REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & OMONDI, JJ.)

CRIMINAL APPEAL NO. 503 OF 2006

-BETWEEN-

ABDI MOHAMED IBRAHIM.....…….....APPELLANT

-AND-

REPUBLIC…….……..…….…….…….RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Mr. Ingutya dated 10th August, 2006 in Criminal Case No.125 of 2004 at Wajir Law Courts)

JUDGEMENT OF THE COURT

The appellant faced the charge of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya) in two counts. Firstly it was stated that the appellant, on 9th September, 1999 at Lafaley Location in Wajir District, within North Eastern Province, jointly with others not before the Court, while armed with dangerous weapons namely AK 47 rifles, robbed ***Bishar Abdi Hussein*** of cash, Kshs.6000/=, a pair of shoes worth Kshs.500/=, a Rado wrist-watch worth Kshs.5000/=, one blanket worth Kshs.460/=, 25kg. of sugar worth Kshs.1000/=, and a motor vehicle driving licence, and at, or immediately before, or immediately after the time of such robbery, used personal violence against the said ***Bishar Abdi Hussein***.

In the second count it was charged that on the same date and at the same place, the appellant and his associates robbed ***Abdi Ahmed Abdi*** of cash (Kshs.3,000/=), one bed sheet, a Marathon wrist-watch, and one pair of open shoes – and at, or immediately before, or immediately after the time of such robbery, used personal violence against the said ***Abdi Ahmed Abdi .***

In his judgment, the Magistrate stated that he would make no findings on the first count, as the complainant did not turn up to give evidence. But on the second count he found the appellant guilty, and sentenced him to death as required by law.

Conviction was arrived at purely on the basis of circumstantial evidence, and several passages in the trial Court's assessment of evidence may be set out here:

> **"The evidence on record reveals that the accused was found bleeding in the same area where the complainant had been attacked and where PW4 and Police officers had pursued and killed one bandit and injured another by a bullet or bullets.**

> **"The accused admitted that he had a bullet wound but maintained that he had been shot by bandits. My careful analysis of the circumstantial evidence herein is that the accused was certainly one of those who robbed the complainant *because he had a gun wound inflicted by PW4 or one of the officers accompanying him* in pursuit of the robbers and *he offered no reasonable explanation as to how he came to be injured*".**

The original grounds of appeal are not clearly worded, it emerges that the appellant is questioning the findings of the trial Court, as founded on a misdirection on both law and evidence. The appellant appeared before the Court with written submissions which also embodied a restatement of the grounds of appeal; these grounds are as follows:

i. that the circumstantial evidence relied upon by the Court, did not conclusively point to the appellant's guilt;

ii. that the trial Court had overlooked the need for language interpretation, as required by s. 77 of the Constitution, and s.198 of the Criminal Procedure Code;

iii. that the prosecution evidence had been contradictory;

iv. that the prosecution had not proved their case beyond reasonable doubt;

v. that the trial Court had not taken the appellant's evidence into account.

In the end the appellant did not have any formal submissions to make, as learned counsel for the Appellant had conceded to the appeal.

Mr. Makura for the respondent, urged that there was insufficient evidence to support conviction for capital robbery. It had been claimed, at the time of arrest, that the appellant was the man who had been shot by the robbers as they fled; and this provided a reasonable explanation of how he came to be injured.

PW1, the second complainant, gave evidence before Principal Magistrate ***Mr. Kingori*** on *26th April, 2007* and, as the testimony proceeded, the prosecutor ***(Inspector of Police Juma)*** made an application:

> "I wish to stand the witness down, as I look to see whether the wrist-watch exhibit can be traced. This is a Lafaley matter and is [a] retrial. This exhibit had been produced".

The Court then directed:

> "Witness stood down. Hearing adjourned to 17th May, 2005".

Before Principal Magistrate ***Mr. Kingori***, on 2nd August, 2005 the ***Inspector of Police Magunga,*** the prosecutor, said:

> "The exhibit rifles were destroyed …The watch exhibit in count 2 has not been availed…"

PW1, who had been stood down, was not again called to complete his testimony. On 30th August, 2005 Principal Magistrate ***Mr. Kingori*** began hearing PW2, ***Yussuf Abdullahi Amin,*** the Assistant Chief of El-Nur Location, who gave the shortest testimony about an elder who had once told him he saw a man bleeding under a tree, and the fact that this man was the Appellant herein. PW2 had then handed the bleeding man, who said he was attacked by robbers, to the Police.

Principal Magistrate ***Mr. Kingori***, who mentioned the matter on 15th February, 2006 and again gave the prosecution "last adjournment" to 23rd March, 2006 , and then again to 27th April, 2006, ceased to handle the matter, and the hearing of PW4 took place before Senior Resident Magistrate ***Mr. Ingutya*** on 15th May, 2006. Although ***Mr. Ingutya***, on 27th April, 2006 recorded: "Section 200 of CPC complied with", it

is not expressly stated whether the Court explained to the appellant herein that he had a *right of witness-recall.*

Mr. Makura submitted that since the second complainant was not recalled, there was *insufficient evidence* to establish the prosecution case. Besides, counsel urged, there had been a shifting of the burden of proof, when the learned Magistrate ruled that the appellant should have called a witness to prove that he had been shot by robbers and not by the Police. Counsel *stated* the commonplace principle applicable in criminal evidence, that "the onus [of proof] was always on the prosecution". He urged that the appeal was a meritorious one.

We are in agreement with the position urged by ***Mr. Makura***. There was no direct evidence in this case, save for that of the second complainant; but this witness did not complete giving his evidence, and the portion of his evidence rendered, in our view, did not provide proof of guilt on the part of the appellant. *Incomplete evidence*, moreover, in our view, is not, as a general principle, valid testimony which may be held to prove guilt on the part of an accused person.

Once PW1's evidence is excluded as above-indicated, only circumstantial evidence then remains as the basis of the prosecution case: but there is not shown, in our judgment, such circumstantial evidence as is irreconcilable with the innocence of the appellant. We also consider, in this regard, that the trial Court was misguided when it held that a mere statement by the appellant that he had been shot by robbers was not enough, and that he should adduce cogent evidence to establish that allegation; his only responsibility in law was to raise doubts about the prosecution case; it was for the prosecution to disprove his claim, and to establish that he had been shot as he executed a robbery.

The prosecution case in this regard, we would note, was woefully inadequate, and it was a wrong inference in the trial Court's judgment, that the appellant *was* the robber "because he had a gun wound inflicted by PW4 or one of the officers accompanying him". Such an inference was, with respect, a pure conjecture; there was no evidence that the appellant's wound was caused by *PW4's gun*, or the gun of one of PW4's associates: this was material for proof by ballistics evidence – extracting the bullet and determining the gun that fired it.

It was wrong in law, with respect, for the learned Magistrate to require that the appellant should *explain* how he had been shot; because the prosecution had not established firm evidentiary pointers that his shooting was occasioned by the Police guns. Only when an overwhelming fact pointing the accusing finger at the appellant had been laid on the table, would a defensive duty arise, for the appellant to *explain the circumstances* in which he came to be shot; failing this, then the prosecution would be calling upon the appellant to prove their case for them – and that is contrary to established principles of law.

We hold, therefore, that the prosecution failed to prove their case against the appellant, and the appellant was convicted in error.

Accordingly, we allow the appeal, set aside the conviction, and nullify the sentence imposed upon the appellant.

We direct that the appellant shall be forthwith released from custody, unless otherwise lawfully held.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 24th day of October, 2008.

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

JUDGE **JUDGE**

Coram: Ojwang & Omondi JJ.

Court Clerk: Huka

For the Respondent: Mr. Makura

Appellant in person