REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 63 of 2008

(From Original Conviction and Sentence in Criminal Case No. 1576 of 2006 of the Senior Resident Magistrate's Court at Kwale: OGEMBO D.O –S.R.M.)

HAMISI IDD MWATABU ....………….. APPELLANT
VERSUS
REPUBLIC ……………….…………..…………….. RESPONDENT

JUDGMENT

The Appellant herein **HAMISI IDD MWATABU,** 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 28th September 2006 and charged with two counts as follows

COUNT NO. ONE
"ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

On the 21st September 2006 at about 7.00 p.m. at Mrururni village of Diani Location Kwale District within Coast Province, with others not before court while armed with a dangerous weapon namely a knife robbed OMAR BARAZA, a mountain bike valued at Kshs.4,900/- and at or immediately before or immediately after the time of such robbery used actual violence to the said OMAR BARAZA"

COUNT NO. TWO
"HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE

On 21st September, 2006 at about 8.00 p.m. at Mvumoni village of Diani Location Kwale District within Coast Province, otherwise than in the cause of stealing, dishonestly received or retained a bicycle valued at Kshs.4,900/- knowing or having reason to believe them [sic] to be stolen goods"

The Appellant denied both charges and his trial commenced on 19th June 2007 at which the prosecution led by **INSPECTOR CHARO** called three (3) witnesses in support of their case. The brief facts were that on 21st September 2006 at about 7.00 p.m. the complainant was heading home from his place of work, pushing his bicycle as he walked. When he got to Mwaroni Primary School eight (8) men accosted him. One man produced a knife with which he threatened the complainant. The men surrounded the complainant and ordered him to leave his bicycle to them. He did as ordered, left the bicycle and ran home. The complainant told the lower court that he was able to identify the Appellant as one of the men who robbed him. He reported the incident to the local chief and then to the police. After the Appellant was arrested he led police to his house which was searched. Police recovered therein a knife and a bicycle which the complainant identified as his stolen bicycle. The Appellant was taken to Diani Police Station where he was later charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. On 28th September 2007, the learned trial magistrate delivered his judgement in which he convicted the Appellant on the main charge of Robbery with Violence contrary to Section 296(2) of the Penal Code, and thereafter sentenced him to death. Being aggrieved by both this conviction and sentence the Appellant filed

this present appeal. **MR. MWABOZA,** learned counsel appeared for the Appellant and argued the appeal on his behalf while **MR. ONSERIO** learned State Counsel, who appeared for the Respondent State made his oral submissions in opposition to the appeal.

We have carefully perused the grounds of Appeal filed by learned counsel. One of the grounds raised was the charge sheet. Mr. Mwaboza submitted that the charge sheet as framed was fatally defective as it did not include the terms ***"dangerous and/or offensive weapon"***. We have noted that the particulars of the charge read

"while armed with a dangerous weapon"

The term ***"offensive"*** is not used. Mr. Mwaboza submitted that both are essential ingredients which **must** be included in the particulars of the charge. Learned counsel has cited the case of **DANIEL MORAA MOSE –VS-REPUBLIC CRIMINAL APPEAL 86/2000** in support of his submissions. However in our view that case is distinguishable from the present case in that in the former the particulars of the charge only referred to a ***'knife'***. This weapon (the knife) was not described as either dangerous nor offensive. In the instant case the weapon (the knife) is described as ***"a dangerous weapon"***. In the case of **JUMA –VS- REPUBLIC [2003] EALR 471**, the same Court of Appeal in a later case held that

"The charge referred to the Appellant having been armed with knives, but the particulars did not clearly state whether the knife was a dangerous weapon. Under Section 296(2) of the Penal Code the charge must state that the accused was armed with a dangerous <u>or</u> offensive weapon or instrument. [our emphasis]. The charge as laid was defective as it did not clearly specify the essential ingredients of the offence under S. 296(2) of the Penal Code"

This decision provided that the weapon must be described as either dangerous **or** offensive. There is no requirement that the particulars include both words. We are satisfied that by including the word 'dangerous', in describing the knife the present charge gave proper particulars and cannot in any way be said to have been defective. We therefore find no merit in this ground of the appeal and hereby dismiss the same.

The next ground of appeal raised was that of identification. Mr. Mwaboza submitted that the identification of the Appellant by the complainant was not adequate. The incident occurred at 7.00 p.m. It was dark. The complainant in his evidence tells the court that he was able to identify the Appellant with the aid of moonlight. At page 9 line 18 he states

"There was enough light"

Aside from this visual identification the complainant told the court that he recognized the Appellant whom he knew before. At page 9 line 1 he states

"I identified 1 man in the group. The one I identified is the accused. He is the one who produced the knife before taking my bicycle. The others urged him to do [sic] fast. I used to see him at PalatinoGarden where there is a shop and a restaurant. I knew him by name as Hamisi. I know him as I have seen him at football matches where I know he supports Black Pastor F.C. He often fights at the matches. I identified him as it was not too dark. There was enough moonlight and he was the only tall man among the group"

From this detailed description there can be no doubt that the complainant was positive as to whom he had seen. He described the role which the Appellant played in the robbery and he even gave the Appellant's name ***'HAMISI'***. It has been held that evidence of recognition is far much more reliable than mere identification alone. In **ANJORONI –VS- REPUBLIC [1980] KLR 59** it was held by the Court of Appeal that:-

"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"

The complainant did report the incident immediately to the police and he did give police the name of the Appellant, thereby removing any suggestion that this identification was an afterthought. The complainant led police to where the Appellant was and on the same day pointed him out to the police. **<u>PW2</u> APC HAMISI SULEIMAN**, who was one of the arresting officers states, at page 11 line 17

"He [the complainant] identified you as Hamisi by name"

The Appellant's identity was revealed by the complainant at the earliest opportunity. In his judgement at page 18 line 16 the learned trial magistrate stated thus:-

"I have no doubt in my mind that complainant indeed knew accused well and identified him properly as the one who had robbed him of his bicycle while armed with a knife. Infact it is the complainant's proper identification of accused that led to the arrest of the accused and the recovery of the knife"

We are in complete agreement with these findings.

Apart from this evidence of identification, we find that there exists yet other evidence linking the Appellant to the commission of the offence. **PW2** the arresting officer tells the court that led by the complainant he arrested the Appellant that same night at 9.00 p.m. barely two hours after the robbery. He searched the Appellant and found a knife in a white polythene paper tied around his waist. The said knife was produced before the lower court as an exhibit **Pexb2. PW3 PC MARK OTIENO** of Diani Police Station, the investigating officer confirms that the knife was handed over to him for safekeeping. The complainant who was present when the Appellant was arrested confirms that the said knife was recovered on the Appellant. **PW1** is able to identify the said knife as the one used to rob him by its ***'rubber handle'***. It cannot be a mere coincidence that at 7.00 p.m. the complainant is robbed by a knife-wielding man, then hardly two hours later the Appellant is arrested with a similar knife hidden on his person. There is also evidence of recovery of the complainant's stolen bicycle. **PW2** told the court that upon arrest the Appellant led police to his house where a bicycle was recovered. The complainant positively identified this bicycle as his. Once again we wish to stress that this recovery was made barely an hour after the robbery had occurred. The doctrine of ***"recent possession"*** comes into play. The ingredients of this doctrine were well elucidated by the Court of Appeal in the case of **ARUM –VS- REPUBLIC [2006] E.A. 10.**

"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."

Regarding the first ingredient the evidence on record is that the Appellant himself led police to his house where the said bicycle was recovered. The evidence of **PW2** in this respect was duly corroborated by **PW1** who accompanied police to the point of recovery. The fact that the bicycle was in the Appellant's own house amounts to clear proof of his possession of the same.

Secondly the complainant did positively identify the recovered bicycle as his stolen property. At page 9 line 13 he states

"This is the bicycle. I know it is the one because I had changed its hands [no doubt here the Appellant is referring to the handle bars]. I had also welded and also tied the chain with a wire that was there"

The complainant here has given a clear description of his bicycle which he was able to identify by certain unique and distinct changes he had made to the handle bars. **PW2** confirms that the complainant did identify the bicycle as his. Appellant does not make any claim that this bicycle was his property. We are therefore satisfied that the recovered bicycle has been properly identified by the complainant as his bicycle which had been stolen from him. This bicycle had been recently stolen from **PW1** that is the same day a few hours before its recovery. All three ingredients of ***'recent possession'*** have been established. The fact that the Appellant had in his possession the complainant's stolen bicycle, a few hours after it was stolen, proves that he was an active participant in that theft.

The incident involved more than one person – the complainant states that he was accosted by eight (8) men. One of the men was armed and use of violence was threatened against the complainant in perpetration of the robbery. The ingredients of the offence of Robbery with Violence contrary to Section 296(2) Penal Code as set out in the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549** have all been shown to have existed. We find that this incident did amount to a robbery with violence.

The learned trial magistrate did consider the Appellant's defence in his judgement at page 19 line 4 when he states

"I have otherwise considered the defence raised by the accused. With respect, I do not believe the same as the same to me was a mere denial"

Taken in its totality we are satisfied that the prosecution have proved its case as required in law. The conviction was sound and was based on fact and the law. We have no hesitation in upholding the same. The appeal against conviction therefore fails.

The learned trial magistrate did take into account the Appellant's mitigation and thereafter imposed the death penalty. This is the lawful sentence upon conviction under Section 296(2) of the Penal Code. We do hereby uphold that conviction. Finally this appeal fails in its entirety. The conviction and sentence of the lower court are hereby upheld.

Dated and Delivered in Mombasa this 13^{t} day of September 2010.

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

Read in open court in the presence of:-
Mr. Mwaboza for Appellant
Mr. Muteti for State

....
M. ODERO
JUDGE
..13.../09/2010