REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 52 OF 2008

PETER MWANGI MUTHAMA……..……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

The appellant herein **Peter Mwangi Muthama** was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal code**. The particulars of offence state that on the 5th day of March 2007 at Highlife Bar and Restaurant within Narok Township in Narok District of the Rift Valley Province, jointly with another not before court he robbed Humphrey Wangahu Kamau of cash Kshs 15,100/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Humphrey Wangahu. After a full trial before the Principal Magistrate at Narok the appellant was convicted of the offence and sentenced to the mandatory death sentence as per law prescribed.

Aggrieved by both the conviction and sentence he filed this appeal citing 7 grounds as follows:

1. That he was not properly identified, the circumstances surrounding such identification not being favourable for positive identification.

2. That he was erroneously convicted on the evidence of a single identifying witness without the learned trial magistrate warning himself as to the dangers of basing reliance on such evidence.

3. That the learned trial magistrate failed to accord the appellant a fair trial by breaching the provisions of section 198 of the Criminal Procedure Code and section 77 (2) (b) and (f) of the Constitution.

4. That the charge in respect of which he was convicted was defective.

5. That the prosecution failed to prove its case beyond doubt as required by law.

6. That the learned trial magistrate erred in law *(and fact)* ***by shifting the burden of proof to the appellant.***

7. That the learned trial magistrate erred in failing to consider the appellants defence in his favour.

The appellant filed written submissions highlighting the above grounds. Firstly, the appellant who argued

his grounds 1 to 3 of his petition together, stated that the evidence of PW1 Humphrey Wangahu Kamau to the effect that he recognized his assailant should not have been believed because he was attacked while in a dark room and he failed to disclose to the trial court the intensity of the light which enabled him to see the appellant through a slightly open door as he alleged in evidence. Regarding the defect as to the language used, the appellant stated that the same was not indicated throughout the trial, neither was it indicated whether the language of the court was interpreted into a language that the appellant understood.

Regarding grounds 4, 5 and 6 the appellant stated that the charge was defective in that the weapon with which the appellant was alleged to have been armed with was neither mentioned in the charge sheet, nor was it described as an offensive or dangerous weapon to fulfil the requirements of **section 296(2)** of the **Penal code.**

The appellant contends that rather than relying on the evidence of a single identifying witness and convicting upon it, even without warning himself of the dangers attendant thereto, the trial magistrate ought to have found that the prosecution failed to avail the evidence of vital witnesses such as the proprietor or the watchman of the lodging house where the offence was committed in order to corroborate the evidence of the single identifying witness. He argues also that evidence as to his demeanour from the time of his arrest and throughout the trial pointed to this innocence in that he never tried to hide, even from his main accuser whom he even greeted during the identification parade. Therefore, the appellant requested us to find that he was wrongly convicted and sentenced.

Opposing the appeal, learned state counsel **Mr. Njogu** asked us to find that the appellant was convicted on sound, and overwhelming evidence in the nature of recognition of the appellant by the complainant during the attack. We have examined the proceedings and judgment of the lower court, analyzed and re-evaluated the evidence adduced by the various witnesses and made our own conclusions.

The complainant, **Humphrey Wangahu Kamau (PW1)** testified that he had known the appellant for 3 months prior to the commission of the offence herein. He told the trial court he and the appellant had spent the day together on 5th March 2007, loading charcoal for payment at Kisiwani. After finishing their assignment their hirer told them that he would pay them at Narok. They proceeded to Narok where, in the presence of the appellant PW1 was paid Shs 15,000/=. At about 8.30 p.m. the complainant together with the appellant left the rest of the group with whom they had gone to Narok and went to Highlife Building to seek lodging. The appellant wanted to share a room with the complainant but the latter refused. The complainant then hired a room *(No. 11),* which the appellant later visited with a stranger after having said he was going to buy cigarettes. After the two left, PW1 testified that they later returned as the complainant was resting on the bed. The appellant was able to see the two for $1^1/_2$ minutes with the help of electricity light just before the assailants switched it off as they entered the room. The stranger sat on the complainant, on the floor, as the appellant, whom the complainant saw clearly as he switched off the light, thus recognizing him, pulled the mattress and proceeding to empty the appellant's Shs. 15,100/= which he had hid under the mattress. The appellant and his accomplice then fled hurriedly as PW1 screamed thus attracting the attention of the lodge watchman. The appellant and the watchman searched in for the robbers in vain. The complainant then went and reported the incident at the Narok Police Station the following morning. He described the appellant by his physical features and was led to the cells to "***find out whether he could have been arrested that night*".** The description given by the complainant was of an injury in the face, that the appellant had sustained when he left the complainant to go and buy cigarettes. The appellant was indeed among the persons the police had arrested during the night. He himself greeted the complainant in Kiswahili with the words "***Wangahu, I am here".*** He was at the time wearing new clothes which PW1 identified in court.

When cross-examined by the appellant PW1 did not waver in his testimony that the appellant followed him to the room he had rented on the night of the robbery and returned later after leaving briefly saying he had gone to buy cigarettes. The appellant later returned in the company of another person and the two proceeded to rob the complainant. PW1 saw the two as they entered and before they put off the electricity light which they found still on. PW1 also saw the two leave through the front door, by passing the watchmen as PW1 alerted the watchmen and told them he had been robbed.

PW2, Ag. Inspector Odhiambo Makori testified that on the morning of 6th March 2007 he was informed of the presence of suspicious characters at a bar known as "*Point Three"* in Narok Town. He proceeded there in the company of a sergeant colleague and found the appellant dancing on the floor dressed up in new clothes and shoes. They arrested the complainant for interrogations and booked him as a suspect in respect of a robbery which had taken place on the same day. At 2.00 p.m. PW1 came and reported that he had been robbed the previous night at High Life Bar by a suspect he described by the name Peter and whom he said had a fresh cut wound on the forehead. Being of the view that the description matched the appellant, PW2 decided to conduct an identification parade. Before PW1 could pick him out the appellant himself called out to the complainant. This caused PW2 to question the appellant who said he had worked with PW1 and knew him.

In his defence the appellant gave an unsworn testimony. He testified that on the day prior to his arrest, he had sold 92 bags of charcoal which he had burnt for $1^1/_2$ months in Nkareta within Narok. From the proceeds amounting to Shs 12,880/= DW1 said he bought several new items including the clothes he was wearing when he was arrested at Sharee Bar as he was preparing to return to his home in Njoro. He denied having been involved in any criminal offence.

As far as the identification of the appellant is concerned we are of the view that the same was proper and quite positive. He was known to the complainant, with whom they had spent three weeks, including the day of the robbery. The complainant described him clearly to PW2 who had already arrested the appellant and placed him in the cells as a suspect. The appellant did not rebut PW1's evidence that the two of them knew each other well and had been together when PW1 was paid the money that he lost. Neither did he deny having been to PW1's rented room a short while before the robbery took place. PW1's testimony that he recognized the appellant as the person who came with another and robbed him is corroborated by PW2's evidence to the effect that the description of the appellant, with reference, *inter alia,* to a fresh cut wound in the forehead matched the appellant's appearance. Evidence of identification by recognition in this case cannot, in our view be faulted. The same being watertight, it was not necessary, in our view to call any further witnesses, such as the watchmen or the owner of the premises where the offence was committed.

On the ground that **sections 77(2) b of the Constitution** and **198 of the Criminal Procedure Code** were violated, the appellant has submitted only that the language used when the various witnesses testified against him was not indicated in the proceedings. Our review of the trial court's record shows that English and Kiswahili were used at the taking of the plea. In our considered view this conforms to **Section 198(4)** of the Criminal Procedure Code which stipulates that the language of the subordinate court shall be English and Kiswahili. PW1 is shown to have testified in Kiswahili while PW2 testified in English. The appellant participated in the proceedings and cross-examined the witnesses. When after PW1's testimony the prosecution asked for an adjournment the appellant is recorded to have stated that he had no objection. The same was the case when the prosecution applied to have the money recovered be restored to the complainant. We have no reason to believe, therefore, that the appellant did not understand the language used at the trial. Accordingly this ground of appeal is rejected.

Regarding the appellant's complaint that the charge was defective, the appellant contention is that the knife said by PW1, in his testimony, to have been used to threaten the complainant was neither mentioned in the charge sheet nor was it described as a dangerous or offensive weapon. According to the appellant the prosecution ought to have amended the charge as soon as the knife was mentioned during the trial and that the failure to do so rendered the charge defective in light of the provisions of **section 296(2)** as to what constitutes a **robbery with violence** charge. We find that we cannot agree with the appellant. Being armed is not the only ingredient of a robbery with violence charge, which, is valid in law if the person charged is said to have been "***in company with one or more other person or persons"*** as was the case herein. The charge facing the appellant clearly indicated that he committed the offence "***jointly with another not before court".*** PW1's testimony was that the appellant was with a stranger when he robbed him. PW2 testified that when he and his colleague, Sergeant Munuve arrested the appellant, he was with, *inter alia*, "***another who escaped."*** This having been the basis upon which the charge was framed, the same is not in our view defective. Therefore, this ground of appeal is also rejected.

We are, in view of the above, quite clear in our minds that the appellant was convicted on sound evidence of identification by recognition which, coupled with the circumstantial evidence of his arrest proved the case to the required legal standard. This, in addition to what we have stated regarding other grounds of appeal, leads us to find, as we hereby do, that the appeal must fail in its entirety. Accordingly the same is hereby dismissed.

Dated signed and delivered at Nakuru this 26th day of June 2009

M. KOOME **M. G. MUGO**

JUDGE **JUDGE**

In the presence of:

Mr. Mugambi - For State

Appellant – in person