REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL CASE NO. 58 OF 2010

(From original sentence and conviction in Criminal Case No. 369 of 2008 the Chief Magistrate's Court at Malindi Before Hon. D. W. Nyambu - PM)

LUMBAO NZAI ……..……..…… ACCUSED

VERSUS

REPUBLIC…….……..….RESPONDENT

JUDGEMENT

Lumbao Nzai (the appellant) was convicted on a charge of robbery contrary to section 296 (1) and sentenced to 5 years imprisonment. He had been charged with robbery with violence contrary to section 296 (2) of the Penal Code but after due trial in which three witnesses testified in support of the prosecution, and appellant was the only defence witness, the charge was reduced to simple robbery under section 296 (1).

The particulars of the charge were that on 20th March 2008 at Kakoneni village within Malindi, while armed with a dangerous or offensive weapon namely a knife, he robbed PAUL MUSEMI KILONZO of a bicycle valued at Kshs. 5500/-, clothing valued a kshs. 1500/- and cash kshs. 4700/- making the total value of items robbed at kshs. 11800/- and that immediately before or after the time of such robbery, he threatened to use actual violence on the victim.

Paul (PW1) was pushing his bicycle ferrying clothes (new and second hand), on 20th March 2009 at about 5.00pm. When he got to Magarini at a corner, he met the appellant who was known to him as he used to see him playing football and PW1 would even pass near his home. Appellant was alone, he approached PW1 while armed with a knife, held his collar, and raised the knife, then ordered PW1 to raised his hands. As PW1 did so, the bicycle fell. Appellant searched and removed Kshs. 4500/- from the victim's shirt and trouser pockets, then told PW1 to choose between his life and the goods he had, and that if he preferred his life, when he should walk away. Pw1 left everything and fled. Appellant had warned PW1 not to scream, otherwise he would kill him. A report was then made to the chief.

On 28th March 2008, the appellant was taken to the AP camp, by his brothers. A search carried out in his house led to the recovery of cash totaling to Kshs. 1700/-. Some of the clothes numbering 20 pieces of assorted used clothes, were also picked by good Samaritans and taken to the chief – PW1 identified them as being among the clothes he had on the day he was robbed. The bicycle was never recovered and PW1 wasn't injured. No one else witnessed the incident.

On cross-examination PW1 denied that he owed appellant any money or that he had requested appellant

to sell some clothes for him. PW1 also confirmed that there was nothing to prove that the Kshs. 1700/- recovered from appellant belonged to him nor did he know the people who had picked the clothes and taken them to the chief.

APC Musa Royoki (PW3) who was at Gongoni AP Post on 20th March at 6.00pm received a report from PW1 about the robbery but according to PW3, the complainant said *"the robber was someone not known to him"*. His evidence was that appellant is the one who led them to the bush in Sosoni area, from where they recovered the items of clothes, and kshs. 1700/- was recovered buried in the forest.

On cross-examination PW3 stated as follows:

"PW1 said that he did not know your name…you led us to the forest where you had hidden the clothes and cash. You removed the cash yourself."

Appellant was then taken to Malindi police station where Pc Mohammed Shee (PW2) received him and booked he report. Also handed over to the officer was cash Kshs. 1700/- and clothes in a paper bag.

Appellant's sworn testimony is that on 13-11-07, the complainant engaged him to sell clothes worth kshs. 800/-.
On 2-12-07 he gave PW1 kshs. 3000/- as proceeds from the sale. PW1 then sold some clothes but did not remit the money – he misappropriated it and when PW1 demanded for the money, on two occasions, appellant said he would pay later. Appellant got angry at the empty promises, and reported the matter to PW1's family saying he would sue PW1.

The family members panicked and decided to have his brothers take him to the area chief to sort out the matter. That is how he ended up being arrested and charged.

It was his evidence that he owed appellant kshs. 5000/- and was surprised to see his own money kshs. 1700/- which police had recovered from him, being presented in court as money he had robbed off the complainant. He also pointed at contradictions that whereas complainant said the incident occurred at Sosoni, the police officer PW2 and it occurred at Kakoneni and his contention was that Sosoni and Kakoneni were two different places and that despite PW1 claiming that he had been robbed by someone known to him, the report he had made to PW3 was that the attacker was no known to him. It was his contention that he knew the complainant well and if he had robbed him, then he would not have gone to the chief.

The trial magistrate in her judgment warned herself of the dangers of convicting an accused person, based on the evidence of a sole identifying witness and was persuaded that visibility was clear and the conditions favoured not just identification, but recognition, as appellant was someone well known to the complainant.

The trial magistrate considered the evidence of the complainant and weighed it against the evidence of the appellant and her finding was that complainant appeared honest and truthful and denied ever asking appellant to sell the clothes on his behalf. She wondered that if this was a set up, then how is it that appellant led police to recovering of the money where he had hidden the same. She wondered what PW3's motive would be in framing up the appellant. However she noted that appellant was alone when he committed the offence and thus reduced the charge to simple robbery.

The appellant challenges these findings on the following grounds:

(1) The charge was defective under section 137 (c) and (f) of the Criminal Procedure Code and so any conviction based on that charge sheet was fatal.

(2) The finding on identification was erroneous as;

(a) PW1 had reported to PW3 that his attacker was not known to him.

(b) PW1 never gave a description of his attackers to the police.

(c) It was dark when the offence took place.

(3) The prosecution evidence was contradictory

(4) No exhibits are produced.

(5) The defence was rejected unfairly.

The appellant filed written submissions in which he stated that the evidence on record did not support the particulars in the charge sheet, as a result of which the charge sheet should be deemed s defective. He submitted that, whereas the charge sheet mentioned three items i.e bicycle, clothes and money, the police officer pW2 only referred to a bicycle and clothes, and that different witnesses gave a different value for the clothes. Also that whereas the charge sheet stated that complainant was robbed of kshs. 4700/- the complainant said he was robbed of kshs. 4500/- and that this made the charge sheet defective. He sought to rely on the decision in **Alexander Nyachio Marure and Marure v R Criminal Appeal No. 590 of 1984** which held that there should be no material discrepancy between the evidence given to the police and that given in court. Also that whereas the charge sheet states that the incident took place at Kakoneni, evidence stated it was at Sosoni and the two, although both in Gongini, are at different locations.

On this aspect, Mr. Kemo in opposing the appeal, submitted that this was an issue which appellant should have raised at the earliest opportunity and in any event it was not prejudicial to him and did not cause any injustice, so remedy can be found under section 382 Criminal Procedure Code.
Actually in terms of where the offence took place, the appellant raised the issue at the earliest opportunity when he cross examined PW1, and also when he cross-examined PW3. In fact PW3 on cross-examination made it very clear that Kakoneni and Sosoni are two different places.

The appellant again referred to this discrepancy in his evidence which was sworn – the prosecution did not find it necessary to cross-examine on that. To that extent then it is true that the evidence as regards where the offence took place varies from what is contained in the charge sheet, and appellant raised that several times when cross-examination witnesses and also in his defence yet the trial magistrate never resolved the issue.

The other discrepancies as regards value of the items were not material discrepancies as the material aspect was that some of the items referred to in the charge sheet were indeed mentioned by witnesses in their evidence.

I would not consider the variance as a defect in the charge sheet but that the evidence did not support the charge sheet as to the place where the offence took place and the trial magistrate failure to resolve this variance was prejudicial to the appellant.

Appellant also submitted that the trial magistrate erred in holding that the appellant was known by the complainant, by face although not by name and also knew his home, so he was recognized. The appellant's contention is that this finding ignored evidence by the police officer who said PW1 reported that he was attacked by someone not known to him and that he didn't even know the person's home.

Appellant does not dispute that PW1 knew him, but wonders why he would the then give a report to the contrary regarding his attacker, and he submits is because there was no robbery, just a dispute over money owing to complainant.

Mr. Kemo's response to this is that PW1 recognized the appellant and that appellant's involvement in the robbery is confirmed by the recovery of the items stolen during the robbery. From the evidence, there is

no doubt that appellant was known to complainant yet how then does the scenario presented here get resolved?

If indeed he made a report to the police officer that he did not know his attacker and he didn't even known the attacker's home, then where did the police get the information that it was appellant who had attacked PW1. How then did his brothers get to take him to the chief's place if PW1 didn't even know him – how did they connect him with the incident? It is instructive to note that PW3 did not claim that complainant had said he only knew the attacker by face but not by name. Yet PW1 claimed he had informed the appellants'' siblings that appellant had robbed him – surely one of the two prosecution witnesses is not telling the truth, and where there is contradiction in the evidence of the prosecution witnesses on such a material aspect as regards identification by purported recognition visa vis non recognition, then that situation, must be resolved to the benefit of the accused. To that extent then, there is every probability that what appellant says in his defence is true – that complainant was known to him, there was no robbery, but a disagreement with complainant as he had misappropriated complainant's money and failed to refund – complainant threatened him with police action, his siblings thinking it was best to avoid trouble took him to the chief (which is why the chief has not testified) and the APs decided to charge him with the offence.

But what about the purported recovery? Again there is contradiction here, PW claimed the money was recovered from appellant's house and that appellant told the chief so and police went and recovered. There was no mark to prove it was the same money, and it wasn't anything near the amount PW1 had been robbed off.

PW3 claimed the money was recovered buried in a bush within a farm so again who is telling the truth. Then there is the recovery of the clothes – PW1 claimed some good Samaritans picked the clothes and took them to the chief. Yet according to PW3 (the police officer) it is appellant who led them to a forest from where they recovered these clothes – so who is not being truthful here.

With the greatest of respect to the trial magistrate, who indeed had the opportunity to observe PW1's demeanor, with such glaring contradictions, then I would be very hesitant to describe PW1 as very truthful and honest person, and if he is, then the police officer is not being truthful and no reason is recorded as to why he would say exactly the opposite of that PW1 stated. Under the circumstances already observed, then even the doctrine of recent possession fails to apply.

Despite Mr. Kemo's submission that there are no material contradiction, I find that these contradictions are indeed so material, that I was unsafe to rely on the evidence on record to convict the appellant. The appeal has merit and is allowed. The conviction is quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **11th** day of **March 2011** at Malindi.

H. A. OMONDI
JUDGE