REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 33 of 2005

APPLICANT:……...……..……JOHN SIMIYU

VERSUS

RESPONDENT:…….REPUBLIC

(From the original conviction and sentence in Eldoret Chief Magistrate's Court,

Criminal Case No.3143/2002 by Hon. V.W. Wandera (Senior Resident Magistrate)

JUDGEMENT

The appellant JOHN SIMIYU was charged in Eldoret Chief Magistrate's Criminal Case Number 3143 of 2002 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 nights of 22nd and 23rd day of March 2002 at Langas Kasarani Estate in Uasin Gishu District within Rift Valley Province jointly with others not before court robbed Mathew Chebon of one radio cassette S/N.3037543 make National Star, a wrist watch make radio, 8 kg of sugar, 4kg of Rice, 6 pairs of slippers, two packets of cigarettes, 18 tea leaves, 16 eggs, 12 pairs of batteries, a dozen of robin thread wool, one empty sack and cash kshs.6000/= all valued at kshs.10,900/= and at or immediately before or immediately after the time of such robbery wounded the said Mathew Chebon. Six prosecutions witnesses gave evidence at the end which the magistrate found that the accused had a case to answer and placed him on his defence. The accused gave unsworn evidence in his defence and called no witnesses. The magistrate found him guilty as charged and accordingly convicted him and sentenced him to the only sentence b y law allowed, death. Being aggrieved the appellant has preferred this Appeal.

The Appellant did on the 11th day of August 2005 file give grounds of appeal in his Petition of appeal. This he did in person. His advocate Mr. Nabasenge filed a supplementary Grounds of appeal dated 4th February 2009 and filed in court on the same date. These were:-

1. THAT the learned trial magistrate erred in law and fact by basing his conviction and subsequent sentencing on the evidence of dock identification in absence of identification parade.

2. THAT the learned trial magistrate erred in law and fact in upholding that the appellant was positively identified by PW2 – PW6 as there were more than 4 assailants.

3. THAT the learned trial magistrate erred in law and fact by failing to consider the Appellant's defence of alibi.

4. THAT the learned trial magistrate erred in law and fact by relying on the allegations that the appellant had been found in possession of military uniforms which PW2 –PW6 alleged to have seen him wearing in the course of robbery, yet he was not charged with the offence of being in possession of public stores as required by law.

5. THAT the learned trial magistrate erred in law and fact in relying on the allegations that the Appellant assaulted the complainant while committing robbery with violence, yet he was not charged with the offence of assault causing grievous bodily harm as required by law.

6. THAT the trial magistrate erred in law and fact by dismissing the appellant's defence without giving due credence to his evidence, pertaining to his previous relationship with the complainant.

7. THAT the trial learned magistrate erred in law and fact for convicting and sentencing the appellant on a charge of robbery with violence while the evidence in support is remote and far fetched thus unreliable evidence in law.

At the hearing of the Appeal before us counsel argued grounds 1 and 2 of Appeal. He submitted that the identification of the appellant as the robber was not free of error as there were three to four assailants. He said that it was at night at around 11:00p.m and the appellant is said to have switched off the lamp and so it was not possible to monitor the image of the appellant. He further added that as the appellant is said to have banged the door the witnesses must have been frightened and so could not have registered the image of the appellant. Counsel's further submission was that it was not indicated how long the robbery took and how long the appellant took with the witnesses. As for the evidence of PW4 and PW5, he said this could not be relied on as they did not say that they had torches. It was submitted further that the appellant was arrested by the Public and this could be a case of mistaken identity. Counsel disregarded the evidence on the part of the dog assisting in the arrest of the appellant saying that the dog was not shown to have had any training. He concluded his submissions on these grounds that as the prosecution failed to carry out an identification parade the accused was only identified at the dock and the magistrate did not warn himself of the danger of convicting on dock identification.

On ground 3 of appeal it was submitted that the accused was not at the scene of the robbery and he appears to have been convicted on the basis of recent possession of the items stolen from the complainant yet it was not established whether he was found in possession of the stolen items or it was merely that he was near the scene of the robbery.

Counsel argued ground 4 of appeal saying that the appellant was not charged with being in possession of military uniform and no photo were produced in court of the appellant in military uniform.

On ground 5 of appeal counsel submitted that the failure to charge the appellant with a count of assault raises doubts as to whether the appellant committed the offence. Counsel, in regard to count 6 of appeal said that the magistrate did not consider the evidence that there was a grudge between the complainant and the appellant over a girl.

Concerning ground 7 of appeal counsel's submission was that the owner of the shop was not called to produce receipts in proof that he had bought the goods. In the absence of that proof the goods could just have been cooked up or could have come from any other shop. His further submission was that the distance between the scene of crime and the point at which the appellant was arrested was given by witnesses as 50 meters, 500 meters, 250 meters etc and it was not clear how the magistrate settled on 250 meters as the right distance. According to counsel the door of the room where PW2 and PW3 were is said to have been broken yet the same door was said to have been locked by the appellant when he left the house. There were contradictions that counsel submitted could not be the basis of a conviction.

The state opposed the appeal. Mr. Omutelema learned counsel for the state submitted that the chain of events from the time of the robbery upto the time of arrest was not broken. He added that the appellant was positively identified by PW2 and PW3 and also PW4 and PW5 who were outside the room and who saw the appellant and his co-assailants attempting to escape. There was sufficient lantern light and

moonlight and having been caught at the crime there was no need for an identification parade, counsel added. Counsel submitted that it was the inside latch of the door that was broken and not the outside and further there is no law requiring any particular number of witnesses to be called to prove a case and in this case it was enough for PW2 who ran the shop on a day to day basis to give evidence and it was not necessary to call the shop owner. On the variance of the distance from the scene of crime to where the appellant was arrested counsel submitted that the differences by witnesses was due to the fact that the distances were being estimated but what is important is that the appellant was arrested near the scene.

We have given this appeal our careful consideration. We have evaluated the evidence herein. We start at the point of identification of the appellant. The evidence of PW3 was that the appellant switched off the lantern after he had been with PW2 and PW3 in the room for about 5 minutes. PW3 said that he had clearly seen the appellant before the appellant put off the light. This was corroborated by the evidence of PW2. They both said that the appellant was in army uniform and they saw him well. It was PW3's evidence that the robbery took about 30 minutes. This further evidence was that the appellant ordered PW2 and PW3 to lie down and go under the bed. PW3 complied but PW2 hesitated. He was then hit on his head by the appellant and he lay down whereupon the appellant stepped of his back and ordered him to give him money. While still lying down PWE2 heard three other persons enter the room. PW2 frightened directed the appellant to where the money was in the cupboard. The appellant was stepping on PW2 and PW3 was under the bed while the other three assailants were busy putting goods in a sack. They also collected the money from the cupboard. PW2's evidence was that there was enough moonlight and he could see what the assailants were doing even as he lay down. PW2 was not under the bed.

The evidence of both PW4 and PW5 agrees with that of PW2 as to how the robbers got out of the room. All agree that the appellant left the room last with the radio after the other three assailants had left. PW4 and PW5 said there was moonlight and they watched from outside the room as the assailants walked out of the room. It was their evidence that the assailants ran away in different directions when PW4 and PW5 screamed. PW5 discovered the robbery when he went out from his room to answer a call of nature and heard commands in PW2's room and went and called PW4 together with whom they watched from the front. It was the further evidence of PW4 and PW5that when the assailants started running away they (PW4 and PW5) pursued the assailant who was in army uniform. The assailant stopped and aimed what looked like a gun at the witnesses and meant as if to shoot them. He then took the bag with the stolen goods and ran. The witnesses pursued him and the dog of PW4 – caught up with the assailant they were pursuing, bit him on his leg and he fell down. The members of Public who had been woken up by the screams of PW4 and PW5 came and thoroughly beat the appellant from where he had been felled by the dog until he lost consciousness.

We find that there was light in the room for about 5 minutes before the appellant lowered the lantern wick and put the light off. We find that 5 minutes was enough time for PW2 and PW3 to identify the appellant. We agree that during the 30 minutes that the robbery took plac4 that was further enough time for PW2 to identify the appellant from the moonlight getting into the room. The evidence of PW4 and PW5 is believable on how they chased the appellant until he was felled by the dog. That chain of events was not broken and we believe the witnesses that the man in army uniform who left the room the scene of the robbery was the same man arrested several meters away by the Public. We do not think that the dog needed any specialized training to fell the appellant as it did. Having found as above about the identification of the appellant we cannot fault the magistrate on his finding. We agree that he was guided appropriately. We therefore do not think that this was mere dock identification. Identification of the appellant by PW2, 3, 4, 5 and PW6 who re-arrested him was airtight and there was no need for an identification parade.

The appellant did not call any witness to prove his alibi. He surely could have called someone from the café where he says he was. He also did not call Andrew Lusaba to disprove that he was at the scene of arrest if not at the scene of crime. In the absence of evidence to prove the alibi we agree that the magistrate rightly rejected that evidence.

As to the submissions that the appellant was not charged with being in possession of government

stores or with causing assault we note that he was charged with the more serious offence of robbery with violence and sufficient evidence was adduced to support the charge. Failure to charge the appellant with the other two offences did not occasion an injustice to the appellant and does not reduce the weight of the evidence adduced.

Evidence led was that the accused was arrested in possession of the radio cassette that belonged to PW2 and some of the goods stolen from the shop ran by PW2. We have no basis whatsoever to fault the magistrate for basing his conviction of the appellant on the doctrine of recent possession.

The defence of the accused on a grudge by the complainant against the appellant over a girl called Maria took our consideration. The appellant said Maria was his girlfriend as well as PWE2's. The appellant was facing a very serious charge of robbery with violence whose only sentence is death. He would have done everything to defend himself. He would have done himself justice by calling his girlfriend Maria to prove the grudge of PW2, if ever there was a Maria. He did not. He is the only one who could have defended himself. The prosecution brought evidence against him to prove the charge they preferred against him. He did not enough to defend himself and we do not find any account on which we could fault the magistrate for rejecting the appellant's evidence as a sham.

The evidence of the broken latch was given some importance by the defence counsel. We fail to see what the issue is. It was clear from the evidence of PW2, PW3 and PW4 is quite clear that it was the inside latch of the door that broke upon being banged by the appellant and the door then opened. There was no evidence that the outside latch was broken. That is why it is understood when evidence shows that the door was looked from the outside by the appellant when he left. There was no evidence that the door itself broke.

There is no evidence of the appellant being framed and the motive for so being framed is not shown. The magistrate was right in rejecting that allegation.

The appellant seemed to suggest that PW2 did not know the object that hit him on the head. As a matter of fact PW2 said he did not see the object that he was hit with by the appellant. But he did say clearly that he was hit by the appellant when he delayed in lying down as ordered. He also said that the appellant had a panga when he entered the room. The p3 form we find was not being amended so as to implicate the appellant with the offence but rather to correct the nature of injury. There was no proof of any wrong doing by the doctors.

We have noted some contradictions in the evidence, the distance from the scene of crime and the point of arrest, PW3 saying he went with PW2 to the police station the following morning after the attack to record their statements while PW2 said he did not go together with PW3. We do not however think that threes were material and we find that they did not affect the evidence in any way whatsoever.

In re-evaluating the entire evidence we come to the same conclusion that the magistrate arrived at. We consequently uphold the conviction and sentence as they were based on proper evidence and a clear appreciation of the Law. The upshot is that this appeal is without merit and it is dismissed.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF APRIL, 2009.

M.K.IBRAHIM **P.M.MWILU**

JUDGE **JUDGE**

IN THE PRESENCE OF:-

…….Court Clerk

……State counsel for the state

……Advocate for the appellant