REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Appeal 151 of 2007

HAMISI ABDALLA ……..…….APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(Being an appeal from the original conviction and sentencein Kitui Senior Principal Magistrate's Court Criminal case No. 1017 of 2006 by Hon. J.O. Omburah on 13/692007)

JUDGEMENT

Hamisi Abdallah, "*the appellant*" was charged with 2 counts of robbery with violence contrary to section 296(1) of the Penal Code before the Principal Magistrate's Court at Kitui. The particulars of the 1st count were that on the night of 23rd and 24th August, 2006 at around 2.00a.m at BAT Estate Kitui Township Location in Kitui District of the Eastern Province, jointly with others not before court, while armed with offensive weapons namely panga, robbed **Teba Mohammed** of her cash Kshs. 2000/= and at the time of such robbery used actual violence on her by cutting her leg. The particulars of the 2nd count are that on the same date, time and place and in similar circumstances he robbed **Abdallah Abu** of Kshs. 11,000/= and immediately before the time of such robbery threatened to use actual violence to the said **Abdallah Abu**. The final count facing the appellant was that of having suspected stolen property contrary to section 232 of the Penal Code in that on the 24th August, 2006 at 11pm at Majengo Estate, Kitui Township Location in Kitui District of Eastern Province having been detained by **C.I. Arnold Etyang** and **No. 62124 PC Simon Mbare,** as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code, had in possession one battery make heavy duty of 12V-32 A.H. serial number 314527, reasonably suspected to have been stolen, or unlawfully obtained. The appellant denied all the charges and was promptly tried.

The prosecution called a total of six witnesses in a bid to prove its case against the appellant. Briefly the prosecution's case was that on the night of 23rd and 24th August, 2006 the complainant, her children **Halima, Asha Abdala** and **Abubakar Abdulla** (PW3) together with her husband **Abdalla Abu** (PW2) were asleep in their house opposite BAT in Kitui town when they were attacked by robbers. At about 2.00 a.m, PW1 heard footsteps outside and woke up her husband (PW2). Their bedroom window was suddenly hit and she started screaming as her husband ran to the sitting room. The children woke up and together with PW2 retreated into the toilet. The thugs cut the bedroom window grills and got into the house. They proceeded to break the bedroom door which PW1 had locked before she and her children dashed to the toilet to hide. One of the robbers kicked open the toilet door, grabbed **Asha Abdala** and dragged her out as he demanded for money. PW1 followed them as the robbers wanted her to tell them where her husband was. The complainant was dragged to the bedroom where the lights were on and she was able to

recognize the appellant among the thugs. She had known him before the incident as he used to park his boda boda bicycle next to her house and that he also used to visit his wife whom PW1 had employed as a house help. The appellant who had a panga hit PW1 on the hip and left leg. The other robbers stood by the window to keep watch as they ordered the appellant to act faster. As the robbery was in progress, a police motor vehicle suddenly appeared and the robbers who were keeping vigil outside escaped together with the appellant. In the meantime PW2 had ran and hid himself in the sitting room under the bed and did not see the robbers. However, he managed to call his employer over phone who in turn alerted the police. After the robbers escaped he came out and found two doors broken and his Kshs. 11,000/= stolen from the wardrobe. The money was one week's collection from the hotel business of his employer. PW1 was also robbed of Kshs. 2000/= in the process. She later went to the hospital and was issued with a P3 by **William Kamwea** *(PW6),* a clinical officer then based at Kitui District Hospital Upon his examination, he concluded that PW1 had sustained injuries which he classified as harm.

PW3 who was one of the children who hid in the toilet with his mother confirmed that one of the thugs kicked the toilet door open and he was able to identify him as the appellant since there was electricity light in the toilet in the natural a tube light. He saw the appellant take his mother (*PW1*) to the bedroom and beat her with a panga as he demanded for money. He told the police immediately they arrived at the scene that he had recognized the appellant who had a panga, a khaki cap and a torch among the robbers. In the morning he picked a khaki cap outside the house which he claimed belonged to the appellant who used to put it on and who even had it on during the robbery. The cap had special mark "**8**" on it. He used to see him with it whilst carrying out his boda boda business next to their house. He would park his motorcycle next to their house.

PW4, PC Simon Bare who visited the scene immediately confirmed that the robbery had indeed taken place. He found doors broken and things strewn all over in the bed room. He also confirmed that PW3 immediately told him that he had seen the appellant during the robbery. He also received similar information from PW1. **PW5, Inspector Etyang** arrested the appellant from his house in Majengo after receiving the information regarding his whereabouts.

The appellant when placed on his defence, elected to give sworn statement in which he denied participating in the robbery. He claimed that PW1 had been his lover since February, 2006 and that he stopped the affair and avoided her when he learnt or discovered that she had a husband. He however admitted that **PW5, Etyang** the OCS and an assistant chief went to his house where he was arrested and a battery recovered. He claimed however, that the battery was his having purchased it from somebody although he did not have any documents.

Having carefully considered the evidence before court by both the prosecution and the defence, the learned magistrate came to the conclusion that the evidence on record was enough to warrant the court to convict the appellant on the capital robbery charge but not so with having suspected stolen property. Accordingly he convicted the appellant on the capital robbery charge but acquitted him on the 3rd count of having suspected stolen property. Upon conviction he sentenced the appellant to death as required by law.

Much as the learned magistrate had acquitted the appellant on the charge of having suspected stolen property, he nonetheless proceeded to sentence him to serve 7 years imprisonment. This was a gross error on the part of the learned magistrate and we must correct it once. That sentence was illegal as he had not been convicted for the offence. It is vacated forthwith.

The foregoing notwithstanding, the appellant being dissatisfied with the conviction and sentence lodged the instant appeal. The appellant has questioned the findings of the trial court on the grounds that the evidence of recognition was not full proof, there was a grudge between him and the complainant, the charge was not proved, there was no indication on record of the language in which the court proceedings were conducted and finally, his defence was rejected when it was not challenged at all by the prosecution.

At the hearing of this appeal, we heard submissions from the appellant through his written submissions and we also heard orally the State Counsel, **Mr Mwenda**. The appellant's submissions have been

considered by us.

After summarizing the evidence and hearing the submissions, it is now our duty as the first appellate court to consider and evaluate the entire evidence and make our own findings with view to deciding whether the trial court reached sound conclusions and whether the appeal should be allowed. *See* **Okeno vs Republic [1972] E.A, 32.**

On our own analysis of the evidence on record, we find that the evidence against the appellant in this case was one of recognition because PW1 and PW3 all said that they knew the appellant prior to the event. He used to operate boda boda business. He would Park his motor cycle next to the complainant's house. At some point, PW1 had even employed the appellant's wife as a house help. Indeed the appellant admits that much. He conceded that both PW1 and PW3 knew him very well. From the evidence we have also established that the robbery took place at about 2.00 a.m and that the only source of light was from electricity in the bedroom and toilet. The question that immediately comes to our mind is whether the circumstances obtaining would have enabled these two witnesses to see and observe the appellant among the thugs as to be able to recognize them.

From the evidence, the robbers gained entry through the bedroom window. By this time PW1 and PW3 had escaped to the toilet to hide themselves whereas PW2 had rushed to the sitting room, and hidden under a bed. He never saw nor recognized the appellant among the thugs. Immediately the thugs gained entry into the house, two of them went for the toilet door and kicked it open. As already stated, the toilet room was lit with tube light. Two of the thugs entered. One of them slapped PW1's daughter, **Asha Abdalla** and asked for money. He dragged her out and PW1 followed. At this juncture, the appellant is alleged to have asked her whether she knew him but the complainant cheekily answered she did not know him. Ofcourse , PW1 knew him. In our view, the fact that the appellant asked her whether she knew him or not goes to show that the appellant knew that this witness was familiar and could easily recognise him. And as the learned magistrate correctly observed, the appellant was aware that he was known to the victims who could clearly identify him and was trying to test their intelligence so that they could be confused about his identity.

It is also instructive that the appellant had not taken steps to disguise himself as to make his recognition difficult. The appellant being a person who was familiar to the witnesses, they could not have failed to recognise him when he entered the toilet in the company of the other thug. There was sufficient light in the toilet to enable these witnesses to positively recognize the appellant. He even talked to them. In any event a toilet is not normally a large room. If the toilet was a small room, then these witnesses were in close proximity with the appellant and whoever he was accompanied with. That is another reason why his recognition by these witnesses could not have been difficult.

From the toilet the thugs moved with PW1 to the bedroom. In the bedroom there was electricity light. They remained in the bedroom for a while. Again they were in close proximity as they kept on demanding for money and she was hit with a panga. As this was happening PW3 was also seeing. It appears that after PW3 was left in the toilet, he was nonetheless able to see what was going on between his mother and the thugs. If this be the case and we have no reason to doubt, then this witness had ample opportunity to observe and see the appellant sufficiently to recognize him among the thugs. Small wonder that PW1 and PW3 gave the name of the appellant to the police immediately they came on the scene, soon after the robbery.

Besides the evidence of recognition, there is also evidence of PW3's recovery of the appellant's cap. During the robbery, the appellant had a cap on. This is a cap that this witness was familiar with as the appellant used to put it on often. It had a special feature or mark on it. It was "**8**". During the robbery, the witness had seen the appellant with it. The police unexpectedly appeared on the scene as the robbery was in progress. This forced the appellant and his cohorts to scamper. It would appear that, as they escaped the appellant dropped the cap. The following day PW3 found the cap outside next to the window. This evidence which was hardly challenged by the appellant goes further to buttress the evidence of recognition by PW1 and PW3.

Having carefully reconsidered and evaluated the evidence of recognition, we have come to the conclusion that the appellant was well known to PW1 and PW3, the conditions under which the robbery took place were not difficult, there was sufficient light in both the toilet and bedroom to enable these witnesses recognize the appellants among the robbers.

We appreciate that recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognise someone whom he knows, we should remind ourselves that mistakes in the recognition of close relatives and friends are often made. *See* **Paul Etole & Another vs Republic, Criminal Case Number 24 of 2000**.

In the instant case, we are satisfied that, given the circumstances, the recognition of the appellant at the scene of crime cannot be doubted.

The appellant's defence that he was set up by PW1 following a break up in their love affair, to our mind was a clear afterthought. He never raised the issue with PW1 in his cross-examination. We also doubt that PW1 would injure herself and have her house extensively damaged merely to set up the appellant much as hell knows no fury for a damsel scorned.

The appellant's other complain that the proceedings were conducted in a language he did understand is also an afterthought. The record shows that he effectively cross-examined every witness called by the prosecution. He could not have done so if he did not understand their *evidence in chief* in the first place. The record also shows that throughout the proceedings there was an interpreter. What was his job?

The appeal lacks merit. Accordingly it is dismissed.

JUDGMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **JUNE 2012.**

ASIKE – MAKHANDIA **GEORGE DULU**

JUDGE **JUDGE**