REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 151 of 2002

JAMES MWITARI …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(An appeal from a judgment of A.N. Kimani P.M. Maua dated on 31st July 2002)

JUDGEMENT

The appellant was tried, convicted and sentenced to death by the court below (A.N. Kimani, PM), for the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the offence according to the charge sheet are that on 20th November 2000 at Gituine village in Meru North District within Eastern Province jointly with others not before court, while armed with pangas and axes, robbed Peter Kabaya M'Nabea 90 packets of champion, 20 packets of rosters, 30 packets of sweet menthol cigarettes and three dozens of Paka Power batteries all valued at Kshs. 10,185/= and or immediately before or immediately after the time of such robbery used actual violence to the said Peter Kabaya Kaiyathi.

In the alternative the appellant was charged with handling stolen property contrary to section 322(2) of the Penal Code. Being aggrieved by the conviction and sentence the appellant filed this appeal relying on seven grounds, which we hereby condense into five, namely:-

(i) That his rights under section 150 of the Criminal Procedure Code was violated.

(ii) That the trial court rejected his application for the transfer of the case without adequate reasons.

(iii) That the evidence relied upon by the trial court was insufficient to found a conviction.

(iv) That the trial magistrate failed to allow him to recall and cross-examine three of the six prosecution witnesses.

(v) That the prosecution evidence was contradictory.

Learned counsel for the respondent supported both the conviction and sentence arguing that there was ample evidence linking the appellant with the robbery. For instance, he submitted, the appellant's identification card was recovered at the scene of the robbery and secondly that shortly after the robbery the appellant was arrested with a large number of packets of cigarettes, to which he did not lay any claim.

The appellant, as is the practice with unrepresented appellants, relied on a detailed written submissions which has raised additional grounds as follows:

(i) That the trial magistrate failed to accord the appellant a fair hearing, namely that the charge was not read to him before entering his defence; that the court failed to consider his health condition denying the appellant the opportunity to call defence witnesses; that section 211 of the CPC was not complied with.

(ii) That the trial magistrate failed to enter coram on 21st June 2002.

It is our duty as the first appellate court to re-evaluate the evidence on record in order to arrive at an independent conclusion bearing in mind that we, unlike trial court, have not had the advantage of seeing and hearing the witnesses.

Briefly the facts of the case are that on 19th Novemver 2000 the complainant, Peter Kabaya Kaiyathu closed his shop before retiring to bed in the room next to the shop. With him was PW2, Adrano Kang'entu. While asleep, they were interrupted at 3am by a gang of robbers who attacked the complainant and robbed him of cash, cigarettes and batteries. The complainant's neighbour, PW3, Tabitha Nchororo heard the screams and responded.

The complainant and PW2 went to report the incident to the police at 4am. On their way they found the appellant being beaten by members of the public. He had been arrested with assorted packets of cigarettes. During cross-examination, the complainant further testified that the appellant's identification card was recovered at the shop, the scene of crime.

PW4, APC Reuben Muthuri was at Akirangondu chief's camp on 20th November 2000 when members of the public brought the appellant with many cigarettes. He advised the public to take the appellant to the police station but remained with the cigarettes, which were later collected by PW5, P.C. Paul Ekon. P.C. Ekon visited the scene and confirmed that the shop was broken into. Pancras Muguika, PW6, the clinical officer who examined the complainant noted the injuries suffered by the complainant which he assessed as "harm". On being called upon to make his defence, the appellant elected to remain silent.

The learned trial magistrate considered the above evidence, found the appellant guilty of the offence of robbery with violence, and after conviction sentenced him to death as provided under the law. It is that finding that has prompted this appeal.

The main issue in this appeal, in our view, is that of identification. Both the complainant and PW2 who were at the scene during the robbery were categorical that they did not identify the robbers. The only evidence the prosecution is relying upon is the fact that an identification card belonging to the appellant was found at the scene and secondly that the appellant was found with a large number of assorted cigarettes.

It is common ground that the prosecution was under a duty to prove the case against the appellant beyond any reasonable doubt, even though the appellant offered no defence. There being no direct evidence of the appellant being part of the gang who robbed the complainant, evidence of his identification card being found at the scene and a large number of cigarettes being found on him, must meet the test enunciated in **R. V. Kipkering Arap Koskc (1949)** 16E.A.C.A, 135 and **Simoni Mosoke V. R. (1958) EA 715**. We find that the circumstantial evidence relied on failed the test in the two cases cited above. The evidence did not point irresistibly and directly to the guilt of the appellant. Indeed there were factors and circumstances that weakened any inference of the appellant's guilt.

The issue of the appellant's identification card was only raised by both the complainant and PW2 in cross-examination, a clear afterthought. When the two, who were the only eye witnesses testified, the identification card in question was not shown to them to identify and confirm that it was indeed the one recovered at the scene. It would also appear that the card was not produced as exhibit.

The other factor is that it was alleged that the appellant was found with many cigarettes when he was

apprehended by members of the public including one Mukuria. Neither Mukuria nor any one of the members of public was called to explain the circumstances under which they apprehended the appellant and to confirm that he was indeed in possession of the cigarettes. The complainant merely found the appellant being beaten and the cigarettes at the scene and we cannot assume that it was the appellant who had them without evidence linking him with them.

Finally, we are not satisfied that the complainant supplied sufficient details of the stolen items so as to link the cigarettes found at the scene where the appellant was being beaten with those stolen form his shop. Cigarettes are ordinary shop goods without any special marks associated with any particular shop. See ***Francis Macharia V. R.*** Cr. Appeal No. 11 of 2004.

In a nutshell, we entertain some doubt as to the appellant's involvement in this robbery. That doubt is resolved in the appellant's favour. In the result, we allow this appeal, quash the conviction and set aside the death sentence imposed. The appellant shall be set free at once unless he is, for any lawful reason held.

Dated and delivered at Meru this 8th day of February 2008.

I. LENAOLA

JUDGE

W. OUKO

JUDGE