REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 395 of 2004

JOHN MATSERERE BARASA…..……..……..APPELLANT

VERSUS

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

J U D G M E N T

The Appellant **JOHN MATSERERE BARASA** was convicted in two counts of **ROBBERY** contrary to **Section 296(1)** of the **Penal Code** and sentenced to 14 years imprisonment in each count to run concurrently.

The Appellant had initially been charged with **ROBBERY WITH VIOLENCE** under **Section 296 (2)** of the **Penal Code**. However, after considering the entire evidence adduced before him, the learned trial magistrate observed thus: -

"***In relation to the two counts of robbery with violence, I find the violence adduced in support of the robbery with violence under section 296(1) of the Penal Code viz simple robbery. It does not support robbery with violence under section 296(2) of the Penal Code. I therefore convict the accused in two counts of robbery with violence under section 296(1) of the Penal Code…"***

I wish to comment on the courts' finding before going into the appeal. The learned trial magistrate seems not to have been clear of the offence facing the Appellant. The statement of the charge were very clear that the Appellant was charged with **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. That offence is not interchangeable with that of **ROBBERY** under **Section 296(1)** of the **Penal Code** as the learned trial magistrate appears to believe. Both offences are totally different in terms of the ingredients for each offence and in terms of the punishment. The law is also very clear as to the manner in which a court can reduce the offence charged with a lesser offence if the facts of the case allow. The learned trial magistrate did not invoke any sections of the law when he found Appellant guilty of the lesser offence of which he had not been charged. Such reduction of the offence can only be done after invoking **Section 179(2)** of the **Criminal Procedure Code** which provides: -

"***Section 179(2) When a person is charged with an offence and facts are proved which reduce it to minor offence, he may be convicted of the minor offence although he was not charged with it."***

Getting back to this appeal, the Appellant raises three grounds.

One, that the evidence of identification was neither positive nor watertight.

Two that the learned trial magistrate shifted the burden of proof from the prosecution to the defence; and

Three the sentence imposed was harsh and excessive.

The appeal is opposed.

The facts of the case were that on the night of 5th and 6th August 2003, some men broke into the home of PW2 and stole a TV set and a radio. They then went to PW1's house and took a TV. As they left, however, police officers on patrol heard a gun shot sound. These were PW3 **PC KIIO** and one **CPL. WAMBUA** not called as a witness. The two went towards the direction of the sound and saw 4 people running. **CPL. WAMBUA** fired in the air and then at the four people but they fled leaving behind PW1's TV. Next morning at 10.00 a.m. PW2 and members of public saw Appellant in a pool of blood in a farm and called police.

In his unsworn defence the Appellant said that he had gone to the area with his girlfriend who after meeting and talking with a man and woman at length decided to abandon him. The Appellant said that before he was left alone, he was told off and then hit. That after that he could not move but slept there until next morning when some children who saw him went and called adults who arrested him.

On the issue of identification the Appellant submitted that there was a need for a further inquiry to determine whether PW2, the sole identifying witness in this case had given any description of those he could identity to the police and also to determine the nature of the torch light with which he was allegedly seen.

The Appellant in written submission, raised doubts as to PW2's ability to identify him in a sitting posture as he claimed he could in his evidence.

MRS. GAKOBO, learned counsel for the State submitted that PW2 was able to identify the Appellant both by the clothes he wore and by the role he played in the robbery. I have evaluated and analyzed the evidence adduced before the trial court bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32.** On the issue of identification, it is true that PW2 was the sole identifying witness. In the case of **KARANI vs. REPUBLIC 1985 KLR 290**, It was held: -

"***A fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances there is need for other evidence."***

The evidence of a single identifying witness can be relied upon but it must be received with circumspection and treated with great caution. PW2, who said he identified the Appellant as the one who guarded him while his co-accomplices went outside did not mention his ability to identify the Appellant until the time he was concluding his evidence. All he said was:

"***I identified him*** (referring to Appellant at the time he was found bleeding in a farm) ***as the person who was guarding me. Accused was then taken to hospital. I later recorded my statement. My radio and TV was not recovered. It is through the torches they had that I was able to identity the accused. The torches were very bright."***

During the examination in chief, PW2 did not give any form of description through which he could say with certainty that the Appellant was one of those who robbed them. Until he was cross-examined by the Appellant is when he said that the Appellant wore a green jacket, black trouser, black shoes and a cream shirt. The issue of how Appellant was dressed at the time they found him in the farm was never mentioned. That leaves a lacuna in the prosecution case. PW2 did into come out clearly to say on what basis he could identify the Appellant. PW2 seems to have arrived at the conclusion on basis that the

Appellant had a gun shot wound more than on the basis of identification as one of those who had robbed him the night before.

Coming to the issue of the gun shot, no medical evidence was adduced to establish the nature of the injury the Appellant had. Even if there was such evidence, it would not form, on its own, circumstantial evidence to the required standard to justify a finding that the Appellant must have been one of those who robbed the Appellant. PW3, who re-arrested the Appellant from PW2 and others, was also one of two police officers who had gone to the scene of robbery on the night the robbery took place. It was his clear evidence that what attracted him to the scene was sound of a gun shot wound. He and **CPL. WAMBUA** then shot at some people they saw running and one dropped a TV and radio. It was there evidence that none of them stopped and that despite searching the area they found none. The proximity of the farm where Appellant was found and the house of PW1 and PW2 was another area that was not inquired into. Since PW3 and **CPL. WAMBUA** heard another gun shot before they fired theirs, it cannot be assumed that the Appellant was shot by the gun fired by **CPL. WAMBUA** or that he was among the four men the two officers saw running away from the robbery scene.

The evidence in the circumstances was scanty, lacked in material detail and fell far too short of meeting the requirement that it should be watertight to justify a conviction. I would say that PW2's evidence was inconclusive and unreliable and could not stand on its own to sustain a conviction. It left more questions than answers. In the learned trial magistrate's judgment at page J3, he observed: -

"***I am satisfied with the evidence of identification having warned myself of the dangers of wrong identification…"***

That was a misdirection. The duty of the court to warn itself while it should consider the evidence of identification by a single witness was well set out in the Court of Appeal case of **CLEOPAS OTIENO WAMUNGA vs. REPUBLIC CA No. 20 of 1982**.

"***Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital important that such evidence is examined carefully to minimize this danger. Wherever a case against the defendant depends wholly or to a great extent on the corrections of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the Defendant in reliance on the correctness of the identification…."***

The learned trial magistrate would have arrived at a different conclusion had he examined the evidence of PW2 with the care required.

The Appellant in written submissions argued that the learned trial magistrate shifted the burden of proof against him when he required the Appellant to prove his defence. **MRS. GAKOBO** on her part submitted that the learned trial magistrate dully considered his defence.

At J4 of the judgment the learned trial magistrate made following observation in regard to the Appellant defence: -

"***Accused defence has no merits at all, in new of the compelling evidence against him if he was speaking the truth he would have called his employer who had employed him as a cook to testify to that effect. He would also have called his girlfriend to testify on his behalf."***

There was clearly a shifting of burden of proof in the learned magistrate judgment. An accused person has no obligation to call evidence to prove his defence or explanation. By requiring the Appellant to call witnesses to corroborate his defence, the learned trial magistrate shifted the burden of proof against him. In effect the court required the Appellant to prove his innocence by calling other evidence. In so doing the learned trial magistrate misdirected himself and therefore came to the wrong conclusion. Considering the Appellant's defence, I found it plausible and reasonable.

The evidence adduced by the prosecution was insufficient to establish the charge of **ROBBERY** whether under **Section 296(1)** or **296(2)** of the **Penal Code.** The learned trial magistrate also misdirected himself when he arrived at the conclusion that the prosecution had proved its case against the Appellant on the required standard. I do not wish to comment any further on the misapplication of **Section 179(2)** of the **Criminal Procedure Code** and as to the ingredients of the **ROBBERY** under **Section 296(1)** and **Section 296(2)** of the **Penal Code**. See **ERICK WAMBULWA MUCHOCHO & ANOTHER vs. REPUBLIC CA No. 24 of 2003**. The Appellant's appeal succeeds and consequently I quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 22nd day of March 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - present

Mrs. Gakobo for the State

CC: Huka

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LESIIT, J.

JUDGE