REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO.14 OF 2011

ALBERT OKUMU BWIRE…….....……..APPELLANT
=VERSUS=
REPUBLIC…….....……..RESPONDENT
(FROM THE CONVICTION AND SENTENCE OF E.H. KEAGO, SRM
BUSIA SPM CR.CASE NO.1395 OF 2009)

J U D G E M E N T

The appellant Albert Okumu Bwire was convicted by Busia Senior Resident Magistrate of the four (4) counts out of five (5) of Robbery with Violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death. He was acquitted of Count IV for lack of evidence. He lodged an appeal against conviction and sentence.

The appellant's appeal raises three main issues namely, that identification was not established; that the evidence was full of inconsistencies and that the defence was not given due consideration. The appeal was opposed by the State on grounds that the scene was well lighted with electricity lights and that the appellant was positively identified.

The facts of the case are that the prosecution witnesses PW1, PW3 and PW5 who were employees of Generations Hotel were on duty on the 7th August 2009. Around 9.45 a.m, the appellant was seen by the witnesses enter the hotel and leave shortly. Later, the appellant came back with armed thugs. The workers were robbed of cash sh12,200/= while each individual patron also lost personal items including cash and mobile phones to the robbers. The witnesses later identified the appellant in a parade conducted by PW8.

It was the evidence of PW1 that on the material day around 9.45 p.m there were customers in the hotel having meals and watching the television. The appellant came into the hotel wearing a marvin on his head and then went out. Thirty minutes later, the appellant returned to the hotel followed by a man armed with a short rifle. The armed thug ordered PW1 and customers and workers to lie down while the appellant removed cash sh.12,200/= from the drawer. Customers were also robbed of two laptops, cash and mobile phones before thugs left the hotel. One week later, PW1 identified the appellant in a parade.

PW3 was working in the hotel as a waiter. He corroborated PW1's evidence on how the robbery took place. The witness was robbed of his phone and a wallet containing sh2000 cash. PW3 said he handed over the items to the appellant on demand by him.

Later PW3 identified the appellant at a parade. PW4 did not identify any of the robbers. However, he recovered a spent cartridge from the floor and handed it over to the police. It had dropped when the armed thug cocked the gun.

The supervisor of the hotel PW5 was sitted near the door when he saw the appellant come up to the parking yard of the hotel and retreat. Then PW5 saw appellant the second time when he entered the hotel and walked up to the counter. He was followed by another man who came in and cocked his gun. PW5 escaped from the hotel before the actual robbery took place. The witness identified the appellant during the parade.

The appellant said that he was arrested from his home by CID Officers led by his neighbor on the 28.08.09 around 5.30 p.m. A search was conducted in his home and nothing was recovered. The appellant alleged that he had disagreed with the neighbor who caused his arrest.

The learned trial magistrate in his judgement found that the appellant was positively identified in respect to all counts save for Count IV . The court noted that the appellant was in the company of another person who was armed and that threats were used during the robbery. On the defence, the court noted that the nature of the alleged disagreement between the neighbour who led CID Officers to arrest the appellant was not explained. His defence did not therefore challenge the prosecution's evidence.

Apart from PW1 who said that he had seen the appellant before the incident, the other witnesses PW3 and PW5 had not seen him. The premises were lighted with electricity lights where normal hotel business was going on. The waiters were serving customers as usual when the incident took place. Three witnesses described how they saw the appellant enter the hotel the first time leave. When he came the second time, he was accompanied by an armed companion and it was then that the two jointly robbed the bar cashier and patrons. The witnesses evidence on the roles played by each of the two thugs was very consistent. The accomplice of the accused ordered everyone in the hotel to lie down, while the appellant went round demanding cash, mobile phones, laptops and other items. I do not find any merit in the appellant's argument on inconsistent evidence. Later, PW1, PW3 and PW5 identified the appellant in a parade which was conducted in accordance with the rules. Although the gun was not recovered, the evidence on record proved that the thugs were armed with PW4 recovering a cartridge at the scene.

The appellant argued that there was no medical evidence. It is not disputed that no one was injured during the incident. In all criminal cases, the court will look at all evidence available to determine whether an offence has been committed. The offence of robbery is defined under Section 295 of the Penal Code. Section 296 (2) specifically sets out several ingredients which separately or put together constitute the offence of robbery with violence. These ingredients have been satisfied and the issue of medical evidence does not arise.

The issue of failure to record the language used by PW1, PW3, 10 and PW12 raised in the submissions but was not a ground of appeal. We have looked at the record. It is correct that the trial magistrate did not indicate the language used by the four witnesses. However, the rest of proceedings from plea taking to the end were conducted in Kiswahili through an interpreter. This was the language that the accused understood. It would therefore be correct to draw an inference that the same language of Kiswahili was used by the four witnesses to testify but due to an oversight, the court omitted to indicate the language. There is no doubt that the appellant understood the proceedings well because there is nothing on record to the contrary. He conducted cross-examination of the witnesses thoroughly. The issue to consider here is whether the failure to record the language used by PW1, PW3, PW10 and PW12 caused any prejudice to the appellant during the trial. We come to a conclusion that no prejudice or any miscarriage of justice was caused to the appellant.

On the date of the offence, the charge is very clear that the incident took place on 27.08.09 around 9.45 p.m. PW3 gave the date as 28.09.09. This was an error because all other witnesses gave the correct date being 27.08.09. This is a minor contradiction which does not affect the charge.

We have come to a conclusion that all the ingredients of the offence in Count 1 were established. The trial magistrate was correct in a convicting the appellant for the offence. We uphold the conviction and sentence in respect of that count.

Vincent O. Osere PW6 testified that he was robbed of Nokia phone and cash 5900 at the hotel car park by a man with a rifle. He was then ordered to enter the hotel at gun point which he did. Although he

was not able to identify his attackers, he was ordered by them to enter the hotel where the next robbery episode took place. The witness inside the hotel lobby saw PW6 and others being robbed of their properties by the appellant and his colleague. The magistrate convicted the appellant of Count V based on the evidence of the other witnesses in other counts who had clearly identified the appellant. The offence in this count was committed in the same transaction with that of Count I. PW1, PW3 and PW5 positively identified the appellant and his accomplice as the persons who robbed the hotel cashier of ksh12200/= and also individual items. PW6 was one of the customers. It was therefore inorder for the trial court to use the identification of the other witnesses in this Count. The appellant was rightly convicted of Count V. We uphold the conviction accordingly.

PW11 was a customer at the same hotel at the material time. He heard someone ordering him to lie down. He gave out his wallet containing sh.6000 cash in response to the demand under threats by the robbers. He saw the man with a rifle standing at the door. PW11 did not take part at the Identification parade. This witness was robbed inside the hotel together with PW1. PW1 and his workmates identified the appellant. The same group of people who robbed PW1 are the ones who robed PW11 at the scene and in the course of the same transaction PW11 testified that he saw the man with the rifle. The trial court found that the appellant was properly identified to which extent we agree. The appellant was in the company of another person who was armed with a gun. The wallet and two laptops were obtained by threats. The magistrate was correct in find the appellant guilty of Count II and we uphold the conviction.

Although the complainant in Count III was present in the hotel during the incident he did not identify the person who robbed him of his wallet. However, other witnesses PW1, PW3, PW5 and PW11 identified the appellant positively. The offences in Count I, II and III were committed in the course of the same transaction. The court was right to convict the appellant in the four counts.

D.A. ONYANCHA
JUDGE.

F.N. MUCHEMI
JUDGE.

The convictions in all the four Counts I, II, III and IV are hereby upheld. The death sentences are hereby converted to Life Imprisonment. We hereby order the sentences to run concurrently.

Judgement dated and delivered in open court on the 8th day of November 2011 in the presence of the appellant and the State Counsel.

F.N. MUCHEMI
JUDGE.