REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 355 OF 2010

MAHAT SHEIKH ABDI …….....…… APPELLANT

VESUS

REPUBLIC …… RESPONDNENT

(From original conviction and sentence in Criminal Misc Case No.* 994 of 2010 *in the Principal Magistrate's Court at Garissa before J.N. Onyiego, Principal Magistrate)

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal code. After a full trial the learned trial magistrate found that the charge of robbery with violence had not been proved beyond any reasonable doubt but that the prosecution had proved the offence of grievous harm contrary to Section 234 of the Penal Code. Invoking the provisions of Section 179 (1) (2) of the Criminal Procedure Code he convicted the appellant of that offence. Following the said conviction he sentenced the appellant to 20 years imprisonment with hard labour. This appeal followed the said conviction. From the outset I note that hard labour is not provided for in the penalty for that offence.

The appeal was argued by way of written submissions which I have on record. The appellant faulted the learned trial magistrate for failing to establish whether or not he was fit to stand trial, and annexed a medical report to show that he suffered prejudice as a result. He also faulted the learned trial magistrate for relying on hearsay evidence to convict him. Further, he also complained that his defence was not considered and also that the duration he spent in custody during the trial was never taken into consideration.

In addition, he stated there were contradictions in the evidence of prosecution witnesses relating to sufficiency of light based on moonlight and which could not establish the guilt of the appellant. That is to say the identity of the appellant was in doubt.

The learned counsel for the appellant has cited several authorities which I have noted. On the other hand the learned counsel for the Republic concedes this appeal. In so doing, he refers to the evidence of P.W. 1 and P.W. 2 whereby contradictory evidence was given relating to the attack on the complainant, who said that he was attached while inside the house with four other people and the only evidence as to lighting was a hurricane lamp. However, P.W. 2 stated that the attack took place outside the house within the compound.

The other contradiction came from PW. 3 who talked of the attack having taken place within the compound but not inside the house contrary to the evidence of the complainant. The learned counsel for the Republic submitted that the contradictions were material and should have been resolved in the appellant's favour pursuant to Section 111 (2) of the Evidence Act. It is also his position that failure to conduct an identification parade left the question of identification unresolved. Further, crucial witnesses who were in the company of the complainant during the attack were never called, and instead the prosecution called a passerby as a witness thereby contravening Section 63 of the Evidence Act which provides that oral evidence must be direct; that is to say, by a person who saw or heard what is being alleged.

For purposes of record, the period spent in custody while an accused person is undergoing trial should be taken into consideration when the sentence is passed. Section 333 (2) of the Criminal Procedure Code is clear on that. On my part, having gone through the evidence on record and submissions by both learned counsel, I am in agreement that the conviction of the appellant was unsafe in the circumstances of this case.

Accordingly, this appeal is allowed, conviction quashed and sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 18TH Day of December, 2013.

A. MBOGHOLI MSAGHA

JUDGE