REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 247 OF 2008

(From the original Conviction and Sentence in the Criminal Case No. 1757 of 2006 of the CM's Court at Mombasa)

ABDULRAHIM BAKARI *alias* MAWAZO..……....APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

The appellant herein **ABDULRAHIM BAKARI alias MAWAZO** has filed this appeal to challenge his conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The appellant was first arraigned in court on 24th May, 2006 on a charge of Robbery with Violence contrary to section 296(2) of the Penal Code. The particulars of the charge were given as follows:

> **"On the 10th day of March, 2006 at about 11.30 p.m. at South Guest Bar and Restaurant in Likoni Location within Mombasa District of the Coast province jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed off REGINAL KULALA scratch cards, assorted wines and spirits and cash Kshs. 8,000/= all valued at Kshs. 20,000/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said REGINA KULALA."**

The appellant pleaded *'Not Guilty'* to the charge and his trial commenced on 28th February, 2007. The prosecution led by **INSPECTOR KITUKU** called a total of three (3) witnesses in support of their case.

The complainant *'Regina Kulala'* told the court that she worked as a cashier at South Guest Bar in Likoni. On 10th March, 2006 at 11.pp p.m. she was on duty with a colleague whom she names as *'Jane Marobe'*. At about 11.30 p.m. five customers came and asked to be let in to purchase beer. The watchman opened to let the customers in. As they entered a group of around ten (10) people also swarmed in with them. The men were armed with rungus, knives, hammer and a pistol. They went on the rampage and ordered all the customers to lie down. They stole cash, mobile phones and valuables from the customers who were in the bar as well as Kshs. 8,000/= from the till. The robbers then rounded up the complainant and a lady patron and took them to a spot near the sea. There they ordered the two to undress and forced them to drink beer all the while holding a knife at them. Police came to the scene and the thugs all ran away. Police rescued the two women and escorted them back to the bar. The complainant gave police the name of one of the robbers – a man she had known from before. The appellant was later arrested and charged in court.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied any involvement in the robbery. On 21st May, 2008 the learned trial magistrate delivered her judgment in which she convicted the appellant and sentenced him to death. Being aggrieved with both this conviction and sentence the appellant filed this appeal.

The appellant who appeared in person opted to rely on his written submissions which with the leave of the court had been duly filed. **MR. JAMI**, learned state counsel made oral submissions opposing the appeal. The appellant in his written submissions raised three main grounds of appeal as follows:

- Defective charge sheet
- Identification
- Insufficiency of Evidence

With regard to the first ground we have anxiously examined the charge sheet and find that it was properly framed in all respects. Both the charge and particulars are framed in clear and concise language. We find no fatal defect as claimed by the appellant. As such this ground of the appeal fails.

With regard to identification the complainant told the court that the incident occurred at 11.30 p.m. It was night time and no doubt dark. However, in her evidence at page 9 line 17 she states:

> **"I saw them as they entered. There was electricity supply in the premises. Lights were on."**

Thus the complainant gave evidence that the bar was well lit. Further we note that the complainant gave a graphic narration of the events of that evening. She described how at first two ladies and three men came posing in as customers. Later a group of ten forced their way into the bar and four headed to the counter where she was. The fact that she could describe events in such clear detail convinces us that the lighting in the bar was sufficient to enable the complainant to clearly see what was happening.

In addition the complainant told court that the robbers herded herself and a lady patron out of the bar and led them to the sea where they ordered them to undress and forced them to drink part of the beer they had stolen. Thus it is quite evident that the complainant spent a sufficient amount of time in the company of the accused such that she was able to see and identify him well.

Aside from mere visual identification, the complainant told the court that the appellant was a person whom she knew before this incident and thus she was able to recognize him. At page 10 line 7 the complainant says:

> **"In the group of ten I was able to identify one of them. I knew him prior to. He was our customer prior to and was living in the neighbourhood. He is called Abdulrahman. He had come to the bar earlier in the day and bought cigarettes. He was one of the four who entered the counter. He had a hammer and knife. He is in court today identified as accused on the dock by pointing."**

The complainant was very clear on the identity of the appellant and was even able to identify him by name. She later confirms that she gave the police the name of the appellant. In the case of **ANJONONI & OTHERS –VS – REPUBLIC [1980] KLR** the Court of Appeal held that:

> **"recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."**

As such we find that given that the complainant was able to recognize the appellant in an area well lit by electric lights her identification was clear positive and reliable. We are alive to the fact that the identification was by a single witness. In her judgment at page 28 line 4 the learned trial magistrate stated as follows:

> **"I have noted one important fact herein. That is although there were several people in the bar during the attack only one witness <u>PW1</u> adduced evidence. Despite that, I find her evidence as overwhelming and unchallenged. I am left with no doubt in my mind that an attack did take place on the 10th March, 2006."**

These comments were made by the trial magistrate who unlike us saw and heard the witness testify. She was better placed to comment on the demeanour and veracity of this witness. We have no reason to dispute her observations in this regard.

In the case of **ABDULLA BIN WENDO & ANOTHER –VS – REPUBLIC [1953] 20 E.A.C.A**. it was held as follows:

> **"Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult."**

Therefore the court need not reject identification when made by a single witness. What is required is that such identification be foolproof. In this case where electric lights provided ample illumination, where the witness spent a fair amount of time in the company of the appellant and where there is sound evidence on recognition, we find the identification of the appellant by a single witness being the complainant was indeed foolproof.

The question may well arise as to why this identification was not tested by way of an identification parade. Given the fact that the complainant stated that she had known the appellant before this incident, in the circumstances an identification parade would have been superfluous. We habour no doubt at all, that the appellant was positively identified as one of the men who invaded the bar on the material night.

The elements of the offence of Robbery with Violence being:

- Perpetrated by more than one person
- Armed with dangerous and/or offensive weapons
- Threats of violence issued to the victims

are all shown to have existed. The complainant described how a group of ten invaded the bar. She describes how they were armed with rungus, pangas, knives and a pistol. She further described how the robbers set upon herself and the other bar patrons with kicks and blows demanding their money and valuables. **PW2 ISSACK GIKARA** the owner of the bar confirms that upon being alerted of the incident he went to his bar and found the whole place in disarray. The counter was open and the money was gone. He also found his employee '*Regina*' (the complainant) missing. There can be no doubt about the occurrence of this incident.

Based on our own analysis we are satisfied that the prosecution did prove their case beyond a reasonable doubt. The conviction of the appellant was in our view sound and we do confirm the same.

The appellant was allowed an opportunity to mitigate after which he was sentenced to death. This sentence was lawful and we uphold the same. Finally, this appeal fails in its entirety and is hereby dismissed.

Dated and delivered in Mombasa this 5th day of August, 2013.

M. ODERO **M. MUYA**

<u>JUDGE</u> **<u>JUDGE</u>**