REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Criminal Appeal 115 of 2007

(From Original Conviction and Sentence in Criminal Case No. 4279 of 2005 of the Chief Magistrate's Court at Mombasa: ***T. Mwangi – S.R.M.)***

GEORGE OCHIENG ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

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GEORGE OCHIENG, the Appellant herein has filed this appeal challenging both his conviction and sentence for the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE** by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant was arraigned and charged before the lower court on 2nd December 2005. The particulars of the offence were as follows:-

> ***"On the 17th day of November 2005 at about 2.30 A.M. at Mwandoni Village in Mombasa District within Coast Province, jointly with others not before court and while armed with dangerous weapons namely pangas and metal bars robbed MOHAMED ABUBAKER NAMAN of his Television set make JVC, one video deck make Sony, 2 mobile phones make Nokia 3100 and Nokia 3310 and cash Kshs.5000/- all valued at Kshs.36,000/- and at or immediately before or immediately after the time of such robbery wounded the said MOHAMED ABUBAKER NAMAN".***

The Appellant entered a plea of ***'not guilty'*** to the charge. His trial commenced on 6th February 2006, at which the prosecution led by **INSPECTOR KITUKU**, called a total of six (6) witnesses. The brief facts of the prosecution case as narrated by the complainant were that on 17th November 2005 the complainant **MOHAMED ABUBAKER NAMAN** and his wife **KUNSUM ALI MOHAMED PW3** were asleep in their house located in Magongo Estate in Mombasa. At about 2.30 A.M. they were woken up by a knock on their door. Upon enquiring who was there the answer was ***"we are police officers"***. The complainant opened the door and four men came into his house armed with pangas and batons. The men interrogated the complainant and then ordered him to get out of the house. They then ransacked the house and stole a TV set, two mobile phones and cash Kshs.31,000/-. One of the men outside attacked the complainant with a panga cutting him on the shoulder. After the incident the complainant was taken to Coast General Hospital where he was treated and discharged.

On 25th November 2005 **PW3** was on her way to the shops when she spotted one of the men who had robbed them alighting from a matatu. She followed him and saw which house he entered. **PW3** then went and called the complainant. Together they went back to the house and knocked on the door. Inside they found the Appellant whom they identified as one of the men who had robbed them lying on the bed. Police were called and they came and arrested the Appellant. Upon searching the house police recovered a video deck which the complainant identified as his stolen property. Upon completion of police investigations the Appellant was taken to court and charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was put to his defence. He gave a sworn defence in which he denied the charges. On 14th July 2007 the learned trial magistrate delivered her judgement in which she convicted the Appellant on the charge of Robbery with Violence and after listening to his mitigation sentenced him to death. The Appellant being dissatisfied with both his conviction and sentence filed this present appeal.

The Appellant who was not represented at the hearing of this appeal opted to rely entirely upon his written submissions which had been duly filed with the leave of the court. **MR. ONSERIO** learned State Counsel appeared for the Respondent State and made oral submissions urging the court to uphold both the conviction and sentence of the lower court.

As a court of first appeal we are obliged to re-evaluate and re-examine all the evidence adduced before the lower court. In

AJODE –VS- REPUBLIC [2004] KLR 81 the Court of Appeal 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 witness and make allowance for that"***

We have carefully perused the written submissions filed by the Appellant and note that he raised the following issues in his appeal.

1. Defective charge sheet
2. Identification
3. Insufficiency and/or contradictions in the prosecution case
4. Failure to consider his defence

On the first ground the Appellant submits that whereas the charge sheet indicates that the stolen items were worth Kshs.36,000/- the complainant in his evidence gives the total value of the stolen items as Kshs.31,000/-. This in our view does not render the charge fatally defective. The charge sheet is but a summary or a synopsis of the evidence which the prosecution intends to adduce. The fact that the value of the stolen goods given in evidence differs from that given in the charge sheet does not in any way negate the charge. In any event the difference between the two amounts is but a mere Kshs.5,000/- which is not a large difference. It must be taken into account that the value given of certain household items is not exact but is a mere approximation. Our finding is that the charge sheet is not in any way defective and this ground of the appeal is dismissed.

The second ground raised by the Appellant for his appeal is that of identification. The Appellant submits that the trial magistrate erred in rendering a conviction on the basis of identification which was less than positive. There is no doubt that this robbery incident occurred at night. Both complainant and **PW3** his wife confirm that the thugs knocked on their door at 2.00 A.M.. As such it must have been dark. However both eyewitnesses tell the court that they were able to see and identify their attackers by way of the electric lights in their house and those in the corridor. At page 3 line 22 **PW1** states

> ***"I woke and confirmed there was a knock. I switched on the light ..."***

Further at page 8 line 4 **PW1** under cross-examination by the Appellant states

> ***"I had put on the light before I opened. I saw your appearance"***

This evidence of **PW1** is corroborated by **PW3** who confirmed that the electric lights in their house were on at the time of the incident which enabled her to see and identify their attackers. Indeed **PW3** tells the court that it was only when the robbers were leading **PW1** out into the corridor that they ordered her to switch off the lights. At page 13 line 19 she states

> ***"After you took out my husband, you ordered me to switch off the light. I did so."***

It is clear that the men who broke into the complainant's house that night were the least bit bothered whether they were seen or not. They did not cover their faces and made no attempt to disguise their appearance. Indeed they were quite nonchalant – they knocked on the door and demanded to be let in claiming that they were police officers. The whole robbery incident must have taken a fair amount of time. The men took **PW1** out into the corridor and then returned to ransack his house. Both witnesses were in the presence of their attackers for more than several minutes and in our view had ample time and opportunity to identify

them. We find that the presence of electric lights at the scene enabled both **PW1** and **PW3** to see and identify their attackers clearly.

This evidence of identification is further strengthened by the fact that on 25th November 2005, eight (8) days after the robbery **PW3** saw the Appellant alighting from a matatu. She recognized him as one of the men who had robbed them and followed him to see which house he entered. She then went to alert her husband. Together they went back to that house and knocked on the door. A lady let them in. They found the Appellant lying on a bed in the house. **PW1** was able to positively identify the Appellant as one of the men who had robbed them.

The Appellant in his submissions takes issue with the fact that no identification parade was conducted by the police to test the witnesses' evidence on identification. This aspect of the case was considered by the learned trial magistrate. At page 43 line 1 of her judgement she states

> ***"At this point court poses a question to itself on whether the mode of identification was proper in this case. I am alive to the fact that the best mode of identification is through an identification parade ... In this case and after cautioning myself I do not think there was any room for an identification parade. It was the complainant who trailed the accused person and then called for help. They were able to see him and an identification parade would have served no meaningful purpose ..."***

We are in agreement that given it was the eye-witnesses who pointed out the Appellant to the police, an identification parade would have been superfluous in the circumstances. In any event we find that such failure to conduct a parade was not fatal to the prosecution case and does not weaken the evidence of identification.

PW1 and **PW4** called police who came and searched the house where the Appellant was found resting. **PW4 PC SAMUEL MAINA** was one of the officers who searched the house. Inside he recovered a video deck which the complainant identified as the one stolen from his house during the robbery incident. It cannot be a mere coincidence that **PW3**, identifies the Appellant as one of the men who had earlier robbed them and in the very house she sees Appellant enter, the complainant's stolen video deck is recovered. The ***'doctrine of recent possession'*** comes into play here. 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; that property was recently stolen from the complainant"***

This decision clearly lays out the three key ingredients that must be satisfied before a court can rely on the doctrine of recent possession. The item in question is a video deck which was produced as an exhibit before the lower court **Pexb2**. Both **PW1** and **PW3** had testified that one of the items stolen from their house in the course of the robbery was a video deck machine. **PW4** testifies that police searched the Appellant's house and recovered therein a video deck machine. Both **PW1** and **PW3** are able to positively identify this item as their stolen video deck machine due to certain peculiar markings on it. At page 5 line 20 **PW1** states

> ***"This is my video. My video deck had no single screw. I had removed them because of over loading. Inside there are markings in green marker. The mark "F. Yoma". F. Yoma is my wife's mother. She gave it to us."***

PW3 corroborates this evidence by stating at page 12 line 26

> ***"I was able to identify the video deck by my mark. It had no screws. It also bore the name of my mother "F. Yoma"".***

PW4 the police officer and **PW5 OMAR MOHAMED MANYAMA** a Community Policing Officer, both of whom were present at the time of recovery of this video deck, confirm having seen the words ***"F. Yoma"*** inscribed on the video deck. The Appellant even in his defence makes no claim that the video deck is his property. He merely states at page 34 line 12

> ***"I don't know about the video deck ... it is not mine"***

We are therefore satisfied and find as a fact that this video deck was proved to have been the property of the complainant.

On the issue of recovery **PW1** told the court that on 25th November 2005 his wife **PW3** led him to the house she had seen Appellant enter. They knocked and entered the house and found the Appellant lying on the bed. **PW1** was able to identify him as one of those who had robbed him. In that same house the complainant's stolen video deck was recovered. The question of ownership of that house does not appear to be in any doubt. In his own defence the Appellant concedes that he was the owner of the said house. On page 33 line 23 he states

> ***"I recall on 22.11.2005 while at home asleep the 2nd accused came to visit me .... They saw me lying in my bed" [our emphasis]***

The Appellant refers to the house as his **home** and admits that he was found lying in ***"my bed".*** Further under cross-examination by the court prosecutor at page 34 the Appellant describes the residence as "***my house"***. We do therefore find that the stolen video deck, having been recovered in the house of the Appellant, can properly be said to have been recovered in this Appellants possession.

This video deck had been stolen from the complainant eight (8) days before it was recovered in the possession of the Appellant. The term ***'recent possession'*** is subjective and will to a large degree depend on the item in question. A video deck being an electronic item is not one which can be quickly or easily disposed of. It is quite feasible that the Appellant would still have it in his possession after the robbery. The Appellant gives no explanation for his possession of the video deck and more importantly he makes no claim that he obtained it from a third party. In our opinion 8 days in the present circumstances does amount to recent possession and provides evidence linking the Appellant to the theft of this item. The only way the Appellant could have had in his possession this stolen video deck so soon after it had been stolen from the complainant is because he was an active participant in the theft of the same from the complainant. This evidence of recent possession only serves to further implicate the Appellant in the robbery of 17th November 2005.

The Appellant in his evidence refers to contradictions in the prosecution case. We have ourselves carefully and anxiously perused the record of the trial before the lower court. We have been unable to find any examples of any contradictions that would materially weaken or cast doubt on the prosecution case. On the contrary our own conclusion is that the evidence adduced by the prosecution was credible, reliable and cogent and did meet the standard of proof beyond a reasonable doubt.

The final ground of appeal raised by the Appellant is that the learned trial magistrate failed to consider his defence. This contention is not supported by the record of the trial. The lower court did give due and adequate consideration to the Appellant's defence in her judgement and concluded thus at page 43 line 24

> ***"Having considered their defence and entire evidence on record, I am not convinced that the two were telling the truth"***

The trial magistrate proceeded to dismiss the defence. We are in total agreement with this conclusion.

Finally, we are satisfied that this incident met all the ingredients of Robbery with Violence contrary to S. 296(2) of the Penal Code. The attack was carried out by several armed men. The complainant was slashed with a panga and was injured in the course of the robbery. This is clearly evidenced by the P3 form produced by **PW2 DR. LAWRENCE NGONE** of Coast General Hospital who examined **PW1**.

In conclusion the upshot is that we find no merit in this appeal. The Appellants conviction was sound and we do hereby uphold and confirm the same. The Appellant was sentenced to death which is the only lawful sentence for the offence of Robbery with Violence. We do likewise uphold and confirm the sentence. The Appeal fails in its entirety.

Dated and Delivered in Mombasa this ...5th..... day of October 2010.

..... **.....**

M. IBRAHIM **M. ODERO**

JUDGE **JUDGE**

Read in open court in the presence of:-

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M. ODERO

JUDGE

...../09/2010