REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 255 of 2008
(From Original Conviction and Sentence in Criminal Case No.1699 of 2008 of the Chief Magistrate's Court at Mombasa: ***M.K. Mwangi – S.R.M.)***

JOHN MBUGUA…….…….. APPELLANT
VERSUS
REPUBLIC …….…. RESPONDENT

JUDGEMENT

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JOHN MBUGUA, the Appellant herein has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting in Mombasa Law Courts on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the offence read as follows –

"On the 4th day of June 2008 at around 5.00 A.M. at Kongowea area in Mombasa District within Coast Province, jointly with others not before court, while armed with dangerous weapons namely pangas and knifes [sic] robbed PETER NDURI a mobile phone make Nokia 1100, a pair of shoes, a trouser, a cap, a wallet, National identity card and cash Kshs.300/- all valued at Kshs.5,500/- and at or immediately before or immediately after the time of such robbery used actual violence to the said PETER NDURI."

The Appellant entered a plea of ***'not guilty'*** to the charge and his trial commenced on 8th July 2008, at which trial the prosecution led by **INSPECTOR NDUBI**, called a total of three (3) witnesses in support of their case. At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He opted to give a sworn defence in which he denied the charge. On 27th August 2008 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the offence of Robbery with Violence and after listening to his mitigation sentenced him to death. Being dissatisfied with both his conviction and sentence the Appellant filed this present appeal.

The Appellant was not represented by counsel at the hearing of the appeal and chose to rely entirely upon his written submissions which with the leave of the court had been duly filed. **MR. MUTETI**, learned State Counsel who appeared for the Respondent State made oral submissions in which he urged the court to uphold both the conviction and sentence imposed by the trial court.

Being a court of first appeal we are mindful of our duty to re-examine and re-evaluate the prosecution evidence and to draw our own conclusions on the same [**see OKENO –VS- REPUBLIC [1975] EALR 81**]. We have carefully perused the record of the trial from the lower court and we do note that the conviction of the Appellant revolved solely around the issue of recovery. In his evidence the complainant told the court that on the material day he was on his way to work at about 5.00 A.M. Three men armed with a knife and a panga accosted him and robbed him of the items listed in the charge sheet. The complainant told the court that he was unable to positively identify any of the men who robbed him. He reported the incident the following day at Nyali Police Station. As he left the police station after making his report the complainant noticed a tout in a passing matatu wearing his stolen cap. He informed the community policing officers who waited for the same matatu on its way back and arrested the Appellant who was still wearing the cap in question. The Appellant was then taken to the police station and charged. This in a nutshell was the prosecution case.

The complainant was candid enough to tell the court that he was not able to identify the Appellant as one of the men who robbed him. He admits that it was still dark at 5.00 A.M. and he was not able to see his attackers well. The only piece of evidence linking the Appellant to this offence is the cap which the complainant identifies as his stolen cap. This is a case where the doctrine of recent possession would come into play. This doctrine was well elucidated by the Court of Appeal in the case of **ARUM –VS- REPUBLIC [2006] 2 E.A. 10**, where it was held –

"Before a court can rely on the doctrine of recent possession as a basis of 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"

With respect to the first ingredient, there is no doubt that the cap was found in the possession of the Appellant. The Appellant himself concedes in his defence that he was wearing the cap when he was arrested. The said cap was shown to the lower court and was produced as an exhibit **Pexb1.** The complainant has been able to positively identify this cap as his from certain special and exclusive marks. At page 3 line 1 he says

"My hat is different from others, it has a personal sticker which had been sewn on it by a personal tailor. I'd got the sticker from a T-shirt and have it sewn on the hat. This is the hat. I have put the sticker on the right side – hat with sticker – PMFI1"

The complainant then proceeds to produce and identify the T-shirt from which the sticker was removed **Pexb2** showing the space from where that sticker was removed. This evidence was properly corroborated by **PW2 ANTHONY MWAKU**. He tells the court that he is a tailor and that **PW1** is his customer. He confirms that at the complainant's request he removed the sticker from a T-shirt **Pexb2** and sewed it onto the complainant's cap. He too positively identifies the said cap with the sticker in court **Pexb1**. Lastly on this point is the evidence of **PW3 PC FAIRFAX MASINDE**, the arresting officer. He tells court at page 4 line 17

"I was able to try and fit the sticker on the cap to the place where it had been removed and it fitted properly"

Based on the strength of this evidence we are satisfied beyond any doubt that the cap recovered in the possession of the Appellant did belong to the complainant who had made certain personal and exclusive alterations to the same. Thus the second ingredient of the doctrine of recent possession has been satisfied.

The cap was stolen from the complainant on 4th June 2008 at about 5.00 A.M.. On 6th June 2008 barely two days later the Appellant is found wearing the stolen cap. This cap had only recently been stolen from the complainant – the third ingredient of the doctrine is proved. At page 11 line 18 of his judgement the learned trial magistrate observes as follows –

"There is no doubt in my mind that the cap stolen from PW1 is the same one recovered from the accused. Evidence of PW1 and PW3 show that the accused insisted the cap was his. The cap was recovered barely 2 days after the robbery creating the inescapable presumption that the person in whose possession the cap was found is the robber"

We are entirely in agreement with the above finding. The complainant was accosted by three (3) armed men, who in pursuance of the robbery threatened his life. The ingredients of the offence of robbery with violence as envisaged by S. 296(2) of the Penal Code are shown to be present.

In his defence the Appellant stated that he merely picked the cap from his matatu, the same having been left on a seat by a customer. If this was so, then we wonder why the Appellant did not surrender the cap to the police or to any other lawful authority – why was he wearing it? The Appellant in his defence stated that the matatu driver would confirm his defence. He did not call this driver as a witness. **PW2** was an independent witness who did not know the Appellant at all. He would have had no reason or motive to fabricate evidence against the Appellant. We are in agreement with the trial magistrate's dismissal of his defence.

The upshot of the above is that we find that the Appellant's conviction was sound both in law and based on the facts. We have no hesitation in confirming the same. The learned trial magistrate did allow the Appellant an opportunity

to mitigate after which he sentenced him to death. This is the only lawful sentence provided for by S. 296(2) of the Penal Code. We do uphold the sentence as passed. Finally this appeal fails in its entirety. The conviction and sentence of the lower court are hereby confirmed and upheld.

Dated and Delivered in Mombasa this 29th day of September 2010.

……. **…….**

M. IBRAHIM **M. ODERO**

JUDGE **JUDGE**

Read in open court in the presence of:-

M. ODERO
JUDGE
29/09/2010

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