REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 59 of 2008

(From Original Conviction and Sentence in Criminal Case No.138 of 2006 of the Principal Magistrate's Court at Kwale: Ogembo – D.O. - S.R.M.]

BEN LEMANGA OLE MAGILU ..... APPELLANT
VERSUS
REPUBLIC ..... RESPONDENT

JUDGEMENT

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The Appellant herein **BEN LEMANGA OLE MAGILU**, has filed this appeal to contest his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts. The Appellant was arraigned in court on 20th January 2006 and 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 4th day of January 2006 at about 3.00 p.m.at maweni village tiwi location in Kwale District within Coast Province, robbed ADAM MOHAMED of two side boards, one bed, mattress, one freezer and cash Kshs.4,000/- all valued at Kshs.164,000/- at or immediately before or immediately after the time of such robbery used personal violence to the said ADAM MOHAMED"

The Appellant denied the charges and his trial commenced on 30th March 2007. The prosecution called a total of (7) witnesses in support of their case. The brief facts of the prosecution case were that on 4th January 2006 **PW3 PASTOR JOHN KARIUKI**, met the Appellant whom he knew before in Diani. The Appellant told **PW3** that he urgently needed money to send to his relatives who were victims of a severe famine in Masai land. The Appellant further told **PW3** that he had various household items that he was ready to sell to raise the money. **PW3** decided to see the goods and purchase some to help alleviate the Appellant's problem. **PW3** hired a canter vehicle to go and ferry the goods so that he could view them. The Appellant led the vehicle to a home in Tiwi where the complainant **ADAM MOHAMED**, was the caretaker looking after the house and its contents for his uncle one **HAMED KHAMIS**. Upon arrival in the compound the Appellant began to beat up the complainant claiming that he was a thief. He ignored the complainant's protests and proceeded to remove –

§ 1 wardrobe
§ 2 side-boards
§ 1 freezer
§ 1 bed
§ 1 6 x 6 mattress

All of these were loaded into the canter. The complainant was forced into the vehicle where the Appellant continued to beat him up claiming that he was taking him to the police station. Whilst inside the vehicle the Appellant took Kshs.4,000/- which the complainant had before throwing him out of the vehicle. The complainant went to report the incident at Diani Police Station. He also went to the doctor where he was treated and discharged. His P3 form was filled and signed. The Appellant was

later arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied the charges totally. On 4th March 2008 the learned trial magistrate delivered his judgement in which he convicted the Appellant and sentenced him to death. The Appellant being dissatisfied with both the conviction and sentence filed this present appeal.

This being a court of first appeal we will in coming to our decision in this matter be guided by the ruling of the Court of Appeal in the case of **AJODE –VS- REPUBLIC [2004] 2 KLR 82**, where 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 heard nor seen the witness and make allowance for that"

We have carefully perused the Appellant's grounds of appeal and we note that he raised the following grounds

§ Defective charge sheet
§ Defective plea-taking
§ Identification
§ Failure to conduct an Identification Parade
§ Recovery of exhibits

On the first ground the Appellant submits that the charge sheet was fatally defective as it has not been signed by the police. Firstly there is no legal requirement that a charge sheet be signed by a police officer. Secondly we have looked at the original charge sheet and we note that it is infact signed for the Officer-in-Charge Diani Police Station. Thus the Appellant is clearly mistaken and this ground having no merit is hereby dismissed.

Secondly the Appellant argues that his plea was not properly taken as it was taken by **Hon. A.M. OBURA**, Resident Magistrate whom he claimed lacked jurisdiction to hear the case. Once again we find this ground to be totally misleading. At his first court appearance in the lower court, the Appellant's plea was taken by **HON. D.M. OCHENJA**, a Senior Resident Magistrate who was possessed of full jurisdiction to hear cases of Robbery with Violence contrary to Section 296(2) of the Penal Code. It is true that on 30th March 2007 the trial commenced before **Hon. Obura** a Resident Magistrate, however the record clearly indicates that on 11th June 2007 the matter was referred back to **Hon. D.M. OCHENJA** , the Senior Resident Magistrate who had proper jurisdiction and who began the case de novo. At no time did a magistrate who lacked jurisdiction fully hear or determine the case. We find that no prejudice was caused to the Appellant at all as the complainant was re-called and gave evidence afresh before the Senior Resident Magistrate. This ground of the appeal has no merit and is dismissed.

On the question of identification it is important to note that the incident occurred at 3.00 p.m. It was broad daylight and conditions were therefore favourable for a positive identification.

In his evidence the complainant told the court that on the material day a group of people came in a vehicle led and directed by the Appellant to the home of his uncle in Tiwi. The complainant was the caretaker left to watch over the house and its contents. The Appellant began to beat the complainant calling him a thief and instructed the men to load the household items into the vehicle. The complainant stated at page 15 line 28

"At the front and leading the vehicle, there was a man dressed in masai clothes. He is the accused. He led the vehicle upto the house"

This complainant was able to identify the Appellant due to his distinctive attire – Masai dress, and he also identified the Appellant in the lower court. The Appellant later forced the complainant into the vehicle and sat next to him and took his Kshs.4,000/-. There is no doubt that these events must have taken much time at the very least an hour. We have no doubt that the complainant had ample time and opportunity to see and identify the Appellant well as they were in each others presence for sufficient length of time.

The complainant's identification of the Appellant is corroborated by **PW2 HAMISI ATHUMAN**, the driver hired to transport the goods. He confirms that it was the Appellant who led them to the house in Tiwi and instructed them to load up the goods. **PW2** at page 19 line 19 says

"Accused was dressed in Masai attire and had a sword in his right waist".

He too noticed the distinctive Masai attire worn by the Appellant. It cannot be the case that both the complainant and **PW2** were mistaken in what they saw.

PW3 Pastor John Kariuki is the man who the Appellant approached offering to sell him household goods after giving him some sob story about his starving relatives in Masai land. **PW3** tells court that the Appellant is the man who he spoke to and agreed with. It cannot be a mere coincidence that Appellant offers to sell to **PW3** a ***"big cupboard, bed and table"*** and on the very same day the complainant's house in Tiwi is robbed of the very same items! **PW3** and Appellant even wrote out and signed an agreement which was produced in court as an exhibit **Pexb3**. The prosecution have called three witnesses who were able to positively identify the Appellant as the one who went to the home of complainant and stole the items in question. Both **PW2** and **PW3** testify that they knew the Appellant before this incident. Their evidence was not that of mere visual identification. They relied on evidence of recognition. This has been held to be more reliable than visual identification alone – **ANJONONI –VS- REPUBLIC 1980 KLR 59.**

Aside from this evidence of identification there is evidence of recovery which links the Appellant to the crime. After the goods had been stolen from the complainant's house the Appellant delivered the same to **PW3.** The items were offloaded and **PW3** stored them in his brother's house. **PW4 MARK NJUGUNA** states that he did see the items which the Appellant delivered and sold to him on 4th January 2006. He identifies the Appellant as the seller of the goods. Later **PW6 NOEL NGWANA** the driver of the vehicle in which the stolen goods were carried, heard that police were looking for his vehicle. He went and led police to the house where he had delivered the goods. They were all recovered and taken to the Diani Police Station where complainant positively identified them as the items stolen from his house. It is very telling that on the very day these items were stolen the Appellant was busy selling them to **PW3**. This is a clear case of ***"recent possession"***. The chain of events clearly leads back to the Appellant. The only inference that we can draw from this set of circumstances is that the Appellant was an active participant in the theft of these items.

The Appellant in his written submissions raised issue with the fact that no identification parade was conducted. It is our considered opinion that in view of the fact that as we have stated earlier, most of the witnesses knew the Appellant before this incident an identification parade would have been superfluous. In the circumstances, a parade was not necessary. Based on the above, we are convinced that the Appellant has been clearly and positively identified by the witnesses as the man who stole household goods from the complainant's house. We find no room for error. The incident described by the prosecution does amount to a Robbery with Violence. The complainant told court that the Appellant beat him in furtherance of the robbery. **PW5 SAMWEL KIPTALAM** a clinical officer attached to Msambweni District Hospital examined the complainant on 4th January 2006. He found him to have bruises around the head and shoulder. He filled and signed the P3 form which he produced in court as an exhibit **Pexb1**. This is clear proof that the complainant was indeed assaulted as he alleged.

In the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549**, the Court of Appeal laid out the essential ingredients of the offence of Robbery with Violence as follows –

"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"

Proof of **any one** of the above ingredients was held to be sufficient proof of an offence under S. 296(2) Penal Code. Thus proof of the assault on the complainant in furtherance of this theft makes this an offence under this provision of the law.

The Appellant did present a defence to the charge. This defence was duly considered by the learned trial magistrate and was dismissed in the following terms at page J5 line 20

"I have otherwise also considered the defence raised by accused. With respect, I do not believe the same. I do not believe that the police would simply arrest one at the beach in the manner alleged and charge him with an offence such as this"

We do agree with these sentiments of the learned trial magistrate. The defence raised does not dislodge the prosecution evidence at all.

Finally we are satisfied that the prosecution presented a watertight case against the Appellant. The Appellant came up with an elaborate scheme to enrich himself by selling stolen goods. Unfortunately he committed the offence of robbery in his

desire to secure the goods to sell. His plan proved not to be as foolproof as he thought. The conviction of the Appellant was both sound and safe and we have no hesitation in confirming the same. The death sentence imposed was the only lawful sentence provided for this offence. We do uphold the same. This appeal fails in its entirety.

Dated and Delivered in Mombasa this 15th day of September 2010.

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J.B. OJWANG	**M. ODERO**
JUDGE	**JUDGE**