REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 115 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 1558 of 2004 of the Chief Magistrate's Court at Malindi: ***D.W. Nyambu – P.M.)***

JOSEPH KOMORA MARO .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

JUDGEMENT

The Appellant **JOSEPH KOMORA MARO ALIAS HIRIBAE** has filed this appeal to challenge his conviction and sentence by the learned Principal Magistrate sitting at Malindi Law Courts. The Appellant was first arraigned before the Lower Court on 22nd December 2004 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.** The particulars of the offence read as follows:-

"On the 25th day of July, 2004 at 6.45 p.m. at Kizingo area of Lamu Island in Lamu District of the Coast Province, jointly with others not before the court while armed with dangerous weapons – pangas, arrows and bows, robbed NAUREEN ALAM of her mobile phone make Nokia, a Kodak camera, a video camera make sony, a battery charger make sony, a walkman cassette player make Benson and Hedges, a spare battery, a document purse containing cash Kshs. 3,500/= Uganda Shs. 60,000/=, US dollars 561/=, toilet attires (assorted) and two electric gadgets all valued at Kshs. 143,380/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said NAUREEN ALAM."

The Appellant entered a plea of ***'not guilty'*** to the charge and his trial commenced on 16th February 2005 at which trial the prosecution called a total of eleven (11) witnesses in support of their case. The prosecution case revolves around a robbery incident which took on 25th July 2006 at a tourist lodge in the Kiingo area of Lamu District. A group of about four (4) men raided the hotel at about 6.30 p.m.. They herded the guests who included **NAUREEN ALAM, PW1** and her husband ***'Perpez Alam'*** (now deceased) into their room. The thugs who were armed with pangas, bows and arrows also handcuffed the daughter of the proprietor of the hotel **EMILY VAN AARDT (PW3)** and a worker named **BENJAMIN CHARO PW5** as well as roughing up other workers in the hotel. **PW1** and her husband were herded into their bedroom by four armed masked men who tied them up and demanded money and valuables. They surrendered all they had which included electrical appliances, mobile phone, charger and foreign currency including US $ 500, Kshs. 3,500/= and Ugandan shillings 6,000/=. **PW1** was hit on her back with a panga by one of the robbers in the course of the robbery. **PW6** **ISSA MOHAMED** the watchman blew his whistle to raise the alarm that there were robbers in the premises and the proprietor of the hotel **LOUIS VAN AARDT** **PW2** collected his firearm and went out in search of the thieves. He saw a group of men and warned them that he was armed. One of the men shot at **PW2** with a bow and arrowwho immediately reacted by shooting back at him. The injured man (who was the accused) fell to the ground whilst his accomplices ran away and escaped. Next to the accused was a yellow sack containing various items which were later identified by **PW1** as the items which were stolen from her room. Police were called in and they arrested accused and took him for treatment as the bullet was still lodged in his leg. The accused was then charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He made a sworn statement in which he denied any involvement in the robbery incident. On 13th August 2009 the learned trial magistrate delivered her judgment in which she convicted the Appellant and thereafter sentenced him to death. Being aggrieved by both this conviction and sentence the Appellant filed this present appeal.

The Appellant who was not represented by counsel at the hearing of his appeal opted to rely entirely upon his written submissions which had been duly filed before the court. **MS WAIGERA**, the learned state counsel who appeared for the Respondent State made oral submissions by which she urged the court to uphold both the conviction and sentence of the appellant.
As a court of first appeal our duties were well elucidated in the case of **AJODE – VS – REPUBLIC [2004] 2 KLR 81**, where it was held by the Court of Appeal that:

"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that"

The first question to be determined in this case is the question of whether or not the robbery incident which occurred at the Kizingo Lodge on the evening of 22nd December 2004 amounted to a Robbery with violence as envisaged by 2. 296 (2) of the Penal Code. The key ingredients of this offence were set out by the Court of Appeal in the case of **OLUOCH – VS – REPUBLIC [1985] KLR 549** and include:

(1) The offence is committed by more than one person or

(2) The offender(s) are armed with a dangerous and/or offensive weapon or

(3) At or immediately before or immediately after the robbery there is threat of/of use of actual violence against the victim.

In this case all the eye witnesses to the robbery confirm that it was committed by a group of more than one person fulfilling the first ingredient. Secondly the witnesses all testify that their attackers were armed with pangas as well as bows and arrows fulfilling the second ingredient. Indeed **PW2** the proprietor of the hotel told the court that when he challenged the robbers to stop one of them fired an arrow at him. There is evidence of fulfillment of the third ingredient given by **PW1** who told the court that she was hit on her back with the blade of a panga and sustained injuries. Likewise **PW5** Benjamin Charo a waiter in the hotel told the court that the robbers used a panga to beat him on the shoulder and leg causing him to sustain injuries. These injuries are confirmed by the evidence of **PW10** **MULSIN SAID**, a clinical officer at Lamu District Hospital who treated **PW5.** His findings in that regard were as follows:

"On examination, the clothes were blood stained. He had a cut wound on the lower limb and scar. The cause of the injury was a sharp object. I assessed the degree of injury as harm."

This evidence corroborates the evidence of **PW5** in all material respects. **PW10** filled and signed his P3 form which he produces before court as an exhibit **Pexb26.** We therefore find as a fact that the all three ingredients cited in the **Oluoch** case have been proven to exist in this case. The incident therefore did amount to a robbery with violence contrary to section 296 (2) of the Penal Code.

The next crucial question is whether the prosecution adduced convincing reliable evidence that the appellant was amongst the group of robbers who struck the hotel on the material day. From the evidence of all the prosecution witnesses the incident occurred at 6.00 p.m. It was still day light and visibility was good. The robbers were inside the hotel for a good amount of time as they were moving from one room to the other terrorizing the staff. On her part **PW1** told the court that she was not able to see or identify any of the robbers because at the time they were robbing her all four were masked to hide their identity. However, it appears that probably the robbers having been emboldened by their successful raid on the room of **PW1** thereafter decided to abandon their masks. **PW3** Emily Van Aart the proprietor's daughter told the court that by the time she encountered the robbers they were not masked. She identified the appellant as one of the men who robbed them. She is categorical that she was able to see the appellant well and that his face was not masked. Under cross-examination by **MR. ANGIMA** counsel for the appellant **PW 3** clearly states at page 40 line 3:

"They were not masked. Their faces were not covered. To me masked means you cannot see the face. I do not agree that 4 of them were masked."

PW3is convincing in her testimony as she gives a very clear and vivid account of what happened to her – how the robbers tied her hands behind her back and led her to the kitchen where they found and tied up **PW5** Benjamin as well as James the cook **PW7. PW3** would not have been able to give such a clear account if she did not see what happened. In addition **PW3** has given a detailed description of the precise role which the appellant played in the incident. She states that when her father **PW2** warned the thieves to stop it was the appellant who drew out his bow and fired an arrow at **PW2.**
The evidence of **PW2** is corroborated in all its material aspects by **PW5** Benjamin who was a waiter in the hotel. **PW5** told the court that the robbers accosted him – tied him up and poured sand into his eyes. He however clarified that he saw the Appellant as the robbers approached him and **before** the sand was thrown into his eyes. **PW5** also gives a vivid accounts of events and he too states with precision the role which the appellant played in the incident. **PW5** states at page 86 line 14:

"I identified 1 of them properly as he tied me with the rope. He is the accused. I did not know him. It was my first time to see him. I saw him carrying a bow and arrow at the ready when they entered the bar. He was then barely 2 m from me. He is the one who ordered me to lie down and given [sic] them money or they will spill blood. He then placed his weapons down and tied my hands."

As we have stated earlier conditions were favourable for a positive identification. Both **PW3** and **PW5** spent ample time with the robbers and had opportunity to see them well.

By far the most compelling evidence linking the appellant to this offence is the evidence of his shooting. **PW2** told the court that his watchman **PW6 ISSA MOHAMED**, raised the alarm by blowing his whistle, **PW2** immediately collected his firearm and went out in search of the robbers. It is imperative at this point to note that from his own evidence, which was duly corroborated by the police, **PW2** waslicenced to carry a firearm. He produces the permit No. 458545 **Pexb2** as well as the firearm in question **Pexb1. PW2** when he came across the robbers confronted them and ordered them to stop. One of them (whom he identified as the Appellant) fired at him with an arrow. **PW2** reacted by shooting at the appellant and shot him in the leg. The appellant fell on the spot. This evidence is duly corroborated by **PW3** and by the watchman Issa Mohamed **PW6.** In his evidence at page 90 line 4 **PW6** states:

"When we flashed and saw the men Louis (PW 2) told them "mimi niko na bunduki". The men fired 2 arrows that missed Louis. Louis then fired his gun. I heard 2 shots – one of the men fell down as 3 of them ran away."

PW6 confirms that he rushed to the fallen man and identifies him as the appellant. **PW7 JAMES NDAA KARISA** the cook was also with **PW2** and witnesses the shooting of the appellant. **PW7** states at page 94 line 13:

"We followed the man as he went on one leg and found him where he had dropped."

He too confirms that it was the appellant who had been shot. The fact that the appellant was shot in the leg is not in any doubt as the police officers who effected his arrest confirm this – likewise **PW8 DR. GIDEON MUTUA** of Lamu District Hospital confirms that he examined the appellant. His findings given on page 113 line 1 were that:

"The major findings were in the lower limb. He had a fracture to the right leg. There were bullet fragments at the right leg and the right foot. I classified the injuries as grievous harm"

The Appellant himself does not deny that he was shot, nor does he deny that he was shot at the said premises. However in his defence the appellant alleges that he had gone to the hotel as a paying guest to have drinks with two of his friends namely ***'JOAN'*** and ***'MUSA'***. The Appellant claims that he was a regular patron at the hotel bar a fact which is vehemently denied by **PW5** and the other witnesses. Further the Appellant tellingly did not call either ***'Musa'*** or ***'Joan'*** to corroborate his defence that they had accompanied him to that hotel for refreshment. Lastly the Appellant's lawyer did raise this issue with the prosecution witnesses all of who denied that the Appellant had come to that hotel as a guest. From the evidence it is abundantly that the Appellant was shot on the premises and he was shot by the proprietor in attempt to protect his life and property. Indeed it was the Appellant who first shot at **PW2** with an arrow. In the circumstances **PW2** was perfectly justified in defending himself.

The yellow bag containing the items stolen from **PW1** was found close to where the Appellant had fallen. It is clear that the 3 other robbers in their hurry to escape dropped this bag. **PW1** has positively identified the items recovered in that bag as the very same items that were stolen from her a few minutes earlier. This again provides concrete proof of the Appellants involvement in this incident.

We are satisfied that there has been a clear, positive and reliable identification of the Appellant as one of the robbers by all the prosecution witnesses. These witnesses were clear and concise in giving their evidence, they corroborated each other in all material respects and remained unshaken under cross-examination by defence counsel. The Appellant on being challenged by the owner of the hotel to stop ignored this warning and instead shot at **PW2**. He was then shot and injured at the scene a fact which the Appellant himself concedes to. The defence raised by the Appellant was in our view a fabrication and was properly dismissed by the trial court. On the issue of identification we find the prosecution evidence to have been water-tight.

In his submissions the Appellant has stated that his trial in the lower court was rendered a nullity because the court failed to adhere to S. 200(3) of the Criminal Procedure Code when a succeeding magistrate took over the trial. We have perused the record and found that this trial was conducted by three (3) different magistrates. The trial commenced before **HON. OGEMBO** Senior Resident Magistrate who heard six (6) witnesses. On 10th July 2007 **HON. OCHENJA** Senior Resident Magistrate took over the matter. The accused on that date applied for a de novo hearing. The application to recall the 6 witnesses was opposed by the court prosecutor. The learned trial magistrate then delivered his ruling dismissing the application for a de novo hearing. Therefore it is factually incorrect for the Appellant to imply that S. 200(3) of the Criminal Procedure Code was not complied with. S. 200(3) provides:

"(3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person <u>may</u> demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right" [emphasis mine]

This provision does not **oblige** the succeeding magistrate to start the trial de novo. It only obliges the magistrate to **consider** an accused persons request for a de novo hearing. The request was duly considered in this case by Hon. Ochenja who in his ruling dated 10th July 2007 declined to order a de novo hearing. We have considered the reasons given for this denial and in our view they were sound. The witnesses who had testified earlier were tourists who had left the country. To obtain their presence for a re-trial would involve much inconvenience and expense not to mention delay of the case (which delay the Appellant apparently did not seem to mind). The case had been ongoing for several years from 2004 to 2007 thus any further delay was undesirable. We are satisfied that Hon. Ochenja did exercise his discretion judiciously in declining to order a re-trial and such denial does not nullify the subsequent proceedings. Hon. Ochenja heard four (4) witnesses only to be transferred and **HON. NYAMBU** Senior Resident Magistrate took over the case. On 5th May 2008 **MR. OTARA** acting for the Appellant applied for a de novo trial. However before this matter could be ruled upon **MR. ANGIMA** Advocate took over the defence and on 26th June 2008 explained to the court that his client wished the case to proceed from where it had stopped. Thus in this instance it was the Appellant himself who through his advocate opted to forgo a de novo trial. He cannot having done so now claim that his rights had been violated. We find no merit on this ground of the appeal and hereby dismiss the same.

Taken in its totality we are convinced that the prosecution mounted a convincing case. The evidence was cogent, clear and reliable. The guilt of the Appellant was proved beyond a reasonable doubt and his conviction by the trial court was sound. We have no hesitation in confirming the same.

The Appellant was accorded an opportunity to mitigate in the lower court. As he has done before us he pleaded that he has now converted to Christianity and has abandoned his wayward past. Whilst we do applaud the Appellant for having ***'seen the light'*** so to speak his mitigation did not hold sway with the trial court then and will not sway us now. The law provides for the death penalty which was imposed by the trial court, and being the lawful sentence for this offence we do hereby uphold the same. Finally this appeal fails. The conviction and sentence of the lower court are hereby confirmed and upheld.

Dated and Delivered at Malindi this …15th…. day of March 2011.

……………………………. ………………………….

H. OMONDI M. ODERO

JUDGE JUDGE