REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 17 OF 2006

BETWEEN

FRANCIS MWITA TEBEN...…………………...……..…. APPLICANT

-AND-

REPUBLIC………………………………………………...RESPONDENT

(*An appeal from the judgement of the Principal Magistrate, Mrs. G.L. Nzioka in Makadara Court Criminal Case No. 19458 of 2004 dated 20th January, 2006)*

JUDGEMENT

The appellant, ***Francis Mwita Teben***, had been charged with the offence of robbery contrary to s.296(2) of the Penal Code (Cap.63), and the charge was in three counts.

It was stated, in the prosecution evidence, that the complainant had been conducting business at her salon, and was in the course of attending to another lady, when five people burst in, armed with pistols, and staged a robbery. One member of the gang was arrested after the complainant raised alarm, and scared away the rest of them. PW1 identified the appellant as the member of the gang who had been arrested. She testified that a toy pistol had been recovered at the time of the arrest.

PW2 testified that he had been in PW1's salon when the robbers struck, and that he himself had been injured, and robbed of Kshs.200/=. PW1 herself testified that she had been robbed of Kshs.1,500/=. PW2, like PW1, testified that the appellant had been one of the robbers. PW3 testified that he had rescued the appellant from the crowd who had arrested him and were beating him up.

The learned Principal Magistrate found the appellant to have a case to answer on the 1st count ("while armed with a dangerous weapon namely a pistol robbed ***Dorothy Clarah Denah*** of cash Kshs.1,200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ***Dorothy Clarah Denah***") and the 2nd count ("on the 18th day of September, 2004 at Umoja 1 Estate…with others not before the Court while armed with a dangerous weapon namely a pistol robbed ***Lennic Dewa*** of cash Kshs.200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ***Lennic Dewa").***

The appellant in his defence made an unsworn statement, in which he said he had been mistaken for the

thief, as he was in a different place, in a pub, and as he came out he heard noises, and saw some people running away. Somebody beat him up felling him, and when he stood up members of the crowd branded him thief, and beat him up. The appellant had said in his statement that the police officers who came to the scene, found a pistol with some lady and used it to stage a frame-up case against him.

The learned Principal Magistrate held PW1's evidence to be corroborative of PW2's, on the account that the appellant was among the gang of robbers who had attacked PW1's salon. The learned Principal Magistrate went on to remark:

"I believe the prosecution witnesses. PW2 told the Court he had followed the accused, heel-to-heel. The accused never got out of his sight. The witnesses gave sworn statements. The accused gave [an] unsworn statement. His evidence cannot be tested. I don't believe the charges were planted on him. There is no reason advanced for that allegation. None of these witnesses were known to the accused earlier. I dismiss the accused's defence as being untruthful and not convincing."

On a third count: that on 18th September, 2004 at Umoja 1 Estate, with others not before the Court and while armed with a dangerous weapon namely a pistol, the appellant robbed one ***Walter Ongondo*** of Kshs.500/= and at or immediately after the time of such robbery threatened to use actual violence to the said ***Walter Ongondo*** **–** the Court gave the appellant the benefit of the doubt, as the alleged victim had not come to Court to testify.

Another benefit of the doubt accorded the appellant was the reduction of the s.296(2) Penal Code Charge (which carried the death penalty) to the s.296(1) Penal Code charge – on the ground that the prosecution *had not produced P3 forms showing injuries* to the complainants; and so the appellant was convicted of simple robbery instead of capital robbery.

I believe such would not be a valid ground in law for reducing a charge of capital robbery to one of simple robbery. For s.296(2) of the Penal Code (Cap.63) is clear, that proof of actual physical injury (to be shown on the P3 form) inflicted by the robber is *not a precondition* to conviction for capital robbery. That section is clearly worded:

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, 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 he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

It would then follow that the Court's reason for reducing a charge of capital robbery to one of simple robbery, was not well-founded in law. But the merits of the judgement of the trial Court are to be assessed in the light of yet other considerations.

From the record of evidence, the main complainant, PW1 (***Dorothy Clarah Denah***) has stated that the attack at the salon took place at ***7.00 p.m***.; and it is clear that she had to deal with a plurality of customers at the same time, more-or-less. It is precisely at that moment that some five robbers burst in, robbed customers, and took off in a cloud, as PW1 raised the alarm. PW1 testified that "three [robbers] had pistols. The accused had a pistol and it was recovered. The police officer came and took him away. I then went to write a statement. I had not known the accused earlier. I am sure he is the one who robbed me that day." On cross-examination, PW1 while acknowledging that her salon was located next to a bar, denied that the appellant was in that neighbourhood, at the material time, as a customer at that bar.

PW2 (***Lenny Mwarige***) confirms the time of the robbery to have been ***7.00 p.m.*** He testified that three men had entered the salon, each wielding a pistol. He was hit with a pistol for asking awkward questions, and he was robbed of Kshs.200/=. The witness further testified: "I tried to fight back. I ran after one [of the robbers] and held him; the members of the public came and helped; they beat him up. The police officers [came]." PW2 identified a toy pistol which had been recovered; and he identified the appellant as the one who had that pistol; he averred: "We collected it [the pistol] after it fell from the accused's body. He was arrested and taken to Buruburu Police Station."

On cross-examination, PW2 testified that the robbers had been in a gang of five, as they entered the salon; in his words: "I know you were five because I saw you enter the salon. I did not lie down after I was ordered to lie down. I saw you well. I ran after you for a very short distance. It was about 50 metres. There is a road nearby; [but] there was no one else other than yourself. I was robbed of Kshs.300/=. My money was not recovered. Three of the robbers were armed." PW2 went on to testify:

> "As I struggled with you on the ground the toy pistol fell off. I was injured on the leg…It's not true we arrested you as you came from the bar and robbed you of Kshs.3,800/= and a mobile phone. The toy pistol was not just picked up from the Police exhibit store to fix you… You robbed us on 18th September, 2004…."

On re-examination, PW2 testified:

> "I arrested you [the appellant] 50 metres away from the salon. I followed [the appellant] heel-to-heel. He never got out of my sight."

PW1, who was recalled to identify the said pistol and was cross-examined by the appellant herein, made remarks which should be set out here, as they dovetail into the pointed testimony of PW2; she had believed the pistol in Court to be a normal pistol when she saw it in the appellant's hands, even though the police later found it to be a toy pistol. On cross-examination, PW1 averred:

"You [the appellant] told us to sit down. I saw you holding the pistol. You had a pistol. I saw the Police officers take it away after they came."

PW3, No. 51221 ***Police Constable James Waweru*** testified that he was attached to the Buruburu Police Station; and on 18th September, 2004 he was out on patrol, with one ***Police Constable Charles Mwige***. They rushed to the neighbourhood of Egessa Villa Club when they heard screams in that direction, and received word that a thief had been caught by members of the public. PW3 and his colleague found a man under arrest by members of the public; the arrested man had been beaten up, and was bleeding profusely. The Police officers stopped the violence being meted out. PW1 was at the scene, and recounted to the Police officers the robbery incident, and told them that the man under arrest had been one of the robbers, and from this man a toy pistol had been recovered. PW3 testified that he had not known the arrested man before; he took that man to the police station, and took also the toy pistol (exh.1).

In his defence, the appellant made a brief unsworn statement in which he said he operated a butchery at Umoja Estate; that on the material day he had gone to Egessa Bar at 6.00 pm and he remained there, taking alcohol, until 7.00p.m. After he came out of the bar he heard noises, but walked on; then he saw people running past; and then suddenly, someone hit him, felling him; he rose to his feet and hurled insults at those beating him up; those people claimed he was a thief; and the police officers came and invited a lady to produce to them a toy pistol, which was then used as the pretext for prosecuting him.

The learned Principal Magistrate found the appellant guilty on two counts, and sentenced him to seven years' imprisonment after considering his record and hearing his mitigation statement. The Court ruled:

"The mitigation is considered. However, the accused has one previous conviction which is relevant. It is clear that the custodial sentence imposed on him in 1992 and the subsequent Police supervision did not help him to reform. He is facing similar charges herein. The charges are very serious…"

The main grounds of appeal, as stated in the Petition of Appeal, are as follows:

i. that, he had pleaded "not guilty" to the charge;

ii. that, the trial Magistrate erred in both law and fact, by wholly believing the evidence of identification at the scene, without considering that in the prevailing circumstances, there was a possibility of mistaken identity;

iii. that, the trial Magistrate failed to reckon with the fact that the prevailing circumstances would not allow of clear determination of who exactly had brandished the toy pistol;

iv. that, the trial magistrate failed to consider the appellant's explanation of his presence at the *locus in quo* at the material time.

The appellant, who prosecuted his appeal in person, elected to speak only after learned State Counsel ***Mrs. Kagiri*** had presented the case, and had set out the stand of the Attorney-General's office on this appeal.

All the facts of the case as recorded and perceived by the learned Principal Magistrate notwithstanding, ***Mrs. Kagiri*** entered upon her task by announcing that the State was "constrained to concede the appeal." Firstly, because, just as sayeth the appellant, "identification at the scene was difficult", and there was a "great possibility of mistaken identity."

Mrs. Kagiri says:

> "I have looked at the record. Evidence as given by the prosecution witnesses does not state time of the offence. Only PW2 says something about time. She says 7.00 p.m.on the material day is when the offence took place. That shows the offence took place at night. Therefore it is of extreme importance for the prosecution to bring out the prevailing circumstances – especially the lighting. Nothing on record shows that the prosecution showed the lighting condition. Even the trial Court did not inquire on lighting conditions. This is a Court of record; it can only go by what's on the record. The record before this Court does not show if the lighting was conducive to proper identification."

To advance her hypothesis that it is not known whether the robbery took place indeed at 7.00 p.m., and that the state of lighting at the time has not been inscribed on record, learned State Counsel proceeds to submit:

> "I invite the Court to look at the evidence of the complainant. She says she was attacked by five people – and three of them had pistols. She does not state how long these attackers were with her."

Learned State Counsel further submits – though this is clearly inconsistent with the evidence on record – that it is not clear how the appellant was arrested, and that there was no special distinguishing mark on the appellant to justify the arrest of him and no other man.

Mrs. Kagiri urges:

> ."There's lots of room left to speculation. I urge the Court to find that the appellant has good grounds when he says he was mistakenly identified as one of the robbers. I urge that the doubt be construed in favour of the appellant."

It warrants note that such an eloquent case for the applicant came forth not from the aggrieved. Neither the Petition of Appeal, nor the detailed written submissions (availed to Court, and served upon the prosecution office) came close to such a level of clarity in the articulation of the cause coming up before this Court. All the appellant would say in reply was this:

> "When I was arrested, the complainant never stated that she arrested me. There was doubt. I pray that I be [allowed to] benefit from this."

It is a trite principle governing the judicial process, that the first appellate Court is to review the evidence as a whole, and to determine, albeit without the benefit of observing the demeanour of witnesses, whether such evidence amounts to proof of the prosecution case beyond all reasonable doubt and, on that account, it formed a safe foundation for the conviction that was meted out by the trial Court.

The upshot of the whole case laid out before this Court on appeal, is that the appellant had not been reliably identified as one of the robbers who had attacked and robbed the complainants.

In contrast to the claim in learned State Counsel's submission, both PW1 and PW2 are positive in their testimonies, that the offence charged was committed at ***7.00 p.m.*** I take that to be the truth. But once I do that, I have to consider the question whether that time, ***7.00 p.m.,*** as contended by learned counsel ***Mrs. Kagiri***, was *night* time so that it would be imperative that the trial Court should have addressed at length, or at all, the possibility that the state of lighting and visibility was fatally impaired. The word *night* is not a legal term. I here take judicial notice that in countries further from the equator, even 10.00 p.m. would sometimes be broad daylight, and sometimes it would be completely dark as early as 4.00 p.m. depending on the latitude on which the sun is positioned, at that time; but such variations are infinitesimal in equatorial countries such as Kenya; so that, generally, visibility is quite good, without any electrical or other lighting, at about ***7.00 p.m.*** On this basis, I would not attach much relevance to the fact that during the trial, the state of the lighting at the time the offence was committed, at 7.00 p.m., was not treated as a central question in the testimonies.

I would not, therefore, accept the issue as to the state of lighting, as a valid one weakening the evidence of both PW1 and PW2 who had identified the appellant as one of the robbers.

The evidence of PW2, in my judgement, is compelling on the question of identification. PW2, an employee in PW1's salon, had the courage of defying the robbers, and suffered a battering and an injury to limb, when the robbery took place. He wrestled with one robber, kept sight of him, chased that robber and arrested him, only some 50 metres away as the robber contrived to flee. There is credible evidence that PW2 was up-and-about in the salon, and very clearly observed the five robbers as they invaded; then he defied them and they injured him. He struggled with the appellant herein, and in the process the pistol – which turned out later to have been a toy pistol – fell out from the appellant's apparel.

On the evidence, I hold that the perceptions of both PW1 and PW2 are crucial; and that PW2 was a witness of substance and credibility, whose visual sense remained riveted upon the robbers in general and the appellant herein in particular, continuously and without a break, from the time of robbery to the time of arrest. This *continuous visual contract,* is a powerful and live expression of identification which cannot be weakened by any of the circumstances (such as the intensity of lighting available) which the appeal cause has sought to rely upon. I hold that the appellant was most reliably identified as one of the robbers who committed the crime charged; and on this account I confirm that he was justly arraigned in Court.

It is regrettable that the line of submissions adopted by the State Counsel in this matter rendered it impractical to caution the appellant that the sentence imposed against him could have been enhanced, to fall properly under the terms of s.296(2) of the Penal Code (which provides for capital punishment for aggravated robbery).

Consequently, this Court will allow the appellant to benefit from that lack of warning; but I uphold the conviction and sentence imposed by the learned Principal Magistrate. This appeal is dismissed.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 10th day of May, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: G. Ndung'u

For the Respondent: Mrs. Kagiri

Appellant in person