REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Appeal 93 of 2008

MICHAEL TSUMA MWAZAMA &
MWAWARA BENJOKA MWACHENYE...….APPELLANTS

VERSUS
REPUBLIC..RESPONDENT

JUDGMENT

Michael Tsuma Mwanzama (referred to as the 1st appellant) and Mwawara Benjoka (referred to as the 2nd appellant) were convicted on a charge of robbery with violence contrary to section 296(2) of the Penal code, and sentenced to suffer death. They were jointly charged with another not before court of robbing Peter Sila Muindi of Kshs. 29,000/-, a mobile phone Siemens, a charger, radio, clothes and utensils, all worth Kshs. 36,800/- and at the time of the robbery they were armed with a panga and an axe, and used actual violence in the course of their action.

The appellants had denied the charge and after due trial in which nine witnesses testified on behalf of prosecution and a appellants were the only defence witnesses, they were convicted of the charge.

Peter Sila (PW1) had a farm at Simakeni and he told the trial court that on the night of 14th December 2005 while at the farm with his wife and child, he heard a knock at the door and they begun screaming. People entered into the house and ordered them to keep quiet. PW1 hid on the door of the bedroom and saw a face peeping three times. He recognized one face, with the aid of a lantern. The people demanded or money and PW1 told them it was under the mattress and he gave them. He was then ordered to lie down while being hit on the head and shoulders repeatedly until he passed out. When he came to, the attackers had left and he realized his property like radio, clothes and utensils were gone.

He stated as follows:

> *"Of the attackers, I had recognized one of them as my worker. I told the chief and even the police. The two workers are in court. Accused 1 is the one who took the money from me. He had worked for me for one year. The second one had been coming to seek work from me."*

On cross-examination PW1 explained that he didn't require to identify 1st appellant at an identification parade because he was someone known to him. He identified 2nd appellant at the identification parade and cross-examination stated to 2nd appellant.

> *"I picked you out as one of them. You are the one who went to the side where my wife was. You took her phone. The lantern lamp was on. I gave your names to the police and description. I got your names from my workers…."*

PW2 Fatuma Mohamed, (wife to PW1) told the trial court that while inside their house on 14th December 2005, she heard a bang at the front door and they called for help as the door broke down. Two people entered, while others stood outside demanding money. She was punched while still in bed and her husband was also assaulted and they collected other items in the house. It was her testimony that:-

> *"of the two that entered, I recognized them. Tsuma was our employee and the other one was a casual labourer who did odd jobs for us."*

She too stated that upon making a report to police she gave names of the suspects and upon learning of their arrest, she told police there was no need for Tsuma to be put on the identification parade as he was known to her. However she picked 2nd appellant in an identification parade.

She further stated that 1st appellant was the one who took money from her husband with 2nd appellant purchased her, took her phone and radio and that 1st appellant (Tsuma) had already left employment. On cross-examination she stated she had known 1st appellant for 1½ years and denied owing him two months' salary.

As regards her interaction with the 2nd appellant, she stated:

> *"You even ferried maize for me from the farm to the house."*

PW3: Mwanaidi Nduna, a son to the complainant also confirmed about the incident and gave evidence similar to PW1 and 2. He stated that:

> *"I recognized one of them as Michael, he was working for us previously. The other one I know him but not by name, as he did odd jobs for us, once in a while".*

He further explained on cross-examination that he was in an adjacent room could see into his parents' room.

Dama Hamisi (PW4) who was inside the house said she only saw the people from the back, but did not see their faces.

Pc Kiplagat (PW4) who received report about the incident stated that the victim mentioned suspects and so they passed by the chief's office and gave names of the suspects. The area chief Stephen Mutua (PW5) confirmed that the complainants mentioned their workers as the attackers. Upon their arrest, Cpl. Mwakio (PW9) conducted an identification parade where 2nd appellant was picked by the witnesses. He confirmed that 2nd appellant had requested or an advocate Kamoti to be present but he did not attend the parade.

1st appellant in his unsworn evidence confirmed to the trial court that the complainant was known to him he had worked for her whilst 2nd appellant was his neighbour. On 14-2-05 while sleeping at his home, he was woken up by police officers and the area chief, who then arrested him and demanded that he produces what he had stolen from the complainant. His house was searched but no significant recovery was made, then he was charged.

The 2nd appellant in his unsworn defence confirmed that he is 1st appellant's neighbour and also knows the complainant. He told the trial magistrate that on 19th December 2005, chief went to his home accompanied by police officers and 1st appellant. He was told he was needed as there had been a robbery reported.

In his judgment, the learned trial magistrate noted that the complainant referred to a lantern inside the house, which enabled him to see the attackers and the trial magistrate was satisfied that the two appellants who previously worked for the complainants had been positively identified and they were armed and used personal violence on the victim, so the ingredients of robbery under section 296(2) were proved.

The appellants contested the findings, and sentence on re-amended grounds by 1st appellant and grounds by 2nd appellant they challenged the findings:

(1) The charge sheet was defective.

(2) The circumstances did not offer ample opportunity for positive identification because:

   (i) it was sudden and terrifying
   (ii) The robbers were armed with dangerous weapons which obviously caused a phobic situation affecting positive identification.

   (iii) The source of light alleged to be in the house was not enough to enable positive identification

(3) That 1st appellant's arrest was as a result of grudges existing between him and the complainant.

(4) Prosecution failed to prove its case, and had contradictions, whereas defence case remained unshaken and created doubt to the prosecution case

(5) The coram did not indicate rank of the prosecutor

The appellants filed written submissions which were similar.

Appellants contested the status of the charge saying it did not disclose what time the offence occurred and the charge sheet did not show which police station it emanated from. Further that some of the items mentioned by witnesses as having been robbed off the complainant were not included in the charge sheet saying PW1 mentioned radio, clothes and utensils, and since the evidence was at variance with the charge sheet, they are entitle dot an acquittal.

In opposing the appeal, the ADPP Mr. Ogoti's response to this ground is that the charge sheet states that the offence took place at night, and that was also the evidence of the witnesses.

We have looked at the charge sheet whose particulars state that:

> *"on the night of 15th December…robbed Peter Sila Muindi of cash, one mobile phone, one charger, one radio, assorted clothes, utensils…"*

That was also the evidence of the witnesses, that the offence too place at night and they mentioned a phone, money, utensils and a radio as having been robbed form him. The fact that none of them mentioned a charger does not make the charge defective, and from a reading of the charge sheet and the evidence of the witnesses, we hold that it was clearly indicated the offence took place at night and witnesses mentioned most of the items listed in the charge sheet – this cannot be said to be variance as to make the charge defective or to constitute an error on the part of the trial court – refuge is found under provisions of section 382 (1) Criminal Procedure Code.

With regard to identification, the appellants state in their written submissions that the circumstances prevailing at the scene and how the consequent events were narrated by the complainants were not conducive for positive identification or recognition since PW1 said that he was peeping from behind a door as the robbers came into the house and that it is not clear what kind of light the lantern was giving – in fact according to the appellants' evidence of there being a lantern was fabrication and that the said lantern ought to have been brought to court as evidence.

They cited the case of Charles O. Maitanyi v R Cr. Appl. No. 6 of 1986 which held that it is essential to ascertain the nature of light available, what sort of light, its size and position relative to the evidence, with greatest care. Appellants contend that the light which was available was not enough for one to ascertain the identity of the robber show were peeping through the door.

They also argue that their names were not disclosed in the first reports which were made.

Mr. Ogoti's response to this is that PW1 on cross-examination gave details of how he was able to see and identify the attackers and he indicated the source of light, however PW2 and PW3 said they recognized the attackers but did not disclose the source of light.

As for their names not being mentioned, Mr. Ogoti referred this court to the evidence of the area chief (PW5) and the police officer (PW6), both of them said the victims mentioned their workers as the culprits and gave them names and he asked this court to take note that the employer/worker relationship was not disputed anywhere.

From the evidence of PW1 and PW2 – it was at the initial stage that PW1 hid behind their bedroom door and saw someone peep thrice. However the person got into the bedroom accompanied by another, and spoke to him demanding for money, and he told them the money was under the mattress and he gave them the money – that was not a sudden, terrifying quick attack – in fact from the evidence, the robbers took some time, and ransacked the house. From the evidence of PW1, there was a lantern burning, which enabled him to see the

appellants – so the source of light was disclosed.

PW2 was in the same room and confirmed seeing the two appellants and recognizing them as their former workers.
We don't know what other description PW1 should have given, anyone who has grown up in a rural setting is fully alive to the nature of light that a lantern produces, it is certainly superior to say a candle or the rudimentary tin lamp. And this was not just restricted to identification of a stranger, but recognition of someone known to the complainant and PW2 – there was no mistake in identification.

There is nothing in the record to suggest that the witnesses were so terrified as to be unable to see and comprehend what was going on around them.

The trial magistrate duly considered the allegations of an existing grudge – which was only raised in cross-examination, because in their defences appellants never referred to it, nor did they refer to their movements on the night of 15th December 2005 – limiting themselves only to events related to the day of their arrest. There was nothing to suggest that the complainants had fabricated the evidence and in fact the defence did not make a single dent in the prosecution case.

We are satisfied that the trial magistrate properly considered the evidence tendered as well as the appellants defences and arrived at a proper conclusion. In our view, the conviction was safe and we uphold it. The sentence was as provided by law and we confirm the same.

The upshot is that the appeals are dismissed.

Delivered and dated this 18th day of March 2010 at Malindi.

H. A. OMONDI	**M. A. ODERO**
<u>JUDGE</u>	**<u>JUDGE</u>**