



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 227 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 1897 of 2007 of the Chief Magistrate’s Court at Mombasa – R. Kirui, PM)

ALEX OCHIENG alias BABU APPELLANT

- Versus -

REPUBLIC..... RESPONDENT

J U D G M E N T

The Appellant, *Alex Ochieng alias Babu* faced three counts of Robbery with Violence contrary to Section 296(2) of The Penal Code. After recording the evidence the learned Magistrate returned the following verdict ***“I am therefore convinced beyond reasonable doubt he committed the offence as charged. Accordingly, I find him guilty and convict him.”*** The learned Magistrate then handed down a death penalty. The appellant prefers this appeal against both conviction and sentence.

In the three counts it is alleged as per the charge sheet, that-

“CHARGE

COUNT ONE: ROBBERY CONTRARY TO SECTION 296(2) OF THE PENAL CODE

PARTICULARS OF OFFENCE: On the 9th day of June, 2007 at about 2.10pm at Kongowea market in Mombasa District within Coast Province, jointly with others not before court, while armed with dangerous weapons namely pangas and knives robbed WILLIAM MAORE of cash Kshs. 31,950/- and six bundles of miraa all valued at Kshs. 37,950/- and at or immediately before or immediately after the time of such robbery used actual violence to the said WILLIAM MAORE.

COUNT TWO

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE: On the 9th day of June 2007 at about 2.10pm at Kongowea market in Mombasa District within Coast Province, jointly with others not before court, while armed with dangerous weapons namely pangas and knives robbed MOSES MURIITHI of cash Ksh. 8,700/- and 31/2 bundles of miraa all valued at Ksh. 19,200/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said MOSES MURIITHI.

COUNT THREE: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE

PENAL CODE: On the 9th day of June, 2007 at about 2.10pm at Kongowea market in Mombasa District within Coast Province, jointly with others not before court, while armed with dangerous weapons namely pangas and knives robbed ANDREW MWENDA of cash Ksh. 12,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ANDREW MWENDA.

The facts to the case are brief and do not present any difficulty. PW1 William Maore, PW2 Moses Muriithi Joseph and PW3 Mwenda Andrew Kamagia are all miraa traders at Kongowea Market. On 9th June, 2007 at about 2.10pm while at their place of business, two people initially holding themselves out as customers forcefully took miraa and money from PW2. The two were joined by others who were armed with knives and also robbed PW1 and PW3. PW3 sought help from a nearby police camp. An Administration Police Officer, John Munyao (PW 5) and his colleagues reacted to the distress call and pursued the attackers. One of them was caught by members of the public as he ran. He was taken to Nyali Police Station and later charged, he is the appellant herein.

The appellant who appeared before us in person raised eight (8) grounds of appeal: They are that-

- (1) His defence was prejudiced as he was not supplied with witness statements by the prosecution.**
- (2) The trial proceedings are irregularly as the magistrate failed to sign them when recording the proceedings.**
- (3) In putting him to this defence, the learned Magistrate invoked Section 215 and not Section 211 of The Criminal Procedure Code.**
- (4) His identification was not foolproof.**
- (5) The prosecution witnesses contradicted each other and were not credible.**
- (6) That the medical evidence did not unequivocally prove that the complainant was injured.**
- (7) The learned Magistrate erred in law and fact in failing to specify on which count he sentenced him.**
- (8) That the learned Magistrate failed to consider his defence.**

Mr. Gioche appearing for the State opposed the appeal and responded to each ground.

We start by disposing of grounds (2) and (3). We have looked at the handwritten proceedings and are satisfied that the Magistrate duly signed the proceedings he recorded. We are also satisfied that on 23rd June, 2008 the trial Magistrate put the appellant on his defence and informed him of his rights under Section 211 of The Criminal Procedure Code. The typed proceedings appear to have a typographic error in this regard. Even if we were to assume that the learned Magistrate cited Section 215 instead of Section 211 of The Criminal Procedure Code we do not see how this would have occasioned any failure of justice. We do note that in response to the information by Magistrate, the appellant chose to give an unsworn statement. He fully understood the rights available to him under Section 211 of The Criminal Procedure Code. The two grounds of appeal are without merit.

In addition and looking at the entire proceedings it is not apparent or clear that the prosecution failed to supply witness statements to the defence. Secondly, no complaint in this regard was raised by the appellant during the trial. If indeed it is true that the statements were not supplied then he should have objected. Again we find no merit in this grievance.

We now turn to re-evaluate the evidence adduced at trial. The incident happened at 2.10pm in broad daylight and in a market. The appellant was seen by PW1, PW2, PW3 and PW4. His face was unmasked and he was arrested immediately after the robbery, some 50 meters from the market. The evidence of all the witnesses corroborated each other on how the appellant, in the company of others robbed the complainants. They gave a consistent story of how the Administration Police were involved and how they (the police) helped in the arrest of the appellant. The appellant himself, in his unsworn testimony, confirmed that he was at the scene at the time and day of the alleged offence. He in fact confirms that he was arrested after he had bypassed some people selling miraa. The learned Magistrate saw and heard the witnesses testify. The Magistrate considered the evidence of the appellant but did not believe it. The

proceedings show the Magistrate was entitled to believe the consistent testimony of the prosecution witnesses over the untested and uncorroborated evidence of the appellant. Our finding therefore is grounds (4) (5) and (8) also fail.

The testimony of PW1 is that he was injured on the mouth in the course of the robbery. A P3 form was produced in court by PW6, Dr. Lawrence Ngome. PW1 had a tender and swollen lower lip. The injuries were about 9 days old when he saw PW1 on 18th June, 2007. That puts the injuries to about the 9th June, 2007 when the robbery is alleged to have taken place. Ground 6 of the appeal is without merit.

The appellant was charged with three counts of robbery with violence. In his judgment of 5th August, 2008 the learned Magistrate failed to make a finding on each count. The learned Magistrate simply stated as follows-

“I am therefore convinced beyond reasonable doubt he committed the offence as charged. Accordingly I find him guilty and convict him.”

The court failed to comply with Section 169(2) of The Criminal Procedure Code which requires that-

“In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.”

Again in sentencing, the learned Magistrate failed to state on which count he imposed the death penalty. These are irregularities in the finding and sentence.

These are the type of omissions and irregularities contemplated by Section 382 of The Criminal Procedure Code. We have found that, on the evidence, the learned Magistrate was entitled to enter a conviction on each of the three counts of Robbery with Violence. The sentence he imposed was the death penalty as provided by Section 296(2) of the Penal Code and so he imposed a lawful sentence, albeit failing to state in respect to which count it was imposed. These irregularities, however, do not prejudice the appellant as they do not go to the root of his conviction and have not occasioned any failure of justice.

The result is that the appeal of both conviction and sentence fails. In exercise of our powers under Section 354 3(ii) we alter the finding on conviction by the learned Magistrate and do hereby find the appellant guilty of Robbery with Violence contrary to Section 296(2) of the Penal Code as charged in Counts 1, II and III. Turning to sentence, we note that actual violence was used on PW1 and he sustained some injuries. We do not see any reason to alter the death penalty imposed. We must, however, correct the irregularity in the manner in which the sentence was imposed. The death penalty shall be in respect to Count I. The sentences in respect to Count II and III are held in abeyance.

Those are our orders.

Dated and delivered at Mombasa this 13th day of December, 2011.

G. L. NZIOKA
JUDGE

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-
Gioche for state
Appellant in person
Court clerk - Moriasi