REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 98 of 2007

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 411 OF 2006 OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT LAMU)

ALI BONEA BARISA ……..……..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

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

The prosecution case was that on 21st day of December 2005 at about 3.00pm along Witu – Mombasa road, within Lamu District of the Coast Province, jointly with others not before court, being armed with offensive weapons, namely AK47 and G3 rifles, robbed Omar Faraj of Ksh 223,680/- and immediately before or immediately after the time of the robbery, beat the said Omar Faraj. Appellant denied the charge.

Omar Faraj (PW1) lives in Witu and works as a driver for Kitui Floor Mills which is based in Mombasa. On 21-2-05 he was driving a Nissan UD Lorry from Witu towards Malindi, accompanied by his loaders Juma and Jillo. They had delivered flour at Witu and were about 7km from Witu (this was at about 2.30pm) when they were attacked near a bridge. PW1 explained that there were cows along the road, so he had slowed down when two men armed with rifles arrived. They ordered him to stop or they would shoot him, so PW1 stopped and they directed him to drive into the bush. So PW1 drove about 5m off the road then he was ordered to alight and taken to the front part of the vehicleand the men demanded for money. PW1 gave them Ksh 2000/- and a mobile phone. They then took the loaders and also demanded for money. The motor vehicle crew had hidden about ksh. 221,180/- in the vehicle which they demanded to be given. They then ordered the crew to proceed to Malindi and on the way after a short while they reported the matter to police. A week later, PW1 was called at Witu Police station to go and identify suspects at n identification parade but he was not able to identify any one.

He said:

"***I had been made to lie down and threatened with death. I did not recognize their faces."***

On cross-examination PW1 stated that the armed men were not masked but he could not recall their physical features or their clothes. He further stated that he produced the money while lying down and he had been warned not to look – in fact they had hit him with a blow on the back. He further stated on cross-examination.

"***I had never seen the men prior. I could have mistaken the figure as it was over a year Ago … I could not recognize the accused person. I had seen the accused person but not many times…I was very scared and I would not have recognized the accused even if he was among the robbers."***

PW2 Jillo Bakari Mohamed who had accompanied PW1 told the trial magistrate that after being ordered to alight, the two men were joined by a third person who was following the lorry. The driver was told to lie in front of the lorry, beaten up, then taken to where the loaders were and the driver told PW2 to give the robbers money – so PW2 gave them ksh 124,18/-.

At the identification parade, three days after the incident, PW2 was able to identify the appellant as the man he had personally given the money to. It was his evidence that:

"***I had spoken to him as he enquired whether there was more money. The accused was not among those who first appeared. He came later. He was armed with a knife."***

On cross-examination PW2 explained that appellant was in a white vest and a shuka and "***he had a knife in the waistline"*** and that they spent about 15 minutes with the gangsters. He further stated that one gun was aimed at him, the other two robbers covered their faces using "shukas" but appellant did not cover his face. PW2 also confirmed that he did not look at the faces of the other two armed men and although he had panicked, he spoke to the appellant and was able to identify him.

Karisa Juma (PW3) the other loader who was with PW1 and PW2 gave evidence corroborating the evidence of PW1 and PW2 as to how the robbery was executed and that it is PW2 who produced money being Ksh 200,000/- and they took Ksh 500/- from PW3. However, he was not able to identify anyone.

On cross-examination PW3 confirmed tht one man did not have a gun, while the other two had guns. However he was categorical that he did not recognize the appellant.

PC Ali Kamara (PW4) attached to Witu Polcie Station told the trial court that on 21-12-05, the OCS IP Isaack Ibrahim instructed him and eight other offices to conduct a raid at Tana River District to arrest one Godfrey. He knew the Godfrey in Witu he did not know his real home – so they surrounded his home, ordered him to surrender and appellant was arrested.

IP Isaack Ibrahim's (PW5) evidence was that after receiving the report about the robbery, and visiting the scene, he interrogated members of the public, and got a report that the two suspects were well known and they told him appellant was among them. So that is why he directed police to arrest appellant. Appellant's house was searched but no significant recovery was made.

On cross-examination he said "The driver and gave me description"

IP Raba Bona Galgalo who conducted the identification parade said appellant positioned himself in his chosen position and out of the three witnesses, only Jillo Bakari identified the appellant.

Appellant in his sworn testimony stated that at 3.45am police officers went to his home and ordered him to surrender – he was then arrested and taken to the police station where he was told that Omar Faraj had been robbed. He told them that he knew Omar Faraj very well and there was no need for a parade. In fact Omar came but did not recognize him. When PW2 went to the identification parade, he said he had seen a tall dark person like the appellant and appellant stated that he was the only tall one in the parade. He said he had no connection with the robbery.

In his judgment the learned trial magistrate noted that a robbery did take place on 21-12-05 and that only PW2 identified the appellant. He found that the incident occurred at 3.00pm and the quality of natural light was very good. That from evidence by PW1, 2 and 3, the incident lasted between 10-15 minutes and PW2 had a good look at the appellant during the robbery and handed over the money to the appellant and that he even conversed with the appellant and so was able to pick him out in an identification parade. The learned trial magistrate was satisfied that PW2 had ample opportunity to identify the appellant.

As regards the identification parade, the learned trial magistrate believed that IP Roba lined member of the parade who had features similar to those of the appellant and gave the appellant the option to position himself amongst them. His finding as that the identification parade was conducted in accordance with the police standing orders.

He also noted the variation in the sums of money but found that there was ample evidence to support the fact that complainant had cash at the time of the robbery and the money was stolen. The learned trial magistrate warned himself of the danger of a conviction based on the evidence of only one identifying witness but he was satisfied that PW2 had ample opportunity to identify the appellant.

The appellant challenged those findings on amended grounds that:

(a) The appellant was not properly identified

(b) The evidence of the prosecution witnesses was contradictory in material particulars.

(c) The evidence of prosecution witnesses did not support the charge.

(d) The appellant's defence was not challenged by the prosecution

(e) The prosecution witnesses did not establish the existence of the property alleged to have been robbed off the complainant.

(f) The prosecution case was not proved beyond reasonable doubt.

(g) The judgment was not dated nor signed by the court

(h) The appellant was kept in police cells for eleven (11) months before being charged thus violating his constitutional rights.

Mr. Gekanana who appeared for the appellant submitted that the trial court erred on the question of identification because whereas PW2 claimed that appellant had a knife, the charge sheet only makes reference to AK47 and G3 rifles and so since the weapons described in the charge sheet are different from what appellant was said to have had, then it follows that appellant was not identified. He points out that PW1who had in fact seen appellant a few times before said he did not recognize him at the scene and casts doubt on the evidence of PW5 who claimed tht the driver gave him the description of the assailants yet PW1 had already said there was no identification or recognition.

Mr. Ogoti's (for the State) response to this is that appellant was properly identified. It is his contention that although the three witnesses were attacked at the scene and ordered to lie down, the conditions differed for each because PW2 said he had not seen appellant prior to the incident but he as able to pick him in the identification parade because he had had a conversation with him and appellant demanded money from him – noting that the attack was during the day.

Mr. Gekanana asked the court to consider that the witnesses were scared and this may have interfered with their ability to identify the assailants.

The paradox in this scenario is that the two people i.e PW1 and PW3 who knew appellant prior to the attack and had seen him several times prior to the attack said they did not identify him during the robbery – then the one person who didn't know him and had never seen him before, is the one who is certain appellant was among the attackers. Could there have been a mistake on the part of PW2? This is the witness who apart from having been subjected to beatings like the other two, also had a gun aimed at him – the person directing the gun at him was not the one demanding for money. What state of mind was he in – where for instance was his focus trained on – was it on the gunman (who could pull his trigger at any moment) or the one asking for the money? It is an established principle of law that certain safety measures have to be taken to ensure reliability and safety of evidence, as a basis for conviction, where visual identification is concerned. This principle is well stated in Blackstone's Criminal Practice 2002 (12th Edition by Peter Murphy and Eric Stockdale) Oxford Oup, 2002 pg 2304 paragraph F 18.2

"***The visual identification of suspects or defendants has for many years been recognized as problematic and potentially unreliable. It is easy for an honest witness to make a confident but false identification of a subject, even in some cases where the suspect is well known to him. There are several possible causes for errors of this kind. Some persons may have difficulty in distinguishing between different subjects of only moderately similar appearance and many witnesses to crime are able to see the perpetrators only fleetingly, often in stressful circumstances…"***

PW2 was already under very stressful circumstances, having been beaten and a gun trained at him, while another demanded for money. He claims to have had a conversation with appellant – the content of the conversation is not disclosed and we are inclined to conclude that the only "conversation" they had was the demand for money.

What defining physical marks regarding the appellant's appearance were observed by PW2 and disclosed to PW5? There is none referred to by either witness and in fact it is only the appellant who says PW2 said the person who attacked him was tall.

It is against this background that we then must consider whether there was any other corroborative evidence – we find none. The identification by PW2 was not free from possibility of error.

Mr. Gekanana also submitted that there were contradictions with regard to how much money was taken away during the robbery – PW1 said it was 221180/-. PW2 said he gave 124180/- and 150000/- while PW3 said it was over 200,000/- and that what's more this evidence did not support the particulars of the charge which stated that complainant was robbed of Ksh. 263,680/-.

Further that there was even no proof that such money existed as there was no receipt or any evidence of having cash at all.

To this, Mr. Ogoti's submissions that the contradiction is minor and does not alter the fact that money was taken away and not recovered. What we note is that there are contradictions as regards how much money was robbed off the complainant. The other issue is was there proof that the money existed – what was its source? Complainant alluded to having made deliveries of flour but he did not state that the same were paid for in cash, in fact he did not disclose the source of the money. Yet one would not reasonably except an individual to have documents for every bit of money that they carry with them – whatever the case what is significant and material to the charge is that some money was robbed off the complainant – it is the "stealing of money" – no mater the amount, and the fact of being armed, using threats that are the material particulars in such an offence – no prejudice was caused by that anomaly regarding figures. There is also the reference of a Godfrey by PW4 – that IP Isaack instructed them to arrest Godfrey, nor was the appellant said to be using an alias or referred to as such in the charge sheet.

The judgment as written by Mr. Bidali was signed. However he did not read it (it would seem he had been transferred outside the jurisdiction) and it was sent to the Senior Principal Magistrate(Malindi) Mr. Kiarie, who read the same but did not endorse by appending his signature. Did this result in a miscarriage of justice is submitted by Mr. Gekanana? Mr. Ogoti says, the omission is unable under section 382 of the Criminal Procedure Code, which proves that:

"***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed, or altered on appeal or revision on account of an error, omission or irregularity in the complainant, summons, warrant, charge, pro….order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice"***

Our finding is that no injustice has been occasioned by the failure of the Senior Principal Magistrate to append his signature to the judgment by Mr. Bidali, and we concur with Mr. Ogoti that such omission is curable under section 382 of the Criminal Procedure Code.

Our finding then is that the ground of appeal which has merit and which persuades us that the conviction was unsafe is with regard to the identification. Having stated this then, we quash the conviction and set aside the sentence meted out.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **30th** day of **June 2009** at Malindi.

L. NJAGI **H. A. OMONDI**

JUDGE **JUDGE**