REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 55 of 2006
BILAN AGINGA NYATAYA …….. 1ST APPELLANT
DANCAN MWEMA ……..……...… 2ND APPELLANT
VERSUS
REPUBLIC ……..……... RESPONDENT

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JUDGEMENT

Before us is the appeal of **BILAN AGINGA NYATAYA** (hereinafter referred to as the 1st Appellant) and **DANCAN MWEMA** (hereinafter referred to as the 2nd Appellant) against the conviction and sentence imposed against them by **HON. T. MWANGI**, the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The two appellants had been arraigned before the subordinate courts on 8th September 2004 and were jointly charged with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the offence were that

"On the 31st day of August 2004 at about 4.45 p.m. at Mwandoni area in Mombasa District within the Coast Province, jointly with others not before court while armed with dangerous weapons namely panga robbed off DANIEL MUTURIA of one mobile phone make Nokia 3310 a wallet containing ID card and cash Kshs.10,250/- all valued at Kshs.20,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said DANIEL MUTURIA"

The trial commenced before the lower court on 25th January 2005 and the prosecution led by **INSPECTOR MUNYOTU** called a total of eight (8) witnesses in support of their case. The brief facts of the prosecution case as narrated by the complainant were that on 31st May 2004 at about 5.00 A.M. the complainant Daniel Matuma was on his way from his house to Kongowea. Someone whom he knew called out to him and he stopped. The man did not talk to the complainant at all – he merely raised a panga and struck at the complainant. The complainant blocked the blow with his arm sustaining a deep cut. A second man emerged and joined in the attack against the complainant who attempted to run away but was weakened by several cuts on his hands. The complainant eventually fell down right outside the doorstep of one **BEATRICE MUTHONI [PW2]**. His attackers pulled him away from the light into a dark corner and stole his cash Ksh.10,250/- Nokia mobile phone and identity card. They then melted away leaving the complainant for dead. Neighbours came out and rushed the complainant to hospital. The matter was reported to police and upon completion of their investigations the two appellants were arrested and charged.

At the close of the prosecution case both appellants were ruled by the trial court to have a case to answer and were placed on their defence. They both gave statements in defence in which they totally denied the charge. On 26th January 2006 the learned trial magistrate delivered her judgement in which she convicted both appellants. After listening to their mitigation she sentenced each appellant to suffer the death penalty. The 1st Appellant unfortunately passed away during the pendancy of this appeal. The hearing of the appeal therefore proceeded only with respect to 2nd Appellant.

The appellant who had filed written submissions opted to rely entirely on those submissions. **MR. ONDARI** the Chief State Counsel gave oral submissions in opposition to the appeal.

This being a court of first appeal we are bound to re-examine and re-evaluate the evidence presented before the lower court and make our own determination on the same **[AJODE –VS- REPUBLIC [1982] KLR 82]**. The first point

for determination is whether the incident as described by **PW1** amounted to Robbery with Violence as provided by S. 296(2) of the Penal Code. The prerequisites for robbery with violence were well elucidated in the case of **OLUOCH – VS- REPUBLIC [1985] KLR 549** where it held

"Robbery with Violence is committed in any of the following circumstances:-
(a) The offender is armed with any dangerous and offensive weapon or instrument; or
(b) The offender is in company with one or more other person or persons; or

(c) 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."

It is important to note that only **one** of the above conditions needs to be met in order to establish robbery contrary to Section 296(2) of the Penal Code.

In his evidence **PW1** told the court that he was accosted by two (2) men who set upon him with a panga. They viciously attacked and robbed him before leaving him all but dead. The attack on the complainant was witnessed by **PW2** at whose door all this took place and who watched the events in horror from her window. Likewise **PW3 CHARITY IVOI**, told the court that on the morning in question she heard screams from outside her house. Both **PW2** and **PW3** state that the ***'men'*** who attacked the complainant were armed with pangas, thereby confirming firstly that there was more than one attacker and secondly that they were armed with dangerous weapons to wit pangas. Finally the fact that the complainant sustained severe injuries in the course of this robbery is proved by the evidence of **PW6 DOCTOR S. SWALEH** who told the court that upon examination the complainant was found to have a deep cut on the left parietal region, depressed skull fracture, a cut in the middle of his chest and on the right thumb. He produced the P3 form **Pexb4** duly completed confirming these injuries. Based on the above evidence we have absolutely no doubt that the robbery attack against this complainant in the early morning of 31st August 2004 clearly fell within the scope of S. 296(2) of the Penal Code.

We did carefully peruse the written submissions filed by the appellant and we note that he raised several grounds of appeal, the key one being that of insufficient identification of himself as one of the culprits in the robbery.

The complainant in his own words told the court that it was 5.00 A.M. when he was attacked therefore it must have been dusk and day light had not fully broken. However **PW1** told the court that when one of the robbers whom he knew called out to him to stop, he stopped directly under one of the security lights. At page 7 line 14 **PW1** states

"I stopped under a security light which was above my head …"

PW1 goes on to state at page 8 line 1

"I knew the accused before. I had been seeing them at my neighbourhood. I see them playing football at a field near my house and they eats [sic] miraa at a block near my house. The 1st accused cut me severally standing in front of me. The others held me while he stood before me cutting me. I was under an electricity bulb and I saw him well"

We find the complainant to have been very clear and concise in his evidence. He was directly under a security bulb which would imply that the area was very well illuminated. Further **PW1** told the court that one of his attackers was a person whom he knew well and he was therefore able to recognize him [2nd Appellant]. It has been held that evidence of recognition is more reliable than that of mere physical identification **[WAMUNGA –VS- REPUBLIC [1989] KLR 424].** In addition we note that **PW1** described the specific role that each appellant played in the robbery. With respect to 1st Appellant **PW1** said he was able to identify him due to the 30 odd minutes they spent together during the attack. At page 8 line 18 **PW1** states

"I knew accused 2 while accused 1 spend [sic] about 20 – 30 minutes attacking me under an electric bulb light. I saw them well and for a long time I could not forget him and I will never forget him because I pleaded with him not to take my soul but he continued cutting me"

It could well be argued that the failure by **PW1** to describe the strength of the light from the electric bulb he relied on weakens his evidence of identification. If this evidence of a single witness were the only available evidence identifying the appellant then this may well have been a valid point. However that was not the case. There is evidence from two other eyewitnesses **PW2** and **PW3** implicating the appellant in this robbery. **PW2** tells the court that she woke up at about 4.45 A.M. to hear the complainant calling her name asking her to rescue him. **PW2** states that she pulled back her curtain and saw two people armed with pangas holding the complainant and cutting him. She states that she was able to see these people by the ***'light at her door'***. On page 10 line 1 **PW2** states

"I know accused 1 as Billy he used to be the Manager of sungu sungu. I know the second as Osama .."

PW3 Charity Ivoki states that she woke up to hear screams for help. She lit her lamp. The complainant and his attackers moved from the veranda of **PW2** to her house. **PW3** told the court that she was able to see the accused by the electric lights at her veranda. At page 11 line 7 she states

"I knew the accused persons, I knew the two before court. They carried pangas. Billy 1st accused was clothed in black and was cutting the person severally. The second Osama also had a panga … I know the two as neighbours, I know their houses. The place was lit with electricity bulbs"

Here again there is clear evidence of recognition. **PW3** like **PW2** before her testified that she saw and recognized the appellant whom she knew well before this incident.

PW4 JAMES NJUE one of the youth vigilante in that area told the court that he was informed of the attack on the complainant on 1st September 2004 at about 4.00 p.m. He organized the other youth to launch a manhunt for the culprits who the complainant had named as ***'Osama'*** and ***'Bilali'***. This is a clear indication that the complainant's identification of the appellant was not a mere afterthought. The complainant named them immediately after the incident. **PW4** and his fellow youth wingers did trace the 1st Appellant whom they took to the police station. They later went to the house of ***'Osama'*** the 2nd Appellant with **PW7 PC DAVID CHUMA**, from where they recovered a panga and a black leather jacket. Both items were produced as exhibits at the trial before the lower court **Pexb5** and **Pexb1**. We find the recovery of a black leather jacket inside the house of the appellant to be of significance because **PW1, PW2** and **PW3** all of whom were eye witnesses to the robbery, all testify that the appellant was wearing a black leather jacket during the course of the robbery. On page 10 line 4 **PW2** states under cross-examination by the appellant

"I know you as Osama. I saw you wearing a black jacket"

Likewise **PW3** under cross examination by the appellant at page 11 line 23 states

"You had worn a black jacket like the one I have identified"

It cannot be a mere coincidence that three eye witnesses to the robbery each state that they saw the appellant wearing a black jacket at the time of the robbery only for police to recover a black jacket in the house of the appellant the very morning after the robbery had occurred. The recovery of this black jacket inside the house of the appellant barely hours after the robbery, in our view undoubtedly links him to the said robbery. We note that an identification parade was conducted by **PW5 INSPECTOR GABRIEL MBURU**. In view of the fact that the identifying witnesses **PW1, PW2** and **PW3** all told the court that they knew the appellant before this incident and were thus able to recognize him, we find this parade to have been superfluous in the circumstances. For what it may be worth the witnesses did actually identify the appellant at said parade. Based on the above analysis we do find ourselves in agreement with the learned trial magistrate when she states at page 38 line 3

"Evidence of identification is thus overwhelming and unchallenged"

Therefore aside from the eyewitness evidence, we are satisfied that there existed further evidence linking the appellant to this crime. The learned trial magistrate did give due consideration to the defence of the appellant as indicated on page 38 to 39 of her judgement. Her conclusion at page 39 line 13 was that

"The defence was a mere afterthought as the issued [sic] were only raised in their defences and not during the

prosecution's case"

On the whole we are satisfied that there was clear a positive identification of the appellant in this case. As discussed earlier the incident did amount to a robbery contrary to S. 296(2) of the Penal Code. The evidence adduced was clear and cogent. The learned trial magistrate did render her conviction of the appellant on the basis of sound and reliable evidence. That being the case we do hereby confirm her conviction of the appellant for the offence of Robbery with Violence.

The trial magistrate did accord the appellant an opportunity to mitigate. She did thereafter impose on him the death sentence. This is indeed the only legal sentence upon conviction under S. 296(2) of the Penal Code. We do therefore confirm this conviction. The upshot of the above is that we find no merit in this present appeal. The same is dismissed in its entirety.

Dated and Delivered at Mombasa this 27 day of May 2010.

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F. AZANGALALA **M. ODERO**

JUDGE **JUDGE**