REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL 325 OF 2006

MWALIMU ABEID MWALIMU .....APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

****

JUDGEMENT

The Appellant one Mwalimu Abeid Mwalimu has filed this appeal against both the conviction and sentence imposed upon him by the Senior Resident Magistrate Mombasa. The Appellant was represented in this appeal by learned counsel Mr. Khatib whilst Mr. Onserio learned State Counsel appeared for the Respondent State. The record from the lower court indicates that on 6th May 2002 the Appellant was charged with the offence of Robbery with Violence contrary to Section 296(2) Penal Code. The particulars of the charge read as follows:-

"**MWALIMU ABEID MWALIMU On the 11th day of September 2004 at Corner Mpya area in Likoni Location within Mombasa District of Coast Province, jointly with others not before court while armed with dangerous weapons namely daggers, iron bars, and sticks robbed Nyoro Njenga Ndonga of ignition keys, a pair of shoes, national identity card, a driving licence, personal documents and cash Kshs.9,000/- all valued at Kshs.17,000/- and at or immediately before or immediately after the time of such robbery wounded the said NYORO NJENGA NDONGA"**

The prosecution called a total of five (5) witnesses in support of their case. The evidence of the prosecution witnesses was that on 19th September 2004 the complainant was walking to his house at about 2.00 a.m. A group of six men confronted him and demanded to see his identity card. The complainant initially thought that they were police officers. However one of the men who had a torch shore it at the complainant. This enabled the complainant to see the men well. He called out the name of one of the men whom he recognized as Mwalimu Abed (the accused). The accused who was armed with a sharp metal rod hit the complainant on his head a cut him. The complainant lost consciousness. He awoke about two hours later at 4.00 a.m. to find himself alone. He dragged himself to his house which was nearby and knocked on the window. **PW1** Benedetta Nduku Ngure states that she was asleep in her house when at about 4.00 a.m. she heard a faint knocking on her window. She went out to check and found her husband the complainant lying against the window with blood pouring from a wound on his

head. She alerted relatives and neighbours who rushed the complainant to hospital. He was admitted in ICU at Pandya Hospital. The matter was reported to Likoni Police Station. On 16th September 2004 the accused was arrested and later he was arraigned in court and charged.

Upon the close of the prosecution case the Appellant was ruled by the court to have a case to answer and was placed on his defence in accordance with S. 211 Criminal Procedure Code. After conclusion of the trial the learned trial magistrate wrote her judgment in which she convicted the Appellant of the offence with which he had been charged. She imposed the mandatory death sentence. It is against this conviction and sentence that the Appellant now appeals. The appeal is opposed by the State.

Ground 1 and 2 of the present appeal which have been argued together was the trial magistrate erred in law and in fact by basing her conviction on the identification of the Appellant by the complainant; in circumstances that were less than conducive for a positive and clear identification. It is not disputed that the incident occurred at 2.00 a.m. It was night time and therefore was dark. The only light which was available and which the complainant says enabled him to see his attacker was a torch light. The torch was allegedly being held by the Appellant. Mr. Khatib for the Appellant argues that the flash of a torch light is not sufficient to have enabled the complainant see and identify the Appellant. Mr. Onserio for the State however responds that the torch light was sufficient for the complainant to identify the Appellant whom he knew well. Let us look at what the complainant himself had to say. At page 29 line 22 of the typed record the complainant says:-

"***He had a torch and lit it to see me. On looking closely I discovered they were people I knew well".***

Further on under cross examination by Mr. Oddiaga advocate for the Appellant at page 31 line 6 the complainant when being questioned about the source of light replies:-

"***One lit a torch. It was Mwalimu accused. He torched me. I looked at him"***

Our interpretation of what the Appellant is saying here is that the Appellant had a torch which he shone at the complainant in order to see him. A torch being shore into the complainants face would obviously dazzle him to some degree. As Mr. Khatib rightly argues the direction of light was from the Appellant to the complainant. In our view this would not provide adequate lighting to enable the Appellant make a clear and positive identification of his attacker. Had it been the other way round and the complainant was holding a torch shining into the face of the Appellant then we may have found differently. A torch provides a beam of light in the direction in which it is being pointed. We assume that the Appellant was holding this torch and shining it into the complainants face. The beam of light would travel from the Appellant to the complainant. The surroundings were dark as the complainant does not mention any other source of light apart from this one torch. In such a scenario the Appellants face would remain in the dark or at very best in shadowy light. What would be illuminated is the complainants face. We are inclined to agree with Mr. Khatib that this torch could not have provided sufficient light for the complainant to see his attacker well enough to identify him.

The second mode of identification relied on by the learned trial magistrate in convicting the Appellant was his name. The complainant in his evidence said that he was able to identify the Appellant whom he knew by name as Mwalimu Abedi. **PW1** the complainants wife told the court that when she found the complainant severely injured and with blood pouring from his head, he kept murmuring "***Mwalimu usiniue"*** in other word "***Mwalimu do not kill me"***. We do accept that the name "***Mwalimu"*** is a very common name in Kenya and is often used to refer to just about any respected teacher or elder within the society. To simply refer to a person as "***Mwalimu"*** alone would not suffice as a form of identification even by name. One would have to go much further and explain exactly which "Mwalimu" was being referred to. Under cross examination by Mr. Oddiaga the complainant at page 31 says –

"***I told my wife I had been cut by someone whom I know. I gave her the names. I said it was the name I have written on the paper. Mwalimu Abedi Mwalimu"***

The complainant claims that he did tell his wife which Mwalimu he was referring to. It was Mwalimu

Abedi. However this testimony is contradicted by the evidence of **PW1** who is the complainants wife. At page 26 of the record she states:-

"**Much later he [the complainant] started saying or telling me that he knew his attacker. He could write the name on a piece of paper. The name was "Mwalimu" Teacher. I later recorded my statement. I never knew the Mwalimu he was referring to"**

Thus the evidence of **PW1** is that the name which the complainant wrote down on the paper was only "**Mwalimu"** while the complainant insists that he wrote down "***Mwalimu Abedi"***. Which was which. The said paper was not produced as an exhibit to enable the court determine exactly what was written down. In her judgement at page 53 the learned magistrate makes the following finding –

"***when the complainant regained consciousness and went home he faintly told his wife that he had been cut by Mwalimu. That was corroborated by PW2. I am again satisfied that in the circumstances accused person was positively identified and named in this case".***

This with respect is an error of fact. The witness did not confirm the name allegedly given by the complainant. Indeed **PW1** said that she did not know the Mwalimu referred to. In our view this is a major inconsistency which the learned trial magistrate ought not to have glossed over in this manner. There is serious doubt raised as to whether the complainant did actually recognize and name his attacker as he claims to have done. We find that the evidence does not show a clear and positive identification of the Appellant by the complainant who effectively was the only eye-witness to this incident.

In view of the foregoing what remains as identification is actually "***dock identification"*** since the complainant did point at and identify the Appellant as his attacker during the trial. In the case of **Ajode – vs- Republic Criminal Appeal No. 87 of 2004** the Court of Appeal sitting in Kisumu held that:-

"**It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade".**

In this case no identification parade was conducted and given the difficulties in relying on the complainants identification of the Appellant we also feel that this "***dock identification"*** cannot suffice. It is our finding therefore that the identification of the Appellant was unsafe and cannot form a sound basis for his conviction. As such this ground of his appeal succeeds.

Apart from the issue of identification our perusal of the lower court record reveals other inconsistencies. In his evidence-in-chief the complainant told the court that two days prior to this attack the Appellant had demanded money from him in the presence of his conductor. When the complainant declined to give out any money the Appellant threatened him saying "***tutaonana na wewe kama umekataa"*** which is to say you will see us if you refuse. In her judgement at page 52 the trial magistrate observed that:-

"***There was no denial during cross-examination that the two [that is the complainant and the Appellant] had met on 8/9/2004 and or accused had demanded money from the complainant as alleged"***

Firstly the fact that the Appellant did not deny this allegation does not make it true. The learned trial magistrate misdirected herself in so finding. The law is that the onus at all times lies on the prosecution to prove its case. At no time does this onus shift to the accused to prove his innocence. It follows therefore that every allegation made by the prosecution must be sufficiently proved. The complainant alleged that this threat was made in the presence of his conductor. The said conductor was not called as a prosecution witness to corroborate this testimony. As such this allegation remains unproved.

There is a third anomaly which we note in that it is not made clear exactly who pointed out the Appellant leading to his arrest. **PW3** PC Harry Charo tells the court that he was directed to "***a lady"*** who was to point out the suspect to him. He does not name this lady and it is not clear exactly how she came

to have the knowledge that the Appellant was the suspect in this case. We are not told if this helpful lady was the complainants wife. Yet as observed above the complainants wife **PW1** had stated very clearly in her evidence that she had no idea who "***Mwalimu"*** was. The prosecution have not claimed that this lady was a police informer whose identity required protection. Failure to identify this lady leaves a gap in the prosecution case and breaks the chain of evidence.

Finally it did come out in evidence that on the day the Appellant was arrested and booked in the police cells a man known as Mwalimu Abdalla was also arrested and booked into the very same police station. **PW4** PC. Greter Mwangari who was the investigating officer did admit as much under cross-examination by Mr. Oddiaga for the accused. As pointed out by Mr. Khatib in his submissions it is not too farfetched to posit that the wrong Mwalimu was arraigned in court and charged with this offence. At page 54 of her judgement the learned trial magistrate states that:-

"***The other Mwalimu's second name was Abdalla and not Abeid and there thus would have been no confusion".***

With respect this is an error of fact on her part. The only name given out by the complainant was "***Mwalimu".*** The name Abeid only came up much later **after** the Appellant had been arrested. Indeed the evidence reveals that the complainant recorded his statement on 25/1/2005 whilst the Appellant was first brought to court on 24/9/2004 about four months **before** the complainant recorded his statement. What did the police rely on to identify this Appellant as the real culprit as opposed to the other suspect who also bore the name "***Mwalimu".*** This anomaly has not been explained satisfactorily.

All in all we find that the prosecution case had several inconsistencies and anomalies all of which must be resolved in favour of the Appellant. Our finding is that this conviction is unsafe and cannot stand. As such we hereby quash the Appellants conviction for Robbery contrary to Section 296(2) Penal Code. We accordingly set aside the death sentence imposed and order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated at delivered at Mombasa this 29th day of July 2009.

…….

F. AZANGALALA

JUDGE

…….

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Monda for State

Appellant in person

…….

M. ODERO

JUDGE

29/7/2009