REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 193 of 2006

ONESMUS MWANDIMA MWAKURU …..…..…. APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

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JUDGEMENT

The Appellant Onesmus Mwandima Mwaruru has filed this first appeal against his conviction and sentence imposed the learned Resident Magistrate Wundanyi Law Courts. Whereas this is an appeal court I will be guiding by the ruling in the case of **Ajode –vs- Republic Criminal Appeal No. 87 of 2004** in which the Court of Appeal sitting in Kisumu held inter alia that:-

"***In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that".***

It therefore behoves this court to restate and critically analyze the evidence which was availed before the subordinate court. The Appellant was arraigned before the lower court on 1st November 2005 and charged with Robbery contrary to section 296(1) of the Penal Code. The prosecution case was that on 24th October 2005 at Ndile Trading Centre Ronge Juu Location in Taita Taveta District the Appellant and the complainant were both enjoying a drink at Farmers Bar. At 11.30 p.m. the complainant left the bar. Outside he was attacked by a man who held him by the neck and threw him to the ground ransacked his pockets and made of with his cash Kshs.10,000/- as well as his personal documents. **PW2** the owner of the bar witnessed the robbery. Both complainant and PW2 identified the Appellant as the perpetrator of the offence. Police were called in. The Appellant later handed back to PW3 some of the complainants personal documents including his identity card, Kenya Commercial Bank ATM Card, Election Card and employment card. The Appellant was then arrested and was charged. The learned trial magistrate found in his judgement that the prosecution had proved their case beyond a reasonable doubt and convicted the appellant. After hearing mitigation the learned magistrate sentenced the Appellant to a prison term of six (6) years without the option of a fine. The Appellant being dissatisfied with both his conviction and sentence filed this present appeal.

At the hearing of the appeal the Appellant who appeared in person relied wholly on his written submissions. Mr. Ondari learned State Counsel who appeared for the Respondent gave oral submissions opposing the appeal and urging the court to uphold both the conviction and sentence.

In his written submissions in support of this appeal the Appellant raised three main grounds

(i) That failure to mention the time of the charge in the charge sheet rendered that charge defective and therefore unsustainable

(ii) That there was no proper identification of the appellant by the witnesses

(iii) That the evidence adduced against him was contradictory and therefore unreliable.

The first ground raised by the Appellant is that the charge sheet was defective as it did not indicate the time when the offence is alleged to have occurred. The particulars of the charge read as follows:-

"***<u>ONESMUS MWANDIMA MWAKURU</u>: On the 24th day of October 2005 at Ndile Trading Centre, Ronge Juu Location in Taita-Taveta District within Coast Province, robbed DANIEL KIGHALA MWAKISIMA of cash Kshs.10,000/-, National Identity Card, K.C.B. ATM Card, Electors Card and Employers ID Card and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said DANIEL KIGHALA MWAKISIMA"***

It is clear that indeed as the Appellant has pointed out the charge does not indicate the time when this offence of Robbery was committed. Mr. Ondari learned State Counsel argues that failure to indicate the time does not render the charge sheet defective. The Rules for the framing of charges and informations is contained in S. 137 of the Criminal Procedure Code Cap 75 Laws of Kenya. S. 137(a) (ii) of Cap 75 provides that:-

"***(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;"***

The law therefore provides only that a charge or information should contain a "***brief"*** description of the offence and should not include any "***technical terms"***. There is no stipulation that the time of the alleged offence must be included in the charge sheet. In the case of **<u>Moses Mathu Kimani –vs- Republic Criminal Appeal 212 of 2004</u>** Hon. Lady Justice J. Lessit facing a similar ground of appeal held at page 3 that:-

"***The particulars of the charge indicate the date of the offence. That date is sufficient particulars to enable the Appellant to know when it is alleged that he committed the offence. The actual time of the offence need not be shown on the charge".***

I need not add any more. The particulars provided in the charge which included the offence, the section of law contravened and the date of the offence were in my view adequate particulars. There is no necessity to add the time and more to the point failure to indicate the time does not render the charge defective. I therefore dismiss this ground of the appeal.

The second ground relied upon by the Appellant in this appeal is that he was not properly identified by the witnesses. In his evidence in chief at page 2 of the record the complainant stated that:-

"***I saw the person. He was also in the bar but have not taken beer. It was the accused. He was familiar to me. I had a torch and I lit it and recognized him".***

The complainant testified that although he did not know the accused he was able to recognize the accused as a man who had been inside the same Farmers Bar with him. The incident occurred at 11.30 p.m. It was dark as night had fallen. However the complainant stated that he had a torch which he lit and used to look at his attacker. It is normal that in such a case the complainant would shine the torch towards the person or item he wished to see. Therefore the beam of light from the torch would go from the complainant towards the Appellant and illuminate the Appellants face. The Appellant was at the time

wrestling with the complainant – their bodies were probably intertwined and thus he was very close, in my view close enough to enable the complainant recognize him by the light of the torch. The Appellant does not deny having been in the vicinity at the material time and more pertinently he does not deny having been inside Farmers Bar at the time. I am mindful of the fact that conditions for a positive identification must be shown to have been satisfactory and in my view this is one such case where the complainant had sufficient light from his torch which he shore at the Appellant to enable him positively identify and recognize a man he had been with hardly a few minutes earlier in a bar.

Furthermore it was not only the complainant who identified the Appellant as the perpetrator of the offence. **PW2** Joyce Mwasoke who works in the said Farmers Bar told court that she left the bar a few minutes after the complainant. When she got outside she saw the Appellant grab hold of the complainant and throw him to the ground. **PW3** did not intervene as she was frightened so she took to her heels and escaped. She unlike the complainant knew the Appellant well and was able to positively identify him as Onesmus. Indeed the day after the robbery **PW2** led the complainant to the nearby centre where they confronted the Appellant demanding back the stolen items. This therefore is evidence of recognition by **PW2** who knew the Appellant well. Her evidence corroborates the complainants evidence in that she testified that she saw the Appellant get hold of the complainant and throw him down. All in all I am quite satisfied that there has been a clear and positive identification of the Appellant by two key witnesses. This evidence squarely places the Appellant at the scene of the crime and identifies him as the perpetrator of the offence.

Quite apart from the positive identification by complainant and **PW2** I find that there exists evidence of recovery of the complainants stolen items which irresistibly points at the accused. In his evidence-in-chief the complainant told the court that apart from his cash Kshs.10,000/- he was also robbed of his ID Card, electors card, ATM card and employment card. **PW3** Cyrus Mwatabu told the court that on 28th October 2005 barely three days after the robbery he was with the Appellant at his house. Appellant led him to a nearby bush and removed the complainants documents from under a rock. Appellant gave the documents to **PW3** and instructed him to go and throw them somewhere where they could be easily recovered. Instead **PW3** went and returned the documents to the complainant. The said documents were produced as exhibits in the lower court. The complainant was able to positively identity them as his because they all bore his name. There can be no doubt therefore that these items belonged to the complainant. The question is how did the accused come to have them in his possession so soon after they were stolen. Although the learned trial magistrate did not mention it in his judgement this is a case where the doctrine of "***Recent Possession"*** squarely comes into play. I am guided by the case of **Arum –vs- Republic [2006] 2E.A**. at page 10 clearly set out the standard under which the doctrine of recent possession may be applied as follows:-

"***Before a court can rely on the doctrine of recent possession as a basis of a conviction in a criminal case, the possession must be positively proved, that is there must be positive proof first that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant; thirdly that the property was stolen from the complainant and lastly the property was recently stolen from the complainant".***

I am satisfied from the record that the complainants documents were actually found in the possession of the Appellant. **PW3** narrated to the court how the Appellant led him to the bushes near his house and removed those documents from beneath a rock. That is not a normal place to keep documents. There is no possibility that it was the complainant who himself placed his documents under a rock close to the Appellants house. **PW3** knew the Appellant well and was visiting him at the time. There is evidence that the Appellant only agreed to return those documents at the urging of **PW3** who told him that if he returned them the matter would be forgotten. **PW3** had no reason to fabricate evidence against the Appellant and indeed as pointed out by the learned trial magistrate **PW3** was infact a relative of the Appellant. There is no doubt in my mind that the Appellant was found in possession of the complainants stolen documents three days after the robbery.

On the issue of positive identification there can be no doubt at all that those documents belonged to the complainant. They all bore his name. At no time did the Appellant ever allege that the documents

were his. Similarly the fact that the documents were stolen from the complainant during the course of a robbery is also not in any doubt. Both complainant and **PW2** gave clear, concise and corroborative evidence of this fact. These documents were recently stolen from the complainant. The term recent is relative. However in such a case where the robbery occurred on 24th October 2005 and recovery was made three days later on 28th October 2005 I do find that this can aptly be described as recent. From the evidence adduced in the lower court I am satisfied that the doctrine of recent possession is properly applicable in this case. The only way the Appellant could have had in his possession the complainants stolen documents is by his having been involved in their theft. For all the reasons cited above I am convinced that the identification of the Appellant as the man who robbed the complainant is both accurate and safe.

The last ground of appeal raised by the Appellant is that the prosecution case was full of contradictions. He has not stated exactly what these contradictions were. Nevertheless having carefully perused the court record from the lower court and in particular the judgement of the learned Resident Magistrate I find no reason to fault the same. In my view the conviction was sound both in fact and in law. I therefore confirm the same.

The Appellant did also appeal against his sentence but again did not indicate what particular aspect of the sentence he objected to. The learned trial magistrate after convicting the Appellant imposed a prison term of six (6) years. S. 296(1) under which the Appellant is charged provides that:-

*"**296(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years".***

I am mindful of the fact that the trial magistrate does have absolute and unfettered discretion in sentencing. As an appellate court I would not be inclined in interfere with this discretion except for very just cause. I do not find any just cause to exist here. The learned trial magistrate did not impose the maximum of 14 years. He gave a much lower sentence. The sentence imposed was lawful. As such I dismiss the Appellants appeal against sentence and I hereby confirm the same. This appeal is dismissed in its entirety.

Dated and Delivered in Mombasa this 3rd day of August 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Ondari for State

Appellant in person

M. ODERO

JUDGE

3.8.2009