REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HCCR APPEAL NO 89 OF 2008

(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 10 OF 2006 SENTENCE OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILIFI BEFORE C. OBULUTSA –SRM)

BENJAMIN FURAHA DICKSON ……..……....APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

J U D G E M E N T

Benjamin Furaha Dickson (the appellant) was convicted on a charge of robbery with violence contrary to section 296(2) Penal Code and sentenced to death.

The particulars of the charge being that on the nights of 14th and 15th December 2005 at Shangia Village Mariakani location in Kilifi within Coast Province, jointly with others not before court while armed with pangas, rungus, bows and arrows, robbed Agnes Ndunge Nzioka of cash ksh. 15,800/- two mobile phones, make Nokia 3310 and Siemens A 35 and two bags full of assorted clothes all valued at ksh. 31598/- and at or immediately before or immediately after the time of such robbery, assaulted the said Agnes Ndunge Nzioka.

Appellant had denied the charge and prosecution called a total of eight witnesses in support of its case. PW1 Agnes Ndunge told the court that on 14-11-05 while at home at about 1.00am her door was forced open and about fourteen (14) people entered demanding for money. She was cut on the head and she gave them Ksh. 15,800/-. They beat her repeatedly and took away her phone and another one belonging to her neighbour, as well as lesos and then they left. She reported to police and was taken to hospital and a week later discharged. She recalled seeing one person who had a rasta hairstyle in the gang whose members were armed with pangas and clubs.

On 19-12-05, youth wingers went to her for assistance saying they wanted a phone and had arrested a suspect. She recognized the suspect as one of those who had been to her house during the robbery – that is the appellant.

On cross examination she stated:

"***You had torches. In my report to the police, I said I could identify one of them when you were arrested. You were found with a torch and hammer"***

Mrabu Kazani Mangali (PW2) a resident of Shangila at Mariakani was asleep at his home on 15-11-05 at about 2.00am when he heard his neighbour shouting for help – he armed himself with a panga and went to answer the distress call. However a group of ten people attacked him, slashing and beating him and he

fell down. It was his evidence that he identified one person as Rasta as there was moonlight and the gang had torches. At an identification parade, he picked out the appellant.

On cross-examination PW2 stated:

"***I saw you that night. I told the police, I could identify one suspect….that was the first day I saw you…at the parade, there were three people with rasta. I however picked you as I saw you… I did not give a description. I only said a rasta"***

Rashid Ali PW3 was also woken up by the sound of the door being broke and people entered the room. This was on 14-11-05. The people shone their torches on his eyes, beating him with clubs as they asked for money and hitting him on the face. He however did not recognize anyone.

Chondo Mbaya (PW4) a member of a vigilante group testified that on 19-12-05 while on patrol at Sangila area at about 10.00pm, they heard voices of people inside a house and a lady said there was no one there. However they became suspicious and on getting into the house, they found appellant hiding under the bed, stark naked – so they arrested him. He had a bag containing a saw, a hammer and a knife.

Eventually appellant was handed over to Pc David Lelei (PW6) who had received a report about the incident and had even visited the scene and investigated the matter.

Dr. Kimanga who examined Agnes Nzioka and Mrabu Kadzini confirmed they were injured and produced their P3 forms as exhibits.

IP Wilfred Kapala conducted the identification parade on 27-12-05 and he stated that the first witness failed to identify appellant the suspect but the second witness (Mrabu) identified him.

On cross examination PW8 stated that he placed three other persons with rasta hairstyles in the parade.

In his unsworn defence, appellant stated that he was familiar with the complainant who was shown to him by one Kadii. On 19-12-05, he visited Kadii, they ate and slept.

Then Chirunga came and Kadii left to go and talk to Chirunga outside. He had just put off the lantern when people entered and questioned him and asked him to go with them. They went to a house got a phone and called the police. The complainant was asked whether she knew appellant and she denied. He was placed in a parade and he lamented to the police officers that the people already knew him.

In his judgment, the learned trial magistrate noted that appellant admitted to being arrested at the home of Kadii and that he admitted he is known to Agnes, having been introduced to him by Kadii. Further that appellant admitted to being put on a parade for identification and that the witnesses were known to him. In considering the defence case, the learned trial magistrate stated that he dwelt on his arrest and appellant did not address himself to the testimony of the prosecution witnesses.

The learned trial magistrate believed that PW1 and PW2 recognized the appellant who had rasta hair style and that the police officer who arrested him plus the identification parade office also confirmed that appellant had the rasta hairstyle. The trial magistrate found the evidence adduced by prosecution to be credible and consistent.

Appellant raised several grounds of appeal:

a) The charge sheet was defective as it did not mention the words dangerous or offensive nor did it indicate the time when the offence occurred.

b) The learned trial magistrate erred in accepting the visual identification evidence of PW1 without finding that there was a probability of mistake considering that the incident occurred in the wee hours of the night and while attack was sudden and terrifying. Also that the source of light enabling identification

was said to be the moonlight and the time taken under observation was not disclosed.

Appellant had filed written submissions but before arguing his appeal, the learned State Counsel informed the court that he was conceding to the appeal on the following grounds:

a) On the date of plea, the name of the prosecutor was not recorded

b) On 18-1-06, it was not indicated whether plea was taken, but when the matter came up for hearing on 3-3-06, the record appears incomplete.

We have looked at the original handwritten record, when plea was taken on 3-1-06, the coram shows the name of the magistrate and court clerk, but not the prosecutor. However that was not fatal because appellant entered a Plea of Not Guilty and when the matter proceeded to hearing on 3-3-06, the recorded coram was complete and the rank of the prosecutor is indicated as IP Ogola which is an abbreviation for Inspector Ogola.

Besides that Mr. Ogoti submitted that the incident took place at night and nowhere in the proceedings is the source of light indicated except on cross-examination when PW1 said:

"***you had torches"***

And that the witness' evidence is confusing because the charge reads 14th and 15th December- the first witness refers to 14th November 2005 at 1.00am and 2nd witness refer to 15th November 2004 at 2.00am and that the issue was not resolved.

He also took issue with the manner of identification which seemed to have been based simply on his rasta hairstyle.

Also that from the evidence of PW4 and pW5 it seems appellant was arrested on a different date about one month later and there was no connection to the present offence. Mr. Ogoti also pointed out that the learned trial magistrate used extraneous evidence to justify the conviction as the named Kadii was not a witness before the trial court.

We have read the original charge sheet which refers to the nights of 14th and 15th December 2005 whereas the evidence of PW1 refer to an incident which took place on 14th November and PW2 refers to 15th November. This would then mean that the evidence tendered does not support the charge preferred. If there was an error in the charge sheet, then this was not addressed and indeed there was no attempt by the learned trial magistrate to reconcile the disparity with the result that conviction was based on evidence which did not support particulars in the charge sheet.

The second issue is with regard to identification – PW1 claimed that she was able to identify appellant because of his rasta hair. The incident occurred at night inside her room, she did not disclose what source of light she relied on in the identification of her attacker. In cross examination she said the robbers had torches. However there was no evidence led as to the light intensity, position of the torch visa vis the appellant or complainant and conditions for identification were not established so as to determine whether they were favourable for positive identification. PW2 claimed there was moonlight and the group of ten had torches. Again there was no description as to the size of the moon, the light intensity of the torches or their position visa vis the witness or appellant.

Indeed this was a crucial part as was cut in the case of **Maitanyi V R [1986] KLR pg 198** which stated:

"***it is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest case. It is not a careful test if none of these matters are known because they were not inquired into"***

That captures adequately the scenario obtaining here – this test was not fulfilled and so the purported identification of the appellant by the two witnesses was unsafe and no reliable and we so find.

Coupled with this is the issue of whether the witnesses recognized the appellant – PW1 and PW2 just seem to have only seen a rasta hairstyle in the group – was the appellant the only person having that hair style in the group that night? There was no other description of his features and it seems that for PW1 the learned trial magistrate in deed believed that she recognized him in spite of the other prevailing circumstances already alluded to. From the circumstances surrounding appellant's arrest, it would appear he had gone for a rendezvous with Kadii (probably an illicit one) – that's why when they heard voices, Kadii came out to talk to the people while he hid stark naked under the bed – surely what explanation would there be for such action when there was no word out to the vigilante group to look for appellant?

That arrest had no nexus with the offence – at least not from the evidence – it was a situation of being "***caught in the romp"*** as it were.

Consequently, we are convinced that the conviction herein was unsafe and we quash it. The sentence is thus set aside.

We order that appellant be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 11th day of March 2009 at Malindi.

H A Omondi **L NJAGI**

JUDGE **JUDGE**

Court;-Judgment read, signed delivered in open court in the presence of the appellant and Mr Ogoti.

H A Omondi **L NJAGI**

JUDGE **JUDGE**