REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO.32 OF 2008

(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 817 OF 2004 SENTENCE OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILIFI BEFORE C. OBULUTSA – SRM)

CHIRO SONJE MBAGA …………………….APPELLANT

VERSUS

REPUBLIC ………………………...……RESPONDENT

J U D G E M E N T

Chiro Sonje (the appellant) was charged with the offence of robbery with violence contrary to section 296(2) Penal code particulars being that on the 30th day of October 2004 at about 3.45pm at Maweni area in Kilifi District within Coast Province, jointly with others not before court, while armed with knives, robbed Omar Mwinyi of cash 5,000/-, an identity card and personal documents and at or immediately before or immediately after the time of such robbery, wounded the said Omar Mwinyi.

The appellant denied the charge and the learned trial magistrate Mr. Obulutsa Senior Resident Magistrate upon hearing the evidence convicted the appellant on the charge and sentenced him to suffer death as provided by the law.

Omar Mwinyi (PW1) was at his home in Maweni on 30-2-04 where there was construction work going on. One Rasta, who was known to PW1 came accompanied by five people – he was the ring leader and he hit PW1 with a rungu several times. They then took PW1 and his workers to a booth which was under construction and took away Kshs. 5000/- from PW1 as well as his national identity card. Later on appellant was arrested and PW1 went to the police station and confirmed he was the attacker who is now the appellant. PW1 knew him as a member of the local vigilante group and that he referred to himself as "Rasta Moi".

PW2 (Ali Mwinyi) who was working at the construction site on the date in question confirms the incident and that the appellant is the one who took some documents from PW1. He only got to know the appellant on that day and says the incident occurred at 3.45pm.

On cross-examination PW2 stated:

"***I do not know your name . I did not know you before then …***

We did ask why you were attacking us. You told us not to ask…"

PW3 Mwazara Kwamu who was also among the workers at the site on the date in question confirms the incident and that out of the group of six people who attacked and beat PW1, one of them took items from

his pocket. On cross examination he stated:-

"***At the time, I was startled, I was still on the ladder then. You said that Mwinyi was not wanted in the area and should leave"***

Pc Nkuli (PW4) of Mtwapa Police received the report about the incident and he noticed that appellant had injuries and he identified the attacker as someone known to him. The appellant had been arrested over a different issue and when complainant learnt about this he informed PW4 and pointed out appellant to him when the complainant had gone to the police station to follow up on his case.

It was PW4's evidence on cross examination that:

"***The name complainant gave about you is Rasta Moi … Rasta Moi is a nickname which was given by complainant."***

PW5 Dr. Mwakagu examined PW1 and confirmed injuries which he assessed as harm and filled P3 form (exh.1).

The appellant in his defence confirmed that complainant was known to him. He explained that he'd differed with a neighbour who had arrested him – he was interrogated at the police station over issues which he did not know. Then someone who had visited him at the station was detained and released and appellant protested and was charged.

Upon hearing and evaluating the evidence, the learned trial magistrate noted that:

"***it is clear from his defence that accused is known to complainant who says he knows accused as a member of the local vigilante group."***

The learned trial magistrate noted that complainant gave the names to police as Rasta Moi and that when appellant later went to the police station to follow up the matter, he is the one who pointed him out in the cells. The learned trial magistrate then stated:

"***This confirms that the accused was positively identified on account of his familiarity. An identification parade was therefore not required."***

The learned trial magistrate noted that the evidence of the other two witnesses confirmed being attacked by the group and that PW1 was injured as confirmed by evidence of the doctor who produced the P3 form.

The learned trial magistrate was satisfied that the evidence showed that the offenders used actual violence by wounding their victim and were more than one.

In considering the appellant's defence, the learned trial magistrate noted that it dwelt more on his arrest and did not address the testimony of the prosecution witnesses which remained unchallenged.

At the hearing of the appeal, the appellant's counsel Miss Okumu relied on the amended grounds of appeal which stated that the learned trial magistrate erred in law and fact by:-

1. failing to consider that the said knives were not stated as dangerous or offensive weapons.

2. failing to consider that the alleged recognition was flawed as PW1 failed to mention his name and the charge sheet did not indicate that he had an alias name.

3. convicting him on allegations that he was Rasta – a name which other witnesses never mentioned.

4. did not consider that the source of his arrest had no connection with the present case.

5. not considering that when PW1 was recalled he was not cross examined under oath contrary to Section 151 Penal Code.

6. not adequately considering his defence.

Miss Okumu submitted that the charge sheet was defective as it stated that appellant was armed with a knife without describing it as a dangerous weapon: further she pointed out that it was only PW2 who said that appellant and his group were armed with knives yet complainant in his evidence said that appellant hit him with a rungu. She further argues that the charge sheet does not support the evidence adduced as regards time saying that although the charge sheet states that he offence took place at 3.45pm none of the witnesses referred to the time in their evidence.

Further that although the charge referred to is robbery, the P3 form refers to complaining being assaulted and so does not support the charge.

The appeal both on conviction and sentence is opposed by the learned Assistant Deputy Principal Prosecutor (Mr. Ogoti) who has submitted on the aforegoing limb, that, the charge sheet was not defective and that the omission of the words "dangerous and/or offensive weapons, did not render the charge defective. It is Mr. Ogoti's contention that the evidence is very clear that complainant and others were attacked by more than two persons who were armed and who took documents from him. He points out that robbery with violence must have three ingredients and where it is a single robber, then it is necessary to indicate that he was armed with a dangerous or offensive weapon.

We recognize that the charge sheet does not describe the knives as dangerous weapon – yet would such an omission negate the fact that when used in the commission of an offence a knife is actually a very dangerous weapon which can be used to not only threaten or create fear but even injure and cause fatal injury. We think there is a lot of hair splitting based on mere semantics and adjectives at the expense of substantive reality. Isn't it a known fact and a matter which the courts should take judicial notice that a knife though in its innocent and natural state can be an implement or tool – can easily be turned into a dangerous weapon by an individual with criminal intent. We are keenly aware of the provisions of section 296(2) of the Penal Code.

(2) If the offender is armed with any dangerous or offensive weapon or is in company with one or more other person or persons, or if at or immediately before or immediately after the time of the robbery, the wounds, beats, strikes or uses any other personal violence to any person…"

The Penal Code does not define what a dangerous weapon is in the interpretation section, but if one is to apply the principles of interpretation, or the ordinary meaning of words in their natural content or the rule of *ejus* *dem* *generis* then a dangerous or offensive weapon is something which has the possibility of causing harm or injury or be used in aggression. A knife is a cutting instrument which may injure. Just because PW1 says he was hit using a rungu does not prove that there were no knives.

Our finding is that the omission alluded to does not create a fatal defect to the charge sheet. As regards the time when the offence took place, we think that what is important is whether the incident occurred in broad daylight or in darkness as to compromise the chances of positive identification. PW1 stated that they were locked up in a booth and managed to free themselves at 5.00pm – there is nothing to suggest that they remained inside the booth overnight. This is fortified by PW2's answer in cross examination.

"***The incident happened at 3.45pm***"

We therefore find that the evidence on time supports what is stated in the charge sheet.

As for the P3 form referring to the incident as assault, Mr. Ogoti submitted that it is supported by evidence from the three witnesses that PW1 was actually hit – that indeed is the thread that runs through out the evidence of all the prosecution witnesses BUT of greater importance we think is this – a P3 form is a medical document – a report which outlines the type of injuries noted by the medical officer upon

examining an individual who alleges to have suffered injuries and an assessment by the medical officer as to the nature of the injury. It is not a charge sheet, its role is to build up on the claim by prosecution that complaint was injured during the incident and thus complete a vital ingredient of wounding as envisaged by section 296(2) of the Penal Code.

Our finding therefore is that there is no fatal defect in the charge sheet as to render the proceedings improper or a nullity.

Miss Okumu also submitted on the question of identification saying that at the time the complainant made a report at the police station, he did not name the appellant or other persons, nor did he give a description of any features of the six persons who assaulted him. Further that since PW3 stated that the assault was sudden then identification must have been difficult and an identification parade ought to have been conducted when the complainant pointed out the appellant at the police station. Miss Okumu argues that the evidence on identification was not safe nor positive to enable the trial magistrate convict the appellant.

Mr. Ogoti's response to this is that the evidence of PW1 is that appellant was known to complainant as Rasta and the assailant even talked to the witnesses, asking them to stop construction and that complainant even made a report to PW4 saying that he had identified the leader of the group as someone he knew. It is the learned Assistant Deputy Principal Prosecutor's contention that there was the evidence of PW3 which repeated the evidence of PW2, and which evidence placed the appellant at the scene. He argues that identification was proper and there was no need for an identification parade as it was a case of recognition under the most favourable conditions. Surely what logic would there be in conducting an identification parade

(a) in respect of someone who is already known to the witness

(b) someone who the witness had already seen and pointed out to the police at the police station?

We find that it would not only be an exercise in futility, it would be a mockery of all manner of sensibilities. Appellant was not only know to complainant by the nickname "Rasta Moi"- he was known to appellant physically – he confirmed that in his evidence and PW2 and PW3 also confirmed that he was the man who led a group which attacked a robbed PW1.

But what about the fact that the charge sheet refers to appellant as Charo Sonje and makes no reference to an alias name of Rasta Moi- is that a fatal omission?

We hold that given the actual physical recognition not only by PW1 but also PW2 and PW3, that omission is not fatal.

Mrs. Okumu also poked holes at the P3 form saying that the injuries could have been caused by kicks, fists and metal bars. She also argues that evidence by the witnesses also differs as to what was taken away from the complainant because PW1 refers to Ksh. 5000/- an identification card and elector's card, PW2 says they took some documents while PW3 says they took some items. Miss Okumu submits that this evidence does not conclusively describe what took place at the scene and that none of the witnesses describe the events properly. It is also her contention that no investigations were carried out by the investigating officer.

We have already addressed in the earlier part of this judgment the purpose of a P3 form and we need not belabour the issue. The learned Assistant Deputy Principal Prosecutor submitted on this point that the evidence of PW2 was that appellant took some documents from complainant's pocket and that this evidence is reiterated by the evidence and PW3. He emphasized that all the witnesses referred to the appellant's act of removing items from PW1's pocket and that its only PW1 who could say exactly what was taken and there is no contradiction. We cannot fault that line of reasoning and concur with Mr. Ogoti.

Mrs. Okumu also took issue with the proceedings saying they were irregular and a nullity because PW1 was stood down on 18-1-2005 and recalled to testify on 25-2-05 yet there is no record that he was reminded that he was still on oath. She cited the provisions of section 151 Criminal Procedure Code saying it is mandatory that every witness be examined upon oath.

The provisions of section 151 Criminal Procedure Code are that:-

"*Every witness in a criminal case shall be examined upon oath, and the court before which any witness shall affirm shall have full power and authority to administer the usual oath.*"

Mr. Ogoti's response to this is that even if the witness was not reminded that he was on oath and even if that piece of evidence is to be expunged from the record, the rest of the evidence remains on record as it was properly taken. We indeed confirm that when PW1 gave evidence on 18-1-005, it was on oath and even cross examination began when he was still on oath. However, he was stepped down after appellant requested for time to get statements of witnesses before proceeding. When he was recalled on 25-2-05 (all the record does not specify that he is the one recalled and we can only draw an inference from the record) the cross-examination proceeded without an indication that he was reminded of being on oath. We therefore find that this cross examination did as a matter of fact contradict of the provisions of section 151 Criminal Procedure Code and we expunge the evidence of PW1 on cross examination given on 25-2-05. However that does not nullify the proceedings because the rest of the evidence was by PW1 and all the other witnesses evidence properly complied with section 151 Criminal Procedure Code.

The last limb of Mrs. Okumu's submissions is that the trial magistrate disregarded the evidence of appellant and treated it perfunctorily. She argued that appellant was under no duty to raise a serious defence or elicit a strong defence by cross examining witnesses and that it was for prosecution to prove the case and that the evidence of the prosecution witnesses was scanty, imprecise and exaggerated.

We concur that it is the duty of the prosecution to prove its case and the question here is – did the learned trial magistrate shift the burden of proof onto the defence and disregard the defendant's evidence?

Mr. Ogoti's response is that there was no shifting of the burden of proof and that simply because the learned trial magistrate said appellant's defence did not challenge the facts given by prosecution does not in any way shift the burden. Mr. Ogoti explained that the learned trial magistrate simply meant that prosecution case was not challenged.

Actually the learned trial magistrate in fact considered the appellant's defence and noted that it dwelt more on the arrest and did not address the testimony of the prosecution witness which therefore remained unchallenged. Indeed a look at the defendant's statement of defence confirms the learned trial magistrate's observation and this is no way amounted to shifting the burden of proof.

Our finding is that the evidence was properly considered and did prove the charge preferred.

Consequently the appeal has no merit and is dismissed. We uphold the conviction and confirm the sentence meted.

Delivered and dated this 24 day of September 2008 at Malindi.

L. NJAGI **H. A. OMONDI**

JUDGE **JUDGE**