of 2008 of the Chief Magistrate's Court at Kiambu by D. Mulekyo, Senior Resident Magistrate)

JUDGMENT

The appellant, **SOLOMON NJOROGE KAMAU**, was convicted for the of fence of Robbery with violence contrary to **Section 296 (2) of the Penal Code**. After conviction, the appellant was sentenced to suffer death as by law prescribed.

He has challenged both the conviction and sentence, through his 5 grounds of appeal, which can be summarised as follows;-

(a)The evidence tendered was doubtful and questionable.

(b) The charge was not proved.

(c) The death penalty is arbitrary and unconstitutional.

(d) **Article 50 of the Constitution** was violated when the appellant was denied vital elements for his defence.

(e) The defence was not considered.

When canvassing the appeal, the appellant submitted that the complainant had failed to tell the trial court about the length of time spent observing his assailant.

The complainant is also said to have failed to specify the duration of the robbery incident.

Considering that the complainant was absent at the time and place where the appellant was arrested, it was the appellant's contention that there ought to have been an Identification Parade.

The appellant believes that if he had been found in possession of a knife, as was alleged then he would have been charged with the offence of being in possession of a knife.

Therefore, as he was never charged with the offence of being in possession of a knife, the appellant

submitted that meant that the evidence about the alleged knife were nothing but unfounded accusations.

An issue was raised concerning the need to have “Independent Witnesses”. By independent witnesses, the appellant meant persons other than the complainant who was robbed, and the complainant's employer, from whose shop the complainant was robbed.

His assertion was that those two witnesses could simply have discussed the matter, and then decided to implicate him. Therefore, the appellant argued that some members of the public, who had no connection with the complainant, should have come forth to corroborate the evidence of the complainant.

The appellant also submitted that the prosecution had failed to prove that the currency notes which were recovered from him, belonged to the complainant.

On the question of the death sentence, the appellant submitted hat it was unconstitutional. It constituted an arbitrary deprivation of his right to life.And, it also constituted an inhuman and degrading form of punishment.

In order to prepare adequately for his case, the appellant says that he needed the witness statements. However, those were never made available to him, even after the trial court ordered that they be provided.

Therefore, the appellant submitted that his constitutional rights to a fair trial, were violated.

In his defence, the appellant had indicated that he had been implicated by **PW 5** and **PW 6** after he failed to remit to a senior police officer, the weekly pay due to that officer. The appellant had told the trial court that he was a “bhang dealer.”

When answering the appeal, Miss Maswai, learned state counsel, submitted that the appeal had no merit.

The respondent summarised the evidence that was presented before the trial court, and submitted that the prosecution had proved the case against the appellant.

It is the respondent's understanding that the appellant was positively identified when he was committing the offence.

The appellant accosted the owner of the shop, who was rushing towards the shop after he had heard the complainant screaming.

The shop owner was confronted by the appellant, who was armed with a knife.

The shop owner fell down, when the appellant shoved him off. But he quickly got up and chased after the appellant. Other members of the public joined in the chase until they arrested the appellant.

The knife which the appellant had used to threaten both the complainant and the shop owner, was recovered.

Also recovered was the sum of Kshs.600/- which had just been taken from the complainant.

And the doctor who examined the shop owner verified that he was injured. The doctor attributed the injuries to a blunt object. However, because the shop owner never testified about any weapon or instrument being used to assault him, the appellant submitted that the doctor's evidence was inconsistent with that of the shop owner.

On the appellant's complaint about witness statements, the respondent pointed out that the trial court ordered that the appellant be supplied with the said statements.

In the opinion of the respondent, the court was entitled to presume that the appellant was given the

witness statements because the appellant never told the court otherwise.

On the legality of the death sentence, the respondent submitted that it was provided for by a statute, and was thus lawful.

Furthermore, the appellant was given an opportunity for mitigation, said the respondent. Therefore, the allegation that the trial court denied the appellant an opportunity for mitigation was said to be erroneous.

Finally, the respondent submitted that the appellant's defence was accorded due consideration by the trial court.

We note that when the appellant was first arraigned before the court, the prosecutor asked the court to defer the taking of the plea. He explained that he needed time to discuss with the Investigating officer, some anomalies which he had noted in the charge sheet.

The court allowed the prosecution's application for an adjournment. Thereafter, the appellant pleaded "Not Guilty" to the new charge which was read and explained to him.

The appellant suggested that the amendment to the charge was not valid. On our part, we find absolutely nothing irregular with the charge sheet. The prosecution substituted the first charge sheet with a new one. And the appellant took a plea on the new charge sheet.

There is therefore no basis for the appellant's contention that the new charge sheet was invalid.

PW 1 is the medical doctor who examined the complainant a few hours after he got injured.

The doctor told the court that the complainant informed him that he had been "assaulted by one known to him."

A perusal of the P3 Form which was signed by **PW 1** confirms the history of the injury suffered by the complainant, as being the case of:

".....assault by person known to him."

During cross-examination **PW 1** further stated;

"He said those who assaulted him were thieves."

The appellant suggested that that piece of evidence was not in conformity with what **PW 3** told the trial court. As far as the appellant was concerned, the owner of the shop only fell down.

However, a perusal of the evidence tendered by **PW 3** shows clearly that the assailant hit him on the right side, using the blunt side of the knife. As a result, **PW 3** had swelling on his hand.

Therefore, the evidence about the assault of **PW3**, with the use of a blunt object is wholly consistent as between the doctor and the witness.

The complainant was robbed at 11.00a.m. The complainant **(PW 2)** said;

"I clearly saw you when you robbed me, it was daylight"

We find that the prevailing circumstances were conducive for positive identification, and that **PW 2** did identify the appellant positively.

The possession of a knife is not, of itself a criminal offence. Therefore, the fact that the appellant was not charged with a separate count of being in possession of a knife, cannot imply that he did not have the

knife.

One of the ingredients of the offence of Robbery with violence is the fact of the accused being in possession of a dangerous weapon or instrument.

In this case, the appellant was sad to have been armed with a knife. By leading evidence to prove the possession of that knife, the prosecution was proving an integral ingredient of the offence of Robbery with violence. It would have been wrong to charge the appellant with both Robbery with violence, (in which the knife was a factor), and for being in possession of a knife, as a separate count.

The law does not stipulate that an accused person can only be convicted if there was an Independent Witness.If there had been such a requirement, many offenders may go unpunished because the witnesses were either all members of a family or colleagues at a place of work, depending on the place where the offence was committed.

The assailant had been identified by **PW 2** and **PW 3**. The knife which had been used to threaten **PW 2** and to injure **PW 3** had been recovered. And the money which had been stolen had also been recovered. In those circumstances, no other witnesses would have been necessary.

We find that the Investigating Officer was right to have concluded as follows;

"I did not find it necessary to interrogate people from the area as to whether such a robbery occurred."

The defence, in the face of the evidence tendered by the prosecution was that the appellant was framed because he had failed to remit weekly dues to Administration Police Officers at some un-named Police Post.

That defence ignores the fact that the initial arrest was made by civilians, who had identified the appellant without the help of any police officers.

The appellant did not, as much as hint, at any possible reason why the complainant and the shop owner would have wanted to frame him.

The appellant failed to raise that line of defence when he was cross-examining APC Muchiri, (PW6) or APC Kanene (**PW 5)** about the alleged reasons why they had framed him.

That can only mean that the defence was an afterthought. It was not plausible. We reject it, as did the learned trial magistrate.

We also note that before the trial court handed down the sentence, it provided an opportunity to the appellant for mitigation. He told the court that he was ailing.

By giving to the appellant an opportunity for mitigation, the trial court complied with the requirements laid down by the Court of Appeal in the case of **GEOFFREY NGOTHO MUTISO Vs REPUBLIC, CRIMINAL APPEAL No. 17 of 2008.**

As to the legality of the death sentence, we emphasis that the Court of Appeal has never declared it illegal or unconstitutional. The position taken by the court of Appeal is that if the death penalty be deemed as a mandatory sentence, which was to be handed down automatically after the conviction of an accused found guilty for offences such as Robbery with violence or murder, then it would, to that extent only, be deemed unconstitutional.

For the avoidance of any doubt, the death penalty remains lawful in Kenya.

In conclusion, we find no merit in the appeal. It is therefore dismissed. We uphold both the conviction

and the sentence which he learned trial magistrate handed down to the appellant.

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

…..... …....

A. MBOGHOLI MSAGHA FRED A. OCHIENG

JUDGE JUDGE