REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 103 of 2005

BERNARD K. MASAKU…..……..APPELLANT

VERSUS

REPUBLIC.…….....RESPONDENT

JUDGMENT

The appellant in this appeal, Bernard Kioko Masaku was charged in the Senior Resident Magistrate's Court at Taveta in SRM CR. Case No. 394 of 2004 with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 19th November 2001 at 7.30 p.m. at Njukini village in Taita Taveta District of the Coast Province jointly with others not before court, robbed Emmanuel Wambua of Kshs. 200.00 and at or immediately before or immediately after the time of such robbery wounded the said Emmanuel Wambua. He pleaded not guilty but after a full hearing K. Muneeni the Learned Senior Resident Magistrate convicted him of the said offence and sentenced him to death.

Being dissatisfied with the conviction and sentence, the appellant has appealed against the same on six (6) grounds which allege breach of Section 121, 134, 141 and 355 of the C.P.C. The appellant further challenges the Leaned Senior Resident Magistrate's findings on facts regarding items allegedly recovered at the scene and the conclusion arrived at with respect to the evidence on the dying declaration allegedly made by the deceased. There is also a challenge that the appellant was convicted on a defective charge and that the Learned trial Magistrate erred in rejecting the appellant's defence.

The brief facts of the case as can be gleaned from the record are as follows: Emmanuel Wambua (deceased) together with Benson Msonga Munga (PW3) left their kiosks at Njukini on their bicycles heading for their homes. That was at 8.00 p.m. on 19th November 2001. PW 3 arrived at his home first and the deceased continued. Shortly after, PW3 heard the deceased screaming calling out his name and saying he was being beaten. PW3 went to where the deceased was and the deceased told him that he had been beaten by Joshua and the appellant and had lost Kshs. 200.00. The deceased had a head fracture. PW3 was joined by Benson Mwanzia Wambua PW2 and James Kimeu Kiminza PW5 who had also heard the screams of the deceased. The deceased also told PW2 who is his twin brother that he had been beaten by the appellant and Joshua Ndulu who had fled from the scene. The deceased further told him that the duo had stolen his Kshs. 200. PW2 also noticed that the deceased had serious injuries on the head, left leg and rib. PW2 found a blood stained cap and knife which belonged to the appellant. PW5, however, did not hear the deceased mention his attackers.

PW3 took the deceased on a motorcycle to Njukini Dispensary where the deceased received first aid. He then took him home where the deceased was received by his wife Loice Kavoi (PW1). She asked the deceased what had happened and the deceased told her that he had been beaten by the appellant and in the process had lost a pen, a watch and Kshs. 200.00.

The following day the deceased was taken to Taveta District Hospital where he died at 7.00 p.m. PW2 and PW5 reported the attack on the deceased to the Administration Police Officers at Taveta D.O.'s Office the same night of the attack at 9.30 p.m. The report was received by PW6 Sergeant Peter Njoroge. The sergeant together with PC Koskey accompanied PW2 and PW5 to the deceased's home where he observed that the deceased had a swollen head and was unable to talk. The team then proceeded to the home of Francis Ndunda Mutuku PW4 to whom the cap found at the scene was alleged to belong. PW4 acknowledged that the cap was his but added that he had given the same to the appellant on 16th April 2001. The team proceeded to the appellant's home. They found him with Joshua Ndulu. The appellant admitted that he had been given the cap by Francis Ndunda Mutuku PW4 and both the appellant and Joshua Ndulu were arrested and taken to Taveta Police Station where they were rearrested and charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. PW7 was the re-arresting officer and produced the post mortem form and photographs of the deceased.

The appellant as we have already said denied the charge and testified on oath that on the day of the robbery, he left his butchery for home at 5.00 p.m. and arrived 30 minutes later. He retired to sleep at 8.00 p.m. At midnight some people knocked at his door. Those people included two Administration Police Officers who showed him a cap which he knew nothing about. The people then asked him to accompany them. At his gate there were many people who included Ndunda who was then in handcuffs. The appellant together with his cousin Joshua Ndulu were then taken to Taveta Police Station where they, together with Ndunda, were placed in cells. He was asked to produce Kshs. 10,000/= in exchange for his release but he refused. Ndunda however complied and was released. From his testimony, it is clear that the appellant put forward the defence of alibi.

That was the case upon which, the Learned Senior Resident Magistrate convicted the appellant and sentenced him to death. Before doing so, the Learned trial Magistrate was satisfied that there was indeed a robbery in which the victim (the deceased) died but before his death, had talked to his wife Kavoi (PW1), Benson Mwanzia Wambua (PW2), Benson Msonga (PW3) and James Kimilu (PW5). The Learned trial Magistrate found the evidence of the four witnesses credible and corroborative of the fact that the deceased was attacked by the appellant and Joshua Ndulu. That evidence, according to the Learned trial Magistrate, was buttressed by the finding that the appellant sought to settle the matter out of court at the time the appellant was apprehended. The Learned trial Magistrate further found as proved the fact that the cap recovered from the scene belonged to Ndunda PW4 from whom the appellant had obtained the same a week or so before the robbery.

This being a first appeal, it is incumbent upon us to make an independent evaluation of the evidence and draw our own conclusions while of course, recognizing that we have not had an opportunity to see or hear the witnesses and should give allowance for that. There is now a plethora of case law for that proposition and if one is required. See Okeno – v – Republic [1972] EA 32. See also Nguli – v – Republic [1984] KLR 729.

The conviction of the appellant in this case depended on (1) what the victim of the robbery, the deceased, told PW1, PW2, PW3 and PW5 before he died; (2) what the appellant told PW2, PW3, PW5 and PW6 and (3) the finding at the scene of a cup which had been, prior to the robbery, in the possession of the appellant.

It is important to appreciate that the appellant was being tried afresh after the first trial was declared a nullity. In this regard the observations made by the Learned trial Magistrate on the appellant's first trial are unfortunate. He said as follows at paragraph 'J5':

"A dilemma these days arises when a High Court orders for re-trial just because the prosecutor was not an Inspector or so as the law requires. Does this imply the findings of a trial court are invalid on that ground alone given that prosecutor relied on evidence on record (Police statements). I hope the superior court will consider this issue for the sake of posterity and development of case load/(sic) rule of law."

We say that this observation was unfortunate because it reveals a latent revulsion to the order of retrial and we are not sure that the attitude of the Learned trial Magistrate did not operate to the prejudice of the

appellant. It certainly did so with respect to the trial Magistrate's findings of fact with respect to the recovery of the cap at the scene of the robbery. PW2, Benson Mwanzia Wambua, testified of finding the cap at the scene which cap he had seen the appellant wearing the same evening of the robbery. PW5, James Kimeu, also said a cap was recovered at the scene. The Learned trial Magistrate on the evidence of the two witnesses, held that indeed a cap was collected from the scene. The cap was however not produced but the Learned trial Magistrate found that the cap had been produced at the first trial. With due respect to the Learned trial Magistrate, the production of the cap at the first trial of the appellant did not remove the obligation to produce the cap at the retrial from the prosecution. The prosecution still bore the burden to prove the facts they intended to rely upon to secure the conviction of the appellant. Since the cap was not produced, our conclusion is that the findings of the trial Magistrate, with respect to the recovery of the cap at the scene of the robbery, had no sound basis. It is obvious to us that the Learned trial Magistrate in finding that the cap was collected from the scene of the robbery relied upon evidence that had been adduced at the first trial which basis in our view was prejudicial to the appellant. As the evidence of finding the cap at the scene of the robbery was not adduced by the prosecution, reliance upon the same by the Learned trial Magistrate was clearly a misdirection.

That leaves the evidence of what the Learned trial Magistrate described as the "confession" and the "dying declaration." With respect to the confession the Learned trial Magistrate observed as follows:-

"This "confession" was on the first day the accused was arrested. Accused denied the charge. The said "confession", are (sic) therefore not very relevant to prove the robbery but they are of some relevance coming from the people who had the first contact with the accused."

The Learned trial Magistrate whilst stating that the "confession" was not relevant to prove the robbery, went ahead to found his conviction on the very same "confession." He said so towards the end of his judgment. He said:

"I based my conclusion on the main findings of fact mentioned above to wit the cap found at the scene and the 'confession' before death by the victim – Emanuel to several persons."

The alleged "confession" was purportedly heard by PW2, Benson Mwanzia Wambua. The weight of his evidence was however, reduced by the fact that part of his evidence appears to have been given unsworn in contravention of Section 151 of the Criminal Procedure Code. PW3 also testified that the appellant had admitted beating the deceased and wanted the matter settled. It is doubtful whether that statement amounts to a confession of the offence of robbery with violence. The evidence on the alleged confession is further weakened by the fact that PW4, Francis Ndunda Mutuku, PW5, James Kimeu Kiminza, and PW6 Sgt. Peter Njoroge who were together with PW3 did not mention the "confession". Indeed Sgt, Peter Njoroge specifically denied hearing any statement from the appellant at the time of his arrest.

In our view therefore, the evidence on the alleged "confession" by the appellant apart from being of the weakest kind was not reliable at all and the Learned trial Magistrate after correctly finding that it was not very relevant misdirected himself when he went ahead to hold that the confession provided "some relevance."

What now remains to be considered is the evidence on the alleged dying declaration. PW1 Loice Kavoi testified that when the deceased was taken home by his neighbour Nyamu, she asked the deceased what had happened. The deceased told her that he had been beaten by Kioko Masaku, the appellant, and had lost a pen, a watch and Kshs. 200/=. The deceased spent the night at his house and was taken to Taveta District Hospital where he died at 7.00 p.m. the next day.

PW2, Benson Mwanzia Wambua, testified that on 19th November 2001, at 8.00 p.m. he heard the deceased screaming calling for his name. He went to the scene and found the deceased seated on a footpath. The deceased told him he had been beaten by the appellant and Joshua Ndulu who had also stolen his Kshs. 200/=. He observed that the deceased was seriously injured on the head, left leg and rib. PW2 found PW3, Benson Msonga Murage, at the scene. The latter testified that they had just parted with the deceased at 8.00 p.m. on 19th November 2001 when he heard the deceased screaming and calling out

his name. He went to the scene and found him down. The deceased told him that he had been beaten by the appellant and Joshua Ndulu. He observed that the deceased had a head fracture. The deceased also said that he had lost Kshs. 200/=. PW3 took Nyambu's motorcycle and took the deceased to Njukini Dispensary where he was given first aid.

So, the evidence on the dying declaration was given by no less than three witnesses: PW1 Loice Kavoi who was the deceased's wife, PW2, Benson Mwanzia Wambua, the deceased's twin brother and PW3, Benson Msonga Munga. Was that evidence sufficient to found a conviction of the appellant? We are alive to the legal position that there need not be corroboration in order for a dying declaration to support a conviction. We are also alive to what has evolved over time that the exercise of caution is necessary in the reception into evidence of a dying declaration as it has been found generally unsafe to base a conviction solely on the dying declaration of a deceased person. (See the case of Choge – v – Republic [1985] KLR 1).

We have considered and re evaluated the evidence of the three witnesses. Having done so, we have come to the conclusion that it was not safe to rely upon the evidence of the dying declaration. We have come to that conclusion after a careful scrutiny of the evidence of the three witnesses who have testified on the dying declaration and the evidence of the other witnesses who were with the deceased. We have also carefully considered the prevailing circumstances at the time of the robbery.

Starting with the evidence of PW2, Benson Mwanzia Wambua, we have already found that his evidence was discredited on the material ground that a substantial portion of the same was given unsworn contrary to the provisions of Section 151 of the Criminal Procedure Code which reads as follows:-

"151. Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."

On that basis alone, it was unsafe to rely upon the evidence of PW2 to support the dying declaration.

There is then the evidence of PW1, Loice Kavoi, the deceased's wife. She testified as already stated that on her enquiry from the deceased of what had happened, he told her that he had been beaten by Kioko Masaku the appellant. It is noteworthy that the deceased did not mention the name of Joshua Ndulu who was alleged to have been with the appellant during the alleged robbery. PW1 also testified that the deceased asked for porridge and when she served him with the same, he vomited blood and slept. There is no doubt that the deceased had been gravely injured. The deceased's serious condition was confirmed by PW6, Sgt. Peter Njoroge, who testified that when he, together with PC Koskey, visited the deceased at his house in the night of the robbery, the deceased had a swollen head and could not talk to them. PC Ronald Kiprop (PW7) confirmed the testimony of PW6 Sgt. Peter Njoroge. He testified that when she talked to the deceased the following day, he could not speak. The serious condition of the deceased can also be gleaned from the testimony of PW3, Benson Msonga Munga. He observed that the deceased had a head fracture.

From the above evidence, there can be no dispute that the deceased received very severe injuries involving his head. The post mortem report revealed that the cause of death was intra-cranial Haemorrhage with brain damage. Is it not possible that the deceased made the alleged statements at a time when exhaustion and strong physical pain may have deadened all feelings and confused his intellectual powers? (See Choge – v – Republic (supra)). These considerations assume grave importance when consideration is taken of the fact that the deceased appeared to have without basis, determined to whom he would disclose who had attacked him. In saying so we have considered the evidence of Sgt. Njoroge (PW6), PC Ronald Kiprop (PW7) and Kavoi (PW1). Of more importance in this regard is the testimony of PW5 James Kimeu Kiminza. He was among the first witnesses who talked to the deceased immediately after the robbery. He testified that when he heard the deceased screaming he answered the distress call and found the deceased seated. He asked him what the matter was, upon which the deceased answered, that he had been beaten by two people who had ran away. The deceased showed him where he had been beaten but did not mention the names of the assailants.

We have also noted that the robbery took place at around 8.00 p.m. It was therefore at night. There was no evidence led on how the deceased could have identified his attackers. The record does not also show whether there was moonlight and how long the robbery took place.

All the above circumstances must be taken into consideration while receiving evidence of dying declarations. We regret that we have not been able to find evidence that the trial Magistrate had those considerations in mind when he received the statements attributed to the deceased. It does not matter that the deceased told different persons that the appellant was the assailant.

The above principles were laid down as early as the year 1954 by the then Court of Appeal for Eastern Africa. (See the case of Pius Jasunga s/o Akungu – v- Reginam [1954] 21 EACA page 331. It was held *inter alia* as follows:

(1) "The admissibility of a statement by a person who has died as to cause of death depends on the Indian Evidence Act Section 32, the weight to be attached to such statement being less than attaches to a dying declaration in England and depend to a great extent on the circumstances in which it was given.

(2) Caution must be exercised in the reception as evidence of dying declarations particularly as to identification when the attack has taken place in darkness.

(3) …...……

(4) There is no rule of law that to support a conviction there must be corroboration of a dying declaration but it is generally very unsafe to base a conviction solely an uncorroborated dying declaration.

(5) That the deceased told different persons that X was his assailant is evidence of consistency but not a guarantee of accuracy."

In the above case, the declaration was made in answer to questions by a police officer and the deceased had suffered a terrible wound. The position in this case is more grave. The deceased suffered a grave head fracture and was bleeding in the brain, the nerve centre of all operations of the body. The possibility of confusion or less than perfect recollection was real. It would not be safe to base a conviction solely on the dying declaration. We do not think that the Learned trial Magistrate appreciated the inherent weakness in the dying declarations and should have exercised extreme caution when receiving the same. We have already found that the evidence of finding the cap belonging to the appellant at the scene was not reliable as the cap was not produced. We have also found that the statement purporting to be an admission by the appellant was also unsafe. There is in the circumstances, no other independent evidence to connect the appellant to the offence for which he was tried and convicted.

Before concluding this matter we briefly refer to the appellant's complaint that the charge as laid was defective on the ground that it did not contain the terms "dangerous" or "offensive." The appellant appeared in person and is not expected to know what technically constitutes the offence of robbery with violence under Section 296 (2) of the P.C. It is now settled that any one of the following need be proved to establish the offence.

(1) If the offender is armed with any dangerous or offensive weapon or instrument or

(2) If the offender is in the company of one or more offenders or

(3) If at or immediately before or immediately after the time of the robbery he wounds, strikes or uses any other violence to any person.

In this case, the particulars of the charge stated that the appellant was with another at the time of the robbery and further that at or immediately before or immediately after the time of such robbery wounded the deceased. It is plain therefore that two of the three ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code were given. It should be remembered that a single ingredient is

sufficient.

In view of the foregoing we are satisfied that the charge was not defective and the appellant's complaint on that score is without merit.

The upshot however, is that we have no option but to hold that the conviction of the appellant is unsafe. We allow the appeal and quash his conviction for the offence of robbery with violence and set aside the sentence of death.

The appellant should be released forthwith unless otherwise lawfully held.

Judgment accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF AUGUST 2008.

L. NJAGI **F. AZANGALALA**

JUDGE **JUDGE**

Read in the presence of:

Onserio for the Respondent and the Accused.

F. AZANGALALA

JUDGE

25TH AUGUST 2008