**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT MALINDI**

**CRIMINAL APPEAL NO. 114 OF 2008**

(From original sentence and conviction in Criminal Case No. 2177 of 2003 the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu - SRM)

**JOANES OKETCH ……..……..……..……APPELLANT**
**=VERSUS=**
**REPUBLIC…….……...…RESPONDENT**

**JUDGEMENT**

*Joanes Oketch (now referred to as the appellant) was convicted on a charge of robbery with violence contrary to section 296(2) of the Penal Code.*

*He was also convicted on a charge of assault causing actual bodily harm contrary to section 251 of the penal Code but the sentence was held in abeyance in light of the sentence of death which was meted out on the first count.*

*The prosecution's case was that on 30th July 2003 at Shella village in Malindi location, within Malindi District of the Coast Province, while armed with dangerous weapons, namely knives, jointly with another not before court, robbed Paul Oduor of 22 sachets of Blue Omo, 8 cowboy cooking oil, 2 packets of mosquito coils, 2 tins of tomato paste, all valued at kshs. 972/- and immediately before or after the time of such robbery, used actual violence.*

*Paul Oduor operates a shop at Shella and on 30th July 2003 at 4.30am while asleep in his house, he heard a sound coming from the shop. He could see his shop from where he slept, and on opening his eyes, he saw flicking lights and noticed that someone was inside the shop, busy stuffing items in a basket. He tried to get out but realized that the door was locked from outside. He looked out through the window and saw another man, so PW1 yelled and his neighbor cum landlord, by name Omari, came out. The two men ran away, Omari opened for pW1 and they both gave chase. In the process PW1 was ambushed by a man who had a knife and who grabbed him and cut his ears and head. Omar went to his aid but was also cut on the left hand. Many watchmen came and the man who is the appellant was apprehended. He had a gunny bag containing 2 Jik detergents, ½ dozen 100g Omo, Topez small Jik 100g (1doz) 100g 7 tins of tomato paste, 18 cigarette lighters, five 100g close up, 1 pair Eveready Battery, 13 pieces of panga bar soap, 7 200 Toss detergent and a knife.*

*PW1 went back to the shop and realized the items had been taken from the shop. Both PW1 and Omari went to hospital for treatment. Appellant who had been subjected to mob justice was also taken to Malindi District Hospital for treatment.*
*On cross-examination PW1 stated that there was security light outside.*

*Omar Ali Sudar (PW2) confirmed being woken up by noise from PW1's house at about 4.30am. He opened the door for PW1 and joined him in following the thieves. He confirms that in the process pW1 was attacked by one Mali and in the struggle he got injured. He confirmed that appellant was the person they apprehended and from whom the gunny bag containing various shop goods which PW1 identified as his.*

*On cross-examination he stated that he did not see the thieves run away but was told by PW1 which route to follow when pursuing the thieves.*
*He too confirmed that there were lights along the road and that a watchman nearby helped by blowing his whistle. It was also his evidence on cross-examination that appellant was armed with a knife, which he used to attack both him and PW1.*

*Dr. Burre (PW3) examined PW1 and noted injuries on his head and left ear, his opinion was that the same were inflicted using a sharp object. He also examined PW2 who had injures probably caused by a sharp object and assessed the degree of injury as harm.*

*Pc Jackoniah Onyango who visited the scene told the trial court that he found appellant having been apprehended by members of the public, he had been beaten and his body was covered with blood. He was shown the recovered items and also observed the knife was beside the appellant. He noted that PW1 and PW2 had injuries. He found the door to the shop (kiosk) open and complainant confirmed that his shop items were missing.*

*In his defence which was sworn, appellant told the trial court that he never committed the alleged offence contending that while at Kobil Petrol Station at about 5.00am, he met two people when flashed a torch at him and demanded that the identifies himself – he named the two people as Apiyo and Oduor. After a brief chat they beat him and left him unconscious and he woke up in hospital. He reported the incident to police but they refused to issue him with a P3 form. He denied being found with the stolen goods saying he did not even know where they came from. The appellant had indicated his desire to call one Samuel Apiyo as a witness but despite summons being issued, the named individual never attended court and appellant closed his defence.*

*The matter was initially heard by Mr. Ogembo SRM, but he was transferred and Mr. D. Ochenja SRM took over and heard the defence case, but he too was transferred, and Miss D. Nyambu SRM took over to write the judgment. Her findings were that there was no evidence to rebut what pW1 saw on the night in question and the appellant was found with the gunny bag containing shop goods a few minutes after the shop had been broken into, and there being no evidence to the contrary when it was safe to conclude that appellant was one of the men who broke into PW1's shop and stole from there and she applied the doctrine of recent possession. She noted that the incident took place at night but that PW1 was able to see the thieves with the aid of the security lights from his shop and neighbouring houses. She observed that had the appellant not attacked PW1 and PW2 after the incident, he would have been properly charged with burglary and stealing but because he inflicted injury using a knife then the offence amounted to robbery with violence.*

*The appellant challenges the findings of the trial court on grounds that:*

*(1) The case was not proved beyond reasonable doubt.*

*(2) Essential witnesses were not called*

*(3) The charge sheet was defective.*

*(4) He had been held in police custody for over 14 days thus violating his right under section 72(3) (b) of the Constitution of Kenya*

*The appellant filed written submissions in which he stated that the charge sheet was defective because the*

*time of the offence was not specified in the charge sheet and that this offended the provisions of section 37 (iv) F which provides that:*

***"Subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing, matter, act of omission, to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearer the place, time, thing, matter, act of omission referred to"***

*It is appellant's contention that since the charge sheet omitted the time then the same was defective. While the observation appellant makes is correct with regard to the provisions under section 137(IV) F, the learned Counsel for the State, Mr. Kemo, submits that witnesses considered referred to the incident as having occurred at 4.30am. Our assessment is that the requirement for time to be specified is so as to enable the person charged to be fully aware of the extent of the claim and be able to prepare his defence adequately. He noted that the witnesses from the onset consistently refer to 4.30am and appellant appreciated that well enough as to be able to relate to the court concerning his movements about that hour of the morning. Furthermore, section 382 of the Criminal Procedure Code comes to the aid of the prosecution to the extent that:*

***"….no finding … by a court of competent jurisdiction shall be reversed or altered on appeal…on account of an error, omission or irregularity in the complaint…charge… before or during the trial… unless the error, omission…has occasioned a failure of justice"***

*Provided that in determining whether an error or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have raised at an earlier stage in the proceedings."*

*Our finding is two-fold on this;*

*(a) The error did not occasion any prejudice as witnesses were clear as to the time the incident occurred.*

*(b) That was a matter which should have been raised at the earliest opportunity during trial, especially taking into consideration that there was a counsel by the name Mr. Angima who came on record for appellant and if the omission would have had a negative impact on the preparation for defence case, then there was sufficient opportunity for that to be raised.*

*The appellant also submits that he was not positively identified because Pw 2's evidence was that he was not in a position to identify the assailants. He argues that since the thieves ran away before PW1 and PW2 got to them, and the fact that although PW1 saw a figure inside the shop, he could not make out who it was as there was no light in the shop, then the opportunity for favourable identification was not positive and he was simply attacked by a mob at a petrol station – he raised the defence of mistaken identity insisting that he was far away from the scene and he was not found with the shop goods. Further that the items listed in the charge sheet are less than those named by PW1 and he urges this court to resolve such discrepancy in his favour.*

*Mr. Kemo's response to this is that PW1's evidence pointed to the fact that the very person he had seen inside the shop is the same one who attacked him and he referred us to the evidence of PW1 at page 13 on cross-examination where he described the position of the shop in relation to his bedroom. Mr. Kemo's contention is that nothing impeded PW1's vision even as he was being attacked and he had good opportunity to see and identify appellant.*

*It is correct that when PW1 was recalled for cross-examination he confirmed to the trial court that there were no lights inside and he could not know who was inside the shop however he was able to make out that there was a man because the person used a lighter.*

*Further he described the window to his bedroom as being just a small opening with no glass and after*

*raising the alarm, the person begun running and PW1 was able to see him because of the shop's security lights. The presence of security lights on the area was confirmed by PW2.*

*He was categorical that after the appellant moved out of the shop he came into PW1's clear view as PW1 never moved away from the window – and although he did not see his face, he only observed is fleeing back, he was certain that;*

***"The person who attacked me is the one I saw run out of my shop…they are not different. He was holding the bag with his hand as he ran away."***

*This is the same bag PW1 saw when appellant was apprehended.*

*This was compounded by the fact that both PW1 and PW2 confirm that upon having given up their chase, a mabati suddenly moved and hit PW1, followed by an attack from the person who turned out to be the appellant. Not all the goods mentioned by PW1 were noted in the charge sheet, but that does not alter the fact that among the items PW1 mentioned, some were listed on the charge sheet. We are persuaded that the trial magistrate properly involved the doctrine of recent possession in this instance – we are persuaded that the situation in* ***James Mwangi Kairuki v R 2006e KLR*** *applies there. Had matters rested there, then we would have no hesitation making a finding that the facts and evidence disclosed the offence of burglary and stealing. However, immediately after the incident, as the appellant was being pursued, he turned violent, using a dangerous weapon namely a knife – at that point the nature of the offence transferred to fit in with what is anticipated by section 296 (2) of the Criminal Procedure Code which provides that:*

***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person …before or IMMEDIATELY AFTER the time of robbery, wounds, beats, strikes or uses any other personal violence…shall be sentenced to death"***

*The ingredients of robbery with violence as envisaged by section 296(2) of the Penal Code, were well set out in the case of* ***OLUOCH V R (1985) KLR 549*** *to include;*

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

*(ii) The offender is armed with a dangerous and/or offensive weapon or*

*(iii) At or immediately before or immediately after the time of the robbery, the offender wounds, beats strikes or uses other personal violence to any person, the use of the word 'or' means that proof of any one of the three named ingredients will be sufficient to prove the charge.*

*The trial magistrate duly considered the sequence of events, the attack which was carried out in perpetration of the mischief already committed by appellant and came to a reasoned conclusion that the same violence was meted out immediately after and in furtherance of that mischief. That holding in our view was proper. Subsequently, our finding is that the conviction was safe and we have no reason to interfere with it – we uphold the conviction.*

*The sentence as provided by law was legal and we confirm it.*
*The upshot is that the appeal is dismissed.*

*Delivered and dated this* ***14th*** *day of* ***March 2011*** *at Malindi.*

***H. A. OMONDI***
***JUDGE***

***M. ODERO***
***JUDGE***