REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Criminal Appeal 116 of 2008

DAVID KATHANDE MUTURA …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(An appeal against conviction and sentence of P. Ngare S.R.M. Chuka in Cr. Case No. 301 of 2006 delivered on 10/7/2008)

JUDGEMENT

The appellant was charged before the lower court with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He pleaded not guilty and after the trial in the lower court's judgment, he was convicted as charged and sentenced to suffer death as provided under the law. Being dissatisfied with the conviction and sentence he has appealed before this court. This is the first appellate court. To that end, we are guided by the principles enunciated by the case of **Gabriel Njoroge Vrs. Republic (1982 – 88) 1KAR 1134** where it was held:-

"As this court has constantly explained it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya Vrs. R. (1957) E.A. 336, Ruwala Vrs. Republic [1957] EA 570.)

Before considering the evidence tendered before the lower court, we wish to first deal with an issue raised by the appellant in support of his appeal. It was submitted that when the appellant appeared before the lower court for plea, the learned magistrate who took the plea, being a Resident Magistrate, did not have

jurisdiction to take such a plea. It was argued that consequently, the said plea rendered the proceedings a nullity and that the same should lead this court to allow the appellant's appeal. It was also further argued that the fact that the learned magistrate did not record the plea of the appellant, also caused the subsequent trial to be a nullity. The appellant drew the court's attention to the first schedule of the Criminal Procedure Code which provides that a charge of robbery with violence ought to be tried by either a chief magistrate, principal magistrate or senior resident magistrate. We have perused the proceedings of the day that the appellant gave his plea. It is correct to state that the proceedings were conducted by a resident magistrate. It is also correct to state that the said magistrate did not record the appellant's response to the charge. That as it may be, we find that such failure did not lead to prejudice to the appellant. This is because the case did subsequently proceed for full hearing before a senior resident magistrate on 25th February 2008. Granted that the said trial magistrate did not again ask the appellant to indicate his plea. But then again we do find that such failure cannot have led to prejudice to the appellant to lead us to find that his trial was a nullity. The Court of Appeal in **DOMINIC MAINA WANJIRU V. REPUBLIC** Criminal Appeal No. 4 of 2005 (unreported) were of similar view when they held:-

*"**It is indisputable therefore that no plea was taken before any of the two trial magistrates. That such elementary axiom or omission escaped the notice of two judges and two experienced advocates somewhat surprises us. However, we have no hesitation whatsoever in holding that the omission not having occasioned the appellant a miscarriage of justice the error is curable by the application of section 382 of the Criminal procedure Code and we so affirm that the trial did not amount to a mistrial so as to justify a retrial."***

The argument of the appellant therefore in respect of the taking of the plea is rejected. In evidence, the complainant PWI stated that on 13th September 2004, at 2am as he slept, he heard his main door to his one roomed house being knocked. The door was made out of timber. After the second bang, it seems that the assailants gained access to his room. He saw a group of people and recognized the appellant. The appellant was leading that group. He was able to identify the appellant by means of the moonlight that shone. The appellant hit him twice on his head leaving him injured. There were two other robbers who joined in in his assault and hit him with a panga which broke.

They demanded from him Kshs. 150,000. The money was in a plastic bag under his bed. The appellant took away the money as the robbers left the scene. His neighbours were unable to assist him because their doors had been locked from the outside. He managed to open for one of the neighbours called Doris but he thereafter fell unconscious. He regained consciousness at Marimanti hospital. PWI recalled that on the 6th September 2004 the appellant had come to his shop and had stated that he could not remain in poverty whilst others were getting richer. This statement by the appellant was also heard by PWII and III. PWI on being cross-examined by the appellant said that he did not report that threat to the Police. He then stated that he was able to recognize the appellant as he stood at the main door through the aid of the moonlight. He was emphatic that he clearly recognized the appellant at the door step. Further, he stated that he recognized the appellant by his voice because he had known the appellant for a very long time. PWII in evidence confirmed the statement made by the appellant to PWI. Similarly, PWIII repeated those words and said that the appellant was very well known to him and that his father was his friend. PWIV heard PWI's door being banged on the night between the 12th and 13th September 2004. He saw that PWI had been injured subsequently and after recording his statement with the Police, was informed by PWI that he had not recognized his attackers. In cross examination he said,

*"**PWI never told me the people who robbed him."***

PWVI was a nurse attached to Tharaka District Hospital. She recalled that on the 13th September 2004 at 3am as she slept in her bedroom she heard a bang on one of the doors in the plot. Later, she saw PWI had been injured. PWI told them that he had been robbed Kshs. 150,000. PWI told them that he had seen the robbers and that he knew one of them. The medical officer, PWIV assessed the injuries suffered by PWI as grievous harm. PWVIII was the investigating officer who on investigating found that PWI's door had been smashed. On visiting PWI at the hospital, he confirmed that the appellant was one of the robbers. When he attempted to arrest the appellant, the appellant run away and did not stop even though he shot at

him. He was emphatic that PWI named the appellant as one of the robbers. The court after receiving that evidence found that the appellant had a case to answer. The appellant gave sworn testimony relating to the date when he was arrested. He stated that on that date, 16th June 2006, at 9am, he found an argument at PWI's shop where PWI claimed that another person had stolen 2 loaves of bread. The appellant intervened by asking PWI to investigate the allegation. He was arrested thereafter. He then stated:

"***This is a frame up where the complainant alleged that I am a robber. He was not able to identify me with the moonlight which he alleged to have been bright. He never named me to his neighbours who came to rescue him."***

The learned trial magistrate had this to say:

"***I hold that at the time of gaining entry and also leaving the scene, the complainant had ample opportunity of seeing his attackers. He stated that accused (appellant) is the one who bust into the room and he had the opportunity of seeing him. I agree with him. That for a person who was well known to him the recognition was proper and cannot be faulted."***

As correctly stated by the learned magistrate, PWI said that he knew the appellant prior to the incident. The appellant did not contradict that evidence. It was therefore a case of recognition rather than of identification. Widgery, C.J. in the well known case of **R. Versus Turnbull** [1976] 3 ALL ER 549 at page 552 had this to say:-

"***Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

We are aware that even in the case of recognition, there can be errors. We therefore, in that regard, warn ourselves of that danger. In the case of **Abdalla Bin Wendo Vrs. Republic** [1953] EACA 166, the Court of Appeal of East Africa had this to say:-

"……***but on identification issue a witness may be honest yet mistaken and may make erroneous assumption particularly if he believes that what he thinks is likely to be true……..."***

In our case, PWI previously knew the appellant. They were very familiar with each other that he even recalled the appellant had made a veiled threat to him. On the material night, he said that the appellant stood by the door step where the moonlight which was bright was shining. By the aid of that moonlight, he was able to recognize the appellant. But much more than this, he recognized the appellant by his voice. As stated before, they had known each other for a long time and had had conversation with each other. The Court of Appeal in the case of **Choge V. Republic [1985]** KLRI held that evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification but the court has to ensure that the identification by voice was free from possibility of error.

In our case, the appellant had conversed with complainant and he was known by him for a long time. His identification by voice is therefore in our view without error. The appellant's argument that PWI could not have recognized him whilst inside the room by aid of moonlight is not supported by the prosecution's evidence. PWI's evidence comes out very clearly that he recognized the appellant because he was standing at the door step of his single room. It was argued that PWI could not have recognized the appellant because he did not name the appellant to his neighbours. We find that it was only PWIV who made a statement that PWI said to him he did not recognize any of the robbers. PWIV did however say later that PWIV did not tell him the names of the people who robbed him. Considering those statements together, we are of the view that PWIV was stating that the names of the robbers had not been given to him. The investigating officer was clear that PWI gave the name of the appellant and it was because of that information they were able to apprehend the appellant. There is no doubt in our view of identification of the appellant by PWI.

Similarly, the argument by the appellant that there were inconsistencies of the date when the robbery took place does not hold water. It is clear that the parties were relating to the incident that occurred on 13th September 2004. In any case, the statement by PWIV that the incident occurred between 12th and 13th of September 2004 would seem to place the incident on the night of 13th September 2004. On the evidence of the prosecution we are unable to find in favour of the appellant in his appeal. We find that the prosecution going by the evidence adduced correctly met the standard of prove beyond reasonable doubt.

Before however concluding this appeal, it is essential to consider two major issues that were raised by the appellant. It is not disputed that the appellant was arrested for this offence on 16th June 2006. He was presented before court on 3rd July 2006. The appellant argued that he was held in custody for 17 days rather than the 14 days provided under Section 72 (3) (b) of the Constitution. That section provides as follows:-

"72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:- ……..

(3) A person who is arrested or detained:-

(a) for the purpose of bringing him before a court in execution of the order of a court: or

(b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

The courts and more particularly, the Court of Appeal have variously held that it is the duty of the court to uphold the provisions of the Constitution. See the case of **Albanus Mwasia Mutua Vrs. Republic** Criminal Appeal No. 120 of 2004. Since the offence which the appellant faced was a capital offence, the Police ought to have brought him before court within 14 days. In our calculation of the number of days that the appellant was held in custody, we find that the 14th day of the appellant's arrest fell on 30th June 2006. That date was a Friday. That being so, the earliest that the appellant could be presented before court was the following working day, i.e. Monday. Monday was the 3rd of July 2006. That was the day the appellant was presented before the magistrate when plea was taken. We therefore find that there is no basis for the appellant's argument that he was held beyond the 14 days because it is obvious from that calculation that he was presented before court as soon as was reasonably practicable. That argument by the appellant is therefore rejected by us. The appellant based his other argument on the finding made in the case of **Simon Muthee Murithi Vrs. Republic** Criminal Appeal No. 162 of 2007. In that case, the court made the following finding:-

"A perusal of both Section 296(1) and 296(2) will readily show that neither provisions declares "robbery" or "robbery with violence" to be felonies. It is section 295 which declares "robbery" to be a "felony". As the side note to section 296(1) currently depicts the section prescribes that the punishment for robbery

(simple robbery) is fourteen years imprisonment), there is no option of fine. The punishment for robbery (with the use of or being armed with a dangerous weapon or instrument and whether alone or in the company of one or more person, and the use of threats of or actual use of such a dangerous weapon or instrument), is death. ……..……

In the matter at hand, the drafters of the charges for robbery are obliged to make a clear distinction between the offence and the punishment; that the offence or felony of robbery is created by section 295 of the Penal Code and is punishable by either imprisonment of fourteen years under S. 296(1) or death under S. 296(2) of the Code. In addition the side note to section 295 should simply read "robbery" and not "definition of robbery" and Form 8 for the charge of robbery should clearly be:-

Charge: robbery contrary to section 295 as read together with section 296(1)/296(2) (delete whichever is not applicable).

This is what we dare to think the Court of Appeal alluding to in the case of <u>Johana Ndungu Vrs. Republic</u> Criminal Appeal No. 116 of 1995 (unreported but referred to <u>Ajode Vrs. Republic</u> [2004] 2KLR 81 at p. 89 – 25 – 35 at page 89 40-1 the Court of Appeal stated as follows:-

In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the subsection in conjunction with section 295 of the Penal Code. The essential ingredients of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or after and further in any manner the act of stealing. Thereafter the existence of the a foregoing detailed ingredients constituting robbery are presupposed in three sets of circumstances prescribed in section 296(2)."

As can be seen from the above finding, the court was of the view to properly disclose the charge of robbery with violence, the prosecution should charge a person under Section 295 as read with Section 296 (2) of the Penal Code. We have considered that judgment and that finding which we might state here is only persuasive. We however find that failure to state in the charge sheet section 295 of the Penal Code is curable under section 382 of the Criminal Procedure Code. That section provides as follows:-

"***382. 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, proclamation, 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 had occasioned a failure of justice.***

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

We find the omission by the prosecution therefore to state section 295 of the Penal Code is cured by that section. In the end, we find that there is no merit in the appellant's appeal and we therefore hereby dismiss the same.

Dated and delivered at Meru this 16th day of November 2009.

MARY KASANGO

<u>JUDGE</u>

M.J.A. EMUKULE

JUDGE