REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 154 of 2006

BENARD OCHIENG AOKO ……....…..… APPELLANT

-VERSUS-

REPUBLIC …… RESPONDENT

Coram:

J. W. Mwera J

Mutai for State

Appellant in person present

Raymond CC.

JUDGMENT

In the lower, the appellant faced a charge under S. 296 (1) of the Penal Code in that on the night of 28th/29th July 2005 at Kibos Primary School, jointly with others not before court, robbed Christopher Ochar Okoth of text books, ball pens, a wall clock, a clamp, three sufurias and other paper goods plus a bicycle all valued at Ksh. 180,000/=.

After plea, there followed a trial at the end of which the appellant was convicted and given a 5 – year prison term. He filed this appeal on the grounds that the complainant (PW2) did not give his name in the first report. Instead he named one Paul whom the police arrested and later mysteriously released. The other ground was that the spotted shirt the complainant alleged that the appellant had been wearing on the material day was not exhibited. No identification parade was conducted and that key witnesses were not called to testify.

Electing to respond after Mr. Mutai, the Learned State Counsel had replied to the appeal, the court heard Mr. Mutai in support of the same. That the evidence which the complainant (PW2) put before the learned trial magistrate was sufficient to convict and the lower court believed it. It warned itself of the dangers of relying on one identifying witness to convict, then properly proceeded to convict. That the incident took place at night, yes, but PW2 had seen the appellant among his armed attackers. There was thus no need to conduct an identification parade or call more witnesses.

In response the appellant reiterated that the complainant (PW2), who worked as a watchman at the school where the robbery allegedly happened, did not give the police the appellant's name, if indeed he recognized him. That other witnesses were coached by PW2 to testify against the appellant and the

investigating officer did not visit the appellant's house to investigate whether stolen goods were kept there.

Dolorosa Opiyo (PW1), a head-teacher at Kibos Primary School, was woken up at 6.45 am with a telephone call that there had been a theft during the night at the school. She went there and found the school watchman with school officials in the compound. A steel door to the staff room was cut and some bags of maize, a sufuria, leaving certificates, a wall clock and books were missing. She got police on the scene. The watchman had not been injured. He said that he could identify the attackers. Police followed a trail of maize which had fallen on the ground to some homes. But their doors were locked.

On 29.7.2005 one suspect was arrested but later released. Another suspect was arrested when the watchman pointed him out. The suspect was identified in court.

Christopher Ocharo Okoth (PW2), was the watchman at Kibos Primary School where this robbery took place. After doing routine patrols on 28/7/2005, he retired in a class room next to the school office. Then thugs came from the dark part of the compound. Four held PW2 while one flashed a torch light at him. That one had a panga. The robbers tied him up and put him down in the class room. It was about midnight. As one thug guarded him the others cut their way into the school office. They then moved PW2 to the office and in the process of that he saw one of them, as the torch light was shone to him and also on the thug – one who had been guarding him. PW2 saw what he wearing. The thug was someone he had been seeing in the area. The robbers laid PW2 on the maize in there and closed the door of the office as they left. By 6.30 am the witness had managed to loosen the ropes tying him; he called for help. He later identified one of the robbers to the police and he was arrested. PW2's bicycle was stolen; he was injured on the head and hand. AP3 form was filled accordingly. The suspect that PW2 identified was the present appellant who had worked for long as a mason at the school. He had told the police that he knew one of the robbers.

In cross – examination PW2 maintained that he had identified the appellant as one of the robbers on the material night. He had wanted to stab the witness. PW2 knew the appellant before and on this night he wore a red shirt with black spots. He saw all this in the light of a torch one tall light – complexioned thug flashed from near the door, directed at the appellant. The appellant also tied up PW2 and blindfolded him with a flag. He and his mate took the witness to the office claiming that they were saving him. They did not beat him but his hands were injured.

Ann Orengo John (PW3) was a pupil aged 17 years at Kibos Primary School. On the morning of 29.7.2005 the watchman (PW2) beckoned her from the window. When she went near, PW2 told her to go and report to the school chairman that a theft had occurred at the school. She did so. On her return she noticed that PW1 had a flag tied about his neck. She went round and noticed maize poured at the door.

Naftali Odero Otieno (PW4), a messenger at Arya Primary School was woken up at 6.30 am on the material day to go and witness a school break-in. He did not say whether he went to Kibos Primary School or that Arya Primary School is the same as Kibos Primary School. But he found the school door broken and a watchman inside in the office. He had untied himself but he had bruised hands. Then PW4 spoke of stolen books, maize etc. That the watchman had spoken to someone of a suspect called Agengo but this was not directly to the witness. PW4 did not mention names in their report to the police. But when one Paul was arrested the appellant went to sue him, he was arrested there. PW4 could not say why this Paul was not in court. Then PW4, without saying when he came by this information told the learned trial magistrate:

"**The watchman mentioned those who stole. You and Paul were named."**

Then on 20th (it looks like 29th from the hand-written record) PW4 met the appellant with the police when they were trying to look for the stolen property. If he knew that PW2 had mentioned his name, PW4 would have told the police to arrest the appellant.

Washington Ochola (PW5), an official of the affected school went over to witness the theft incident.

PW2 told him that he had noticed the clothes one thief wore whom he knew. One suspect called Agengo was arrested but later released. Nothing was recovered. PW2 gave the description that led to the appellant's arrest.

P.C. Yusuf Alumasi (PW6) was on duty at Migosi Police Base on 30.7.2005. There was a suspect in the cells arrested the night before. A visitor came to check on him. The watchman who was there recording his statement called PW6 out and told him that the "**visitor**' was one of those who had broken into the school office. The witness arrested this suspect, now the appellant, and took him to Kondele Police Station. He was later charged. That as PW2 recorded his statement he had told PW6 that he would identify one of the attackers who had tied and warned him against screaming, by his clothing and voice.

In his defence the appellant, a mason, told the lower court that on 30.7.2005 her aunt sent for him and informed him to go and check on his uncle called Paul Agengo. who had been arrested on 29.7.2005. The appellant found him at Car Wash Police Post and talked to him. The appellant met two people with the police officers who together, had gone to arrest Paul. They chased him away but one of them called the appellant back and arrested him. He was later charged with an offence he knew nothing about. That the appellant was not the only person who could wear a red T-shirt as PW2 claimed; he was arrested when he had gone to see his uncle in police cells.

The learned trial magistrate in his judgment found that Kibos Primary School was broken into and property stolen. Its watchman was tied with ropes during the incident. The thugs had a knife and threatened to stab him. And that the offence of robbery was established. The learned trial magistrate went over all the evidence before him and concluded that the appellant was one of the attackers. This he did by warning himself that PW2 was the only identifying witness in an incident that took place at night, with the only light coming from a torch.

In this court's opinion from the evidence on record, quite probably the appellant ought to have faced a violent robbery charge C/S 296 (2) of the Penal Code. Evidence had it that there were more people than one involved and one was armed with a knife. They threatened to stab PW2 during the incident. They tied him up. But with the State not having cross – appealed, this court proceeds to determine the appeal as it is.

The robbery took place at night. The issue of identification therefore became crucial. PW2 was the only identifying witness. He testified that he did so through torch light that one of the robbers held from the door and it played on the appellant as he tied and gagged PW2. This is someone he knew. The appellant was a mason who had worked at the school. The appellant kept guard over PW2 during the initial attack and moved him to the school office. He was locked there when the incident ended.

Evidence has it that PW2 told other witnesses here that he had noted the appellant and he could identify him. When the appellant came to PW6's station to visit a suspect in the cells, it turned out to be Paul Agengo the appellant's uncle, PW2 who was there writing a statement, and had intimated to PW6 that he could identify his attackers, called PW6 out and told him the visitor was one of the robbers. The appellant, who introduced himself as a mason, was then arrested and charged. PW2 apparently did not know the appellant by name and it can be said that he had not or did not describe his clothes or profession to police. But he had said that he could identify one of the attackers. He did so. PW2 gave credible evidence.

In this regard, the learned trial magistrate's finding that he believed PW2 and warned himself of the danger of relying on that single witness to convict before doing so, need not be overturned.

Thus there was no need to produce the spotted T-shirt in court or call more witnesses than those who testified in the lower court. There was no need for an identification parade either.

In sum, this appeal is dismissed. Judgment accordingly. Delivered on 5.5.2008.

J. W. MWERA

JUDGE