REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & OMONDI, JJ.)

CRIMINAL APPEAL NO.48 OF 2006

BETWEEN

BISHAR ABDI…………………….……..…..…… APPELLANT

-AND-

REPUBLIC……………………………….………...RESPONDENT

(An appeal from the Judgement of Principal Magistrate Mrs. Wasilwa dated 8th February, 2006 in Criminal Case No. 1554 of 2005 at Kibera Law Courts)

JUDGEMENT OF THE COURT

The appellant herein was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, on 27th February, 2005 at Kagishu in Riruta, within the Nairobi Area, while acting jointly with another person not before the Court, and while armed with offensive weapons, namely knives, robbed one ***David Wahia Kariuki*** of a wallet containing cash in the sum of Kshs.1,500/=, a national identity card, and a job card – all valued at Kshs.1,650= ? and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said ***David Wahia Kariuki***.

PW1, the complainant, testified that on 27th February, 2005 at *6.30 a.m.* he was returning home from his place of work. When PW1 reached a place by the name Kagishu, two people, one brandishing a knife, and the other wielding a pistol, attacked him. The intruders ordered him to stop, which he did, but was then stabbed with a knife, and relieved of his money, Kshs.1,500, his national identity card, and his employment identity card. It was PW1's testimony that the appellant herein, who launched the assault from the front, and stabbed him in the right hand, was one of the two robbers. PW1 raised the alarm by screaming, and Good Samaritans rushed in, to give help – and the appellant herein thereupon took to his heels. The mob gave chase, and arrested the appellant some 300 metres from the *locus in quo*; he was taken to Riruta Police Station and held there; and the complainant recorded his statement at the Police Station.

PW2 who was accompanied by his fellow watch-men and was returning home from his work-place, at 6.30 a.m. on the material date, heard screams, when he reached a bus stage in the Riruta area known as Maragoli Stage. From this point, about 100 metres from the place of origin of the alarm, PW2 saw two people running, one bearing a knife, and the other carrying a pistol. The one with the pistol escaped, but

members of the public at the stage caught the escapee with the knife. It is PW2 who pleaded with the irate mob not to pelt the said escapee with stones. PW2 identified in Court the knife with which the escapee had been arrested. After rescuing the escapee, PW2 teamed up with the complainant and others, to deliver the man to Riruta Police Station.

PW3, ***Cpl. Josphat Ndung'u,*** testified that he was at the Police station at 7.00 pm. when the appellant herein was brought by members of the public, who said they found him robbing the complainant along a footpath. Owing to injuries suffered by the appellant herein at the hands of the arresting members of the public, PW3 had to take him to Kenyatta National Hospital, where the appellant was admitted. PW3 found that the complainant herein had been stabbed on the hand, and he gave the complainant a P3 medical-reporting form, which was subsequently filled in by a Police doctor. The appellant herein was charged, after his injuries had healed.

The appellant herein, in his defence, gave an unsworn statement and called no witness. He said he was a carpenter and lived at Kawangware Estate. He said he went to his workshop on the morning of 27th February, 2005, opened up, and then did some cleaning-up work at a neighbouring petrol station; then, as he was returning the cleaning-up bucket to his workshop he met two people who fell upon him with physical assaults, and who were then joined by others from the said petrol station. The said two people took the appellant, to the Police station; he was later taken to Kenyatta National Hospital where he stayed for three days before being returned to the Police station and charged.

The learned Principal Magistrate thus assessed the foregoing evidence adduced before the Court:

> **"From [the] evidence of PW1 and PW2 the events occurred….in their presence, and the accused never left their sight until he was arrested. There was no problem of identification as it was about 6.30 a.m. in the morning when there was enough light to see what was happening.**
>
> **"The accused's defence on the other hand, does not in any way shake the prosecution case. There is no motive [suggested] which would have made the complainant plant this case on the accused, yet the two had not known each other before.**
>
> **"I find the prosecution has established their case against the accused beyond [any] reasonable doubt. I find [the] accused guilty as charged, and convict him accordingly under section 215 of the Criminal Procedure Code."**

The appellant appeared before this Court bearing written submissions, founded on his amended grounds of appeal. Although the appeal should have been argued on the basis of the grounds filed by the applicant on 15th February, 2006 this Court considered it practical to still entertain the new grounds, in view of the fact that the appellant was subject to the disadvantage of acting in person. The appellant's new grounds were as follows:

i. that the charge against him was defective, and should not have led to conviction;

ii. that the evidence tendered had been "meagre and flimsy" and was not a proper basis for entering a conviction;

iii. that the conduct of trial had not been fair;

iv. that the trial Court had erred in fact and in law, by relying on the evidence of a single identifying witness;

v. that the trial Court erred in fact and in law by rejecting the defence case.

Responding to the foregoing contentions, and to the submissions thereupon, learned counsel ***Mr. Makura*** urged that overwhelming evidence in support of the charge of robbery with violence, had been adduced in

Court. The offence took place at 6.30 a.m, and, apart from the complainant, members of the public (including PW2) had come along and perceived the appellant's involvement in the crime. The crime was followed by attempted flight by the appellant and his accomplice – and it is as he fled, that the appellant was apprehended, only a short distance from the *locus in quo*. ***Mr. Makura*** urged that the chain of events, from the moment of commission of the offence to the moment of arrest, had been unbroken. It is the members of the public arresting the appellant, who progressed with that course of apprehension from the material moment, to the moment of delivery of the appellant to PW5 at the Police station, for re-arrest. The doctor (PW4) who examined the complainant, had confirmed that the complainant was assaulted, and had classified the resulting injury as "harm."

Learned counsel submitted that the evidence brought by PW1, PW2, PW3 and PW4 clearly supported the charge of robbery with violence. Counsel urged that the evidence of identification was not contestable, especially when taken together with the evidence of arrest of the appellant herein. By contrast, it was submitted, all the appellant had brought in by way of defence, was an unsworn narrative which only dealt with circumstances said to have led to his arrest: "The Magistrate considered it all, and found it to cast no doubt on the overwhelming evidence from the prosecution witnesses."

Counsel contested the contention that the charge brought against the appellant was defective; for it could not be said violence was not an ingredient in the attack upon the complainant: the appellant bore a knife at the time of the incident, was accompanied by a fellow-robber, and indeed, did visit violence upon the complainant. So, ***Mr. Makura*** urged, all the conditions in s.296(2) of the Penal Code (Cap.63) attached to the offence of robbery with violence, were present.

Mr. Makura disputed the appellant's contention-in-gross, that he had been denied a fair trial; in the words of counsel: "he was accorded a fair trial, with all constitutional and procedural safeguards.

Counsel contested the claim that the appellant had been convicted on the evidence of a single identifying witness. The testimonies of PW1 and PW2, it was urged, was mutually corroborative, and showed the appellant to be one of the two robbers who had attacked the complainant on the material date.

A point belatedly raised by the appellant was that at the time of plea-taking, he had asked for translation into the Borana language, but that this request had not been acceded to. Learned counsel ***Mr. Makura*** addressed this new point, and noted that on 6th April, 2005, the trial Court had adjourned, when the appellant made the request for a Borana interpreter. When the matter resumed on 14th October, 2005, interpretation in Kiswahili was done, and the record shows that the appellant did cross-examine the witnesses; in particular he did cross-examine PW2, PW3 (at length), PW5. On the question of language, counsel urged, the appellant was not prejudiced. And he urged that, should this Court find any prejudice to have taken place during the hearing, then he would ask for orders for a retrial.

In our assessment, the time of day when the offence took place would have facilitated clear vision. We, in this regard, take judicial notice that in Nairobi's location, only several degrees south of the equator, the state of natural lighting at 6.30 a.m. would be good and would not impair visibility. In these circumstances, we do not doubt that PW1 was properly able to see his attackers. But we do not, in any case, view PW1's evidence of identification as standing all by itself. What, specifically, is under investigation is whether the appellant at the material time robbed from the complainant. Yet the robbers who were being sighted and pursued as they decamped from the scene of crime, were, while in that motion, seen by persons other than PW2, and one of them, the appellant herein, was arrested. That continuum of crime – robbery and assault, then flight – may, in law, be proved by common evidentiary process, under the doctrine of *res gestae*. The principle is explained in ***Sir Rupert Cross and Nancy Wilkins,*** *An Outline of the Law of Evidence*, 4th ed. (London: Butterworths, 1975) (at p.159):

> **"It is sometimes said that facts may be proved as part of the *res gestae* when they form part of the same transaction as that under investigation. For example, a man is charged with murder, and it is proved that the culprit stole a car immediately after the incident in order to effect his escape."**

In the instant case the appellant is perceived by PW1 attacking him and robbing him, while the appellant is armed with a knife. As the appellant decamps with his accomplice, a number of persons (including PW2) see them as they jostle to disappear; but the appellant is chased by those others who observe him, and they (including PW2) catch him with the very knife which it is said he used to execute his robbery with violence. This chain of circumstances, by the doctrine of *res gestae*, may be proved together by evidence; and the conclusion we have come to is that PW2's testimony very well corroborated that of PW1, to the effect that the appellant was identified as one of the two robbers on the material morning.

Since we are clear that there is overwhelming evidence of the commission of the offence charged by the appellant herein, the only question left is whether there was any irregularity in the trial such as should be held to nullify the trial Court proceedings.

On the occasion of plea-taking, on 2nd March, 2005 it is recorded thus:

> **"The substance of the charge and every element thereof has been stated by the Court to the accused person, in the language that he understands….."**

And the recorded plea is "Not Guilty". This Court, as a Court of record, will take the foregoing record as valid; and we note, besides, that the appellant could not then have been prejudiced, as the plea recorded is a *non-admission of guilt.*

After PW1 gave testimony, the appellant stated he was more conversant with the Borana language than Kiswahili. After several adjournments, testimonies continued, with interpretations in Kiswahili; and the appellant cross-examined PW1, PW2, PW3, PW5.

Although we think the appellant's intimation regarding his preference for Borana-language interpretation should have been addressed more squarely, and a record in that regard kept, we find as a fact that the hearing *did take place with Kiswahili interpretations*; that the appellant *made no further complaint*; and that the appellant fully exercised his *rights of cross-examination* of prosecution witnesses. So long as those elements were achieved, no appearance of infringement of the appellant's trial rights is left. The importance of the requirements for suitable language interpretation is that they enable an accused person to hear and be heard, as part of the trial process. This Court must set its sights particularly on that practical angle to communication in Court, as it is this that empowers or disempowers an accused person during a criminal trial. From the facts before this Court, we would conclude that the appellant had not suffered any disadvantage during trial, on account of difficulties of language. Accordingly, we disallow this belatedly-adopted ground of appeal. Were we to be wrong on this point, especially in the light of our earlier determinations based on the evidence, then we would have ordered a retrial.

In the light of our findings on the basis of the evidence, we hereby dismiss the appellant's appeal; uphold conviction; affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 6th day of May, 2008.

J.B. OJWANG	**H. A. OMONDI**
JUDGE	**JUDGE**

Coram: Ojwang & Omondi, JJ.

Court Clerk: Huka & Erick

For the Respondent: Mr. Makura

Appellant in person