REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CRIMINAL APPEAL NO. 34 OF 2010

(From original conviction and in Criminal Case No. 249 of 2009 sentence of the Chief Magistrate's Court at Malindi before Hon. B. T. Jaden– CM)

IBRAHIM SAID ……..…….....……..APPELLANT

VERSUS

REPUBLIC ……..…….....……RESPONDENT

JUDGMENT

1. The appellant was charged before the Lamu Senior Resident Magistrate's Court with the offence of Robbery with Violence contrary to section 296(2) of the Penal code, and in the alternative, with handling stolen property contrary to section 322(2) of the Penal code. It was alleged in the particulars that on 18-2-09 at Mkomani location, Lamu district, while armed with a knife, he robbed MRS. JUANITA CARBERRY of one camera worth Ksh. 25,000/- and other assorted items and at or immediately before or after the robbery threatened to use violence on the complainant. In the alternative charge, it was alleged that he dishonestly handled Juanita Carberry's stolen camera on 18th February, 2009. Following a full trial, the appellant was convicted and sentenced on the alternative count and appealed to this court. Before the appeal could be heard, the appellant, who appeals against both conviction and sentence, successfully applied to put in amended grounds of appeal.

2. These grounds can be summarized as follows:

a) The trial magistrate erred in relying on the evidence of the recovered camera whose ownership the complainant did not establish.

b) The trial magistrate erred by relying and basing the conviction on the recovery evidence of only police officers. This is the substance of grounds 1, 4 and 5.

c) The trial magistrate erred by placing reliance on contradictory evidence regarding the color of the recovered camera.

d) The appellant also put in written submissions which he relied upon during the hearing of the appeal.

3. The state opposes the appeal by restating the prosecution evidence as the trial which the State Counsel describes as "consistent, reliable and overwhelming".

4. The evidence itself is straightforward. The elderly complainant, Juanita Carberry and her friend Penelope Ann Loudon Deubel (PW3) were foreigners visiting Lamu in the material period. On the

evening of 18-2-09 at about 7.00pm they were walking along a narrow street within Lamu town on the way to the place where they were staying. They had been out shopping. Because of PW1's advanced age and poor sight, she walked behind PW3 who acted as a guide.

5. Suddenly PW1 felt someone tagging at her shoulder bag. She resisted but before long it was slit open from her shoulder and the contents removed. The thief fled from the scene as PW1 and her friend shouted for help. PW3 even gave chase after the fleeing thief but he ducked into an alley. Back home, their host took them to the police station (Tourist Unit) where a report had already been made by a member of public.

6. On the same night at about 10.40pm, police constables Mosoibei (PW2), Cheruiyot (PW4) and Sergeant Kiilu (PW5) all attached to the Lamu Tourist Police Base were led to a Swahili house in Mkomani. They met three people, one of them the appellant, seated on mats in the corridor of the house. They conducted a search on them. Sgt. Kiilu recovered a camera hidden in the underwear of the appellant, in his crotch. The camera was in its case and bore the name and address of PW1. Also recovered from the person of the appellant was shs.500/- in notes. He was arrested. The complainant identified the camera at the police station as her property on the day after the incident, whereupon the appellant was arraigned in court.

7. The appellant's sworn defence was that on the material date he went home from work. While sleeping he heard knocking and on opening met with five police officers who promptly handcuffed him demanding to go to his room upstairs. They conducted a search of his room. He was eventually placed in police cells and was charged, on the alleged instigation of an informer, even though the complainant had not identified him.

8. I have re-evaluated the evidence of the trial **(Okeno vs Republic (1972) E.A.32)** as well as the matters canvassed at the hearing of the appeal.

9. The alleged attack on the complainant occurred in a narrow alley at night, and she and her companion (PW3) freely stated that they did not identify the thief. In this case, the conviction was based on the alleged possession by the accused of the PW1's stolen camera a few hours after the theft. And the key witnesses to the recovery are PW2, 4 and 5.

10. Having reviewed afresh the evidence of the police officers, I find it consistent as to the recovery. The appellant in his defence did admit that police visited him on the material night and conducted a search. I do not find any substance in the complaint by the appellant that the court should not have relied on the evidence of the police officers in the absence of other persons who witnessed his arrest. This matter was raised with the police officers by the appellant at the trial. They gave what in my view was a reasonable explanation. The other persons present in the house were relatives of the appellant who were naturally reluctant to get involved as witnesses.

11. But, and that is important, the appellant never alleged that the camera was found on any of these persons, and indeed his defence appears to be a denial of the alleged recovery at his residence.

Section 143 of the Evidence Act states:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact".

And there is no provision of law requiring the evidence of police officers in such a case as this to be corroborated.

12. The appellant admitted in his testimony before the lower court that he was not aware of any grudge harbored against him by any of the police officers although he complained the officers harassed him and others over business permits in seemingly unrelated matters. He did not clarify whether the business in question is the boat captainship he said was his occupation.

13. In the case of **Benjamin Mbugua Gitau vs Republic [2011]eKLR** the Court of Appeal considered similar objections regarding the failure by the prosecution to call certain witnesses. The court stated:

"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – See section 143 of the Evidence Act."

14. In the course of her evidence PW1 identified the camera and its pouch pointing the court to her name embossed on both items. The court notes indicate that the court confirmed the presence of the special mark on the items. These marks were also highlighted in the evidence of recovery by PW2, 4 and 5. At the hearing, the appellant did not challenge PW1's claim to the camera and case as indeed in the entire trial he persistently sought to distance himself from these items. His first ground of appeal therefore appears baseless. The appellant's reliance on Section 116 of the Evidence Act to buttress the said ground is actually a misdirection and would avail more to the complainant than the appellant.

15. As regards the colour of the camera, it is true that the police officers variously described the camera as silver (PW2), grayish (PW4) and metallic (PW5), while the case was described as black. This cannot by any stretch of imagination amount to a "material" contradiction in the prosecution case as alleged by the appellant. The camera was identified by its make – Fuji film Serial No. 1051758 in the charge sheet and the prosecution evidence. There was only one camera at issue, stolen from the complainant and recovered from the appellant, according to unassailable prosecution evidence.

16. The Lower Court carefully considered the denials of the appellant and correctly dismissed them, as clearly the defence was displaced by the prosecution evidence.

The court went on to observe:

"It beats any logic why the police officers would visit the house of the accused and plant the camera on him. With the recent possession of the camera and the strange position where the camera was found hidden (in the crotch) it is clear the accused knew he was handling stolen property"

It is evident that the appellant's conviction was justified and his appeal therefore lacks merit and is dismissed.

17. Although the circumstances of the offence bordered on robbery with violence, I think the sentence of ten years imprisonment is rather severe, the accused having been treated as a first offender. The value of the stolen goods was modest even though only the camera was recovered. For these reasons, I would set aside the sentence imposed by the trial magistrate and substitute the same with imprisonment for five years from the date of sentence.

Delivered and signed this **9th** day of **February 2012** at Malindi.

C. W. Meoli
JUDGE

In the presence of: