REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 251 of 2008

THOMAS MORARA NYAMBEGA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant herein **THOMAS MORARA NYAMBEGA ALIAS GEORGE MORARA**, and another by the name **KIOKO MUOKA** (hereinafter referred to as the 2nd Accused) had jointly been charged before the Chief Magistrate's Court Mombasa with seven (7) counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. Both the Appellant and the 2nd Accused denied the charges. Their trial commenced on 5th March 2008 and the prosecution led by **INSPECTOR KITUKU** called a total of ten (10) witnesses in support of their case. The prosecution case revolved around a robbery incident which took place on 27th June 2007 in the premises of Penguin Forex Bureau, situated along Nyerere Avenue in Mombasa next to Biashara Building. **PW4 SAMUEL OKOMBO ABEBA**, a security guard with Wells Fargo Security, told that court that on that material date he had been assigned to guard the premises of Penguin Forex. He reported on duty at 6.45 A.M. and found the doors securely locked. He remained outside the premises until one of the employees **HUSSEIN NASSIR PW2** arrived and switched off the alarm. PW2 opened the security grill and the inner door. As **PW2** made to enter the building he was grabbed by the shoulders, a gun pointed at him and he was ordered to keep silent and was led into the banking hall. **PW4** and a cashier **ZUBEDA HEMED KALOMA**, who had also arrived were also forced into the banking hall at gun-point. The two men who had forced them in ordered them all to lie down and robbed them of their valuables including mobile phones, jewellery and cash. The thugs continued with this trend. Any employee or customer who tried to enter the bureau was pulled in at gun-point and ordered to lie down and surrender all they had. Finally **PW1 SHENAZ CHARANIA** the managing director of the bureau came. She too was pulled into the bureau at gun point and robbed of her mobile phone and jewellery. The thugs then ordered **PW1** to open the safe. She informed them that it required two employees to open the safe together and pointed out the accountant **MOHAMED BARANIA**, who had the second key to the safe. They opened the safe and the robbers emptied it of all the foreign currency inside it. **PW1** told the court that they lost the following:-

- 3,500/- Euros
- 6.5 million Swiss Francs
- 6,800 American dollars
- 4000 Japanese Yen

The total sum of money stolen was Kshs.14.5 million. After they had helped themselves in this manner the thugs took off and the alarm was raised. Police were called and the serial numbers of the stolen

currency was circulated. The day following this robbery on 28th June 2007, the Appellant and the 2nd Accused were arrested at Barclays Bank Ruaraka Branch, where they had gone to exchange foreign currency. Amongst the notes they presented for exchange included Euro notes bearing the circulated serial numbers. Police were called in and arrested the two. They were eventually charged with these 7 counts of Robbery with Violence.

At the close of the prosecution case both the Appellant and the 2nd Accused were found to have a case to answer and were put to their defence. Each gave a sworn defence and denied all the charges they faced. On 8th September 2008 the learned trial magistrate delivered her judgement. She acquitted the 2nd Accused of all seven (7) counts. However the Appellant was convicted on Count Nos. 1 and 7 but was acquitted on Counts 2, 3, 4, 5 and 6. After listening to his mitigation the trial magistrate sentenced the Appellant to death on Count No. 1 and directed that the death sentence for Count No. 7 be held in abeyance. Being dissatisfied with both this conviction and sentence the Appellant filed this present appeal.

The Appellant who appeared in person chose to rely entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO**, learned State Counsel made oral submissions by which he opposed the appeal.

As we are sitting as a court of first appeal we will be guided by the decision of the Court of Appeal in the case of **AJODE –VS- REPUBLIC [2004] 2 KLR 81** in which their lordships held as follows:-

"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that"

[see also **OKENO –VS- REPUBLIC [1972] E.A.L.R. 31**].

We have carefully perused the written submissions filed by the Appellant and note that he raises three main grounds for his appeal.

§ Defective charge sheet
§ Identification at the scene
§ Recovery of exhibits

With respect to the first ground, whereas the Appellant submits that the charge sheet is defective our own close perusal of the said charge sheet does not reveal any defect which would be fatal to the charges. There is no legal requirement that the evidence on record correspond **exactly** with the charge sheet. The charge sheet is a mere synopsis, a preview if you will of the evidence to be adduced at the trial. What is important is that the charge do specify the ***"essential ingredients"*** of the offence. The present charge sheet has certainly met that threshold. More pertinently we do not find any defect in the charge sheet that would nullify the charges. We find no merit in this ground of the appeal and the same is hereby dismissed.

The second ground raised by the Appellant is that of identification at the scene. Out of the ten (10) prosecution witnesses who came forward to testify before the lower court only one was able to identify the Appellant as one of the robbers. All the other nine (9) witnesses told the court that they would not be in a position to identify their attackers. However, **PW6 RAPHAEL MWONDORO**, told the court that on that material date he went to the forex bureau as a customer seeking to change money. He arrived at the premises at 8.20 A.M. but found that the bureau was not yet open for business. He waited until 8.30 A.M. when one employee came. **PW6** who no doubt was getting impatient asked her why they were opening the business late. She told him to wait. At 8.50 A.M. **PW6** got tired and decided to enter the bureau. At page 27 line 1 **PW6** states

"At 8.50 A.M. I thought it was taking too long. I decided to enter. I pushed the door and it opened. On entering, I met a man. It was unusual as he wasn't in uniform. He obstructed my way. He asked me why I was waiting for so long. He ordered me to lie down brandishing a pistol at me. I saw the guard and other employees lying down. I complied and also lay down".

PW6 here has given very clear and concise evidence regarding the events that took place that morning. The time as he mentioned was 8.50 A.M. It was broad daylight and as such conditions was favourable for a positive identification. Further down the same page at line 13 **PW6** says

"On my part I saw three thugs, the one who was on my right supporting the one who was ordering me to lie down and the one who was on the phone from inside. I was able to identify only one, the one who opened for me and drew a pistol. We took about three minutes arguing. He is in court today identified as the 1st accused in the dock"

This witness has made a positive identification of the Appellant. He has stated precisely what role the three men played and he is specific that the Appellant was the one who confronted him at the door armed with a gun. The two argued for some minutes giving **PW6** a better opportunity to see and note his features. It is important to note that **PW6** was not a mere passer-by who happened to chance upon a robbery in progress. He had left his house in Likoni and driven to this particular bureau with the sole intention of buying foreign exchange. He arrived before the bureau was opened and waited impatiently for the employees to arrive. I find that **PW6** was alert and watchful on that day. He even noted that the man who let him into the bureau was not in uniform and he found this to be unusual – clearly he had expected to be ushered in by a security guard in uniform. In her findings on this issue of identification the learned trial magistrate with respect to the evidence of **PW6** commented at page 51 line 14

"The above analysis is a clear indication of someone who was fully alert and noted every event as it unfolded. Nowhere through out the proceedings were the attackers said to have been in hoods such that their faces would not have been seen. Secondly it is not denied that the accused one exchanged words with PW6. Three minutes in view of the circumstances herein was sufficient to warrant positive identification"

We are inclined to agree with the above findings. From his narration of events it is quite clear that **PW6** took keen interest events as they unfolded. It is worth repeating that it was broad daylight and **PW6** engaged the 1st Appellant in a conversation. We are very alive to the fact that this identification has come from only one single witness. Can it suffice as the basis for a conviction? In the case of **MAITANYI – VS- REPUBLIC [1986] KLR 198**, it was held with respect to the reliability of the evidence of a single identifying witness that

"The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made"

We are satisfied that the learned trial magistrate did so warn herself. At page 51 line 20 she states

"The above finding [that PW6 had made a positive identification of the Appellant] has been arrived at even with full regard of the dangers of relying on a single identification witness and more so in a case

like the one before me where no identification parade was conducted".

The next logical question that would arise is whether the identification made by **PW6** was properly tested by way of an identification parade? The trial magistrate has already alluded to the fact that no identification parade including the Appellant was ever conducted by the police. **PW10 Sgt. ERASTUS OGUTU** who was the investigating officer told the court that he did request an Inspector Bett to conduct a parade but the Appellant objected and declined to participate. It is curious that a man who ought to have been anxious to clear his name would decline to participate in such a parade. Why would the Appellant so decline? In his defence the Appellant claims that the police organized 11 parades and he was not identified in any of them. Appellant has however tellingly not indicated that he participated in any of the alleged eleven (11) parades. The learned trial magistrate did consider this aspect of his defence. At page 56 line 10 of her judgement she states as follows:-

"There is evidence that the accused refused to take part in an I.D. parade. This explains why the only identifying witness PW6 Raphael Mwandoro couldn't pick out accused whom he said was not in the parade he attended. His evidence was however clear and described the role of accused 1 during the robbery. I never doubted him at all.
I strongly doubted the defence of accused persons that 11 parades were conducted. This was because even the number of witnesses doesn't get to 11 ...."

We also have our doubts that police conducted eleven (11) parades. There were not enough witnesses to support the need to mount eleven (11) parades. **PW10** is emphatic that the Appellant declined to participate in a parade. We find no reason why **PW10** would lie about this. If the Appellant had actually participated in a parade there would have been no logical reason for **PW10** to say that he did not.

As stated earlier we find it curious that the Appellant would decline to take part in the very parade which could assist him clear his name. The Appellant did not advance any valid reason for his rejection of the parade. If he had any reservations about the parade then he was at liberty to voice them. If the Appellant wanted to have his lawyer, a relative or friend present during the parade then again he was quite at liberty to demand this. In view of all these safeguards the Appellant's blanket refusal to participate in an identification parade speaks volumes. The trial magistrate who had the opportunity to see the witnesses testify and was able to observe their demeanour found **PW6** to be a credible witness. We find no reason to disagree with this finding. On our part we too, are impressed by the detailed manner in which **PW6** gave evidence. He remained unshaken under cross examination by the Advocates for the Accuseds. It is more than likely he was telling the truth. From our own re-evaluation of the evidence of identification we are satisfied that there was a clear, positive and reliable identification of the Appellant which linked him inextricably with the robbery.

This evidence of identification is not the only evidence linking the Appellant to the offence. The prosecution did also present evidence of recovery of exhibits in the possession of the Appellant. **PW2** who was the Principal Assistant Officer at the bureau told the court that it was his duty to collect all the cash from the cashiers at the end of each day, prepare a tally and serialize the notes in preparation for banking the next day. He states that he had already prepared a list serializing the Euro notes due to be taken for banking on the morning of the robbery. He produces his original handwritten serialization list in court **Pexb10**. After the robbery had occurred **PW2** gave to the police this list and police circulated the serial numbers of the stolen bank notes. The day after the robbery on 28th June 2007 **PW8 Joshua Mutei** a cashier with Barclays Bank told the court that Appellant came to Barclays Bank Ruaraka Branch and presented some foreign currency for exchange. The amount presented exceeded his limit as a cashier and he referred the matter to his manager. Amongst the notes presented by the Appellant were certain Euro notes bearing the circulated serial numbers of the stolen notes. Police were immediately called in. This evidence of **PW2** is corroborated by that of **PW7 SGT. MICHAEL NKUMUM**, an officer stationed at CID Kasarani. He told the court that on 28th June 2007 he was instructed by the DCIO to proceed to Barclays Bank Ruaraka Branch where two men had been held. They went to the bank and found the

Appellant and 2nd accused held in the manager's office. The two men were arrested and transferred to Mombasa for further investigations. **PW10 SGT. OGUTU**, who was the investigating officer received the suspects in Mombasa and proceeded with investigations. The foreign currency recovered on the Appellant was handed over to him. He made a comparison of the serial numbers and found that 25 of the Euro notes presented to the bank in Nairobi by Appellant bore the same serial numbers as the notes stolen the previous day from the Forex bureau in Mombasa. This evidence of recovery provides clear proof that the Appellant was found in possession of the stolen foreign currency one day after the robbery in Mombasa. This is a situation where the doctrine of ***"recent possession"*** is squarely applicable. The key ingredients of the doctrine of recent possession were well elucidated in the case of **ARUM –VS-REPUBLIC [2002] 2 E.A. 10** as follows –

"Before a court can rely on the doctrine of recent possession as a basis of a conviction in a criminal case, the possession must be positively proved, that is, there must be positive proof, first; that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant; thirdly that the property was stolen from the complainant, and lastly; the property was recently stolen from the complainant"

Our own analysis of the evidence on record in the lower court is that all these key ingredients have been proved. **PW2** prepared in his own hand a list serializing the Euro notes due for banking which notes were stolen in the robbery on 27th June 2007. The very next day **PW8** positively identifies the Appellant as the customer who presented Euro notes bearing the exact same serial numbers to him at Barclays Bank in Nairobi. Currency notes are distinctly identifiable by their serial numbers which are unique to each note. No two currency notes would bear the same serial number (unless one was a forgery which is not alleged in this case). The serial numbers clearly identify the Euro notes recovered in the possession of the Appellant as a very same notes which were stolen from the bureau during the robbery. More importantly the Appellant did admit in his defence that he did go to Barclays Bank in Nairobi and that he did present foreign currency for exchange (though he denies any involvement in the robbery). In her judgement at page 56 line 25 the learned trial magistrate observes that

"Anyone found in possession of stolen goods shortly after loss and fails to give an explanation as to how he attained it is presumed to be the one who stole/robbed the same. This case is no exception"

We find this to have been a correct analysis of the doctrine of recent possession. This doctrine squarely implicates the Appellant in the robbery at the forex in Mombasa.

In his defence the Appellant denies having been in Mombasa on the day of the robbery 27th June 2007. He produces a bus receipt **Dexb1** as proof that he had traveled from Mombasa to Nairobi on 25th June 2007. Firstly the fact that the Appellant traveled to Nairobi on 25th June 2007 is not proof that he was not in Mombasa two days later on 27th June 2007. In these days of quick and easy travel it could take as little as 45 minutes for the Appellant to make his way back to Mombasa on any day he wished. Secondly this defence does not in any way dislodge the prosecution evidence. The trial magistrate was correct to dismiss the same.

Taken in its totality the prosecution did in our view prove a watertight case against the Appellant. There was evidence of positive identification of the Appellant at the scene of the robbery, and in addition there was evidence of recent possession by the Appellant of the stolen currency. In the circumstances we are satisfied that the conviction of the Appellant was sound both in law and on fact and we have no hesitation in confirming the same.

The trial magistrate did impose the only lawful sentence which was the death penalty. We do hereby uphold the same. Finally this appeal fails in its entirety. The conviction and sentence rendered by the lower court are confirmed and upheld.

Dated and Delivered in Mombasa this 20th day of July 2010.

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F. AZANGALALA	**M. ODERO**
JUDGE	**JUDGE**