REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 136 of 2004

(*From original conviction and sentence in Criminal Case No. 692 of 2003 of the Senior Resident Magistrate's court at Molo*)

ERICK KIPKURUI ……..……. APPELLANT

VERSUS

REPUBLIC …….……. RESPONDENT

JUDGMENT OF THE COURT

The appellant and one David Kipkoech Kitur were jointly charged with the offence of robbery with violence contrary to ***section 296(2) of the Penal Code***. The particulars were that on 25.7.2002 at Masaita farm, Kericho district, jointly with others not before court, they robbed John Shironje of one bicycle, two bundles of Supermatch Kings cigarettes, three bundles of Horseman cigarettes and cash kshs.10,425/- all valued at Kshs.17,625/- and at the time of such robbery used actual violence against him.

The appellant denied the charge and after a full trial was convicted of his offence and sentenced to death as mandatorily provided. He was aggrieved by his conviction and sentence and preferred this appeal. The appellant raised the following grounds:

1. That the learned trial magistrate erred in law and misdirected himself on the essential ingredients of the offence of Robbery with Violence under section 296(2) of the Penal Code and hence arrived at a wrong conclusion in finding that ALL the ingredients had been proved against the appellant.

2. That the learned trial magistrate erred in law and misdirected himself on the burden and degree of proof in a charge of Robbery and hence arrived at the wrong conclusion that the appellant did not displace the allegations made against him and further that the charge had been proved as required by law.

3. That the learned trial magistrate erred in law and misdirected himself on the evidence in failing to find that the circumstances under which the offence was committed was not conducive to proper and accurate identification of suspects, the offence having been committed at night (7.30pm) and hence arrived at the wrong conclusion in holding that the appellant had been properly identified by PW1.

4. That the learned trial magistrate erred in law in putting weight on the evidence of PW1 that he (PW1) had already met with the appellant earlier before a fact that was not confirmed to

the appellant.

5. That the learned trial magistrate erred in accepting the prosecution evidence that the PW1's stolen items had been found in custody of the appellant and indeed the same having been disposed of the bicycle without any effect that the same items indeed belonged to PW1.

6. That the learned trial magistrate erred in law in failing to find that there was no evidence that the appellant had been armed with any offensive weapon and further that none was produced before the court as exhibit and hence the charge of Robbery with Violence under section 296(2) of the Penal Code was not sustainable on the evidence before the court.

This being the first appellate court, we are mandated to reconsider and re-evaluate the evidence that was tendered before the trial court and arrive at our own conclusion as to whether the appellant was rightly convicted or not; see ***OKENO VS REPUBLIC [1972] EA 32.***

The prosecution case can be summarized as hereunder: **PW1, John Shironje** was a businessman at Londiani and used to sell cigarettes from Mastermind Company. On 25.7.2002 at about 7.30pm he was at Kamwingi area on his way home when he met the appellant and four others. They were armed with pangas and clubs. They stopped him and demanded to be given money. They beat him up and robbed him of the cash and items as stated in the charge sheet. The complainant recognized the appellant since he had known him prior to the robbery incident and when he went home he informed his employer, PW2, Charles Juma Oliech of the robbery and of his identification of one of the robbers. They went and reported the matter at Londiani Police Station. PW1 specifically mentioned to the police that one of the robbers was the appellant. The appellant used to work at a certain hotel but had disappeared shortly thereafter. The appellant was arrested after several months. PW1 said that on the material night he was in close proximity to the appellant for a period of over ten minutes.

PW2 corroborated the evidence of PW1 in all material respects. PW3, P. C Stephen Gacheru said that on 26.3.2003, he was at Londiani Police Station and was asked to investigate the said case after the appellant had been arrested. PW3 interrogated the appellant who disclosed his accomplices and led the police to their hide out.

PW4, Inspector Samwel Olongo referred to a confessionary statement that had been taken from the appellant. The same was objected to by the appellant saying it had been obtained under duress. After a trial within a trial the court allowed the production of the same.

PW5 PC Samwel Osoro testified that on 26.3.2003 at 10.30am, he was at Londiani Police Station when the complainant met him and told him that he had seen a person who had earlier robbed him at Londiani town. The complainant then led PW5 and another police officer to the place where he had seen the suspect. When the appellant saw PW5, he turned and attempted to escape from the scene.

PW5 enlisted the assistance of some cattle dealers who assisted him arrest the appellant. PW5 said that he knew the appellant prior to the day of his arrest.

The appellant was put on his defence and he elected to give a sworn statement in his defence. He said that on 24.7.2002 he attended a funeral of a family member at Kapsuser and after the funeral on 25.7.2002 a family meeting was called and after the meeting he returned to Londiani.

He denied having committed the offence and gave an account of the various places where he had been working from the material day of the robbery incident up to the date of his arrest. He said that he had been forced to sign a confessionary statement.

The trial magistrate held that the evidence of the appellant's recognition by the complainant and the appellant's disappearance thereafter was sufficient and proceeded to convict him of the said offence. He further held that the appellant's act of disappearing from his place of work after commission of the offence upto March, 2003 when he resurfaced corroborated the evidence of PW1. He also took into

account that the appellant tried to escape after he saw PW5 and had to be arrested through assistance of members of the public.

The trial magistrate also relied on the appellant's retracted confession which he said had been corroborated by the complainant's evidence.

In arguing ground one of the appeal, Mr. Ogola for the appellant submitted that it was not proved that the complainant had been in possession of the items that he alleged to have been stolen. The complainant alleged that he was robbed of 15 bundles of cigarettes but in his evidence he talked of 13.

In reply, Mr. Gumo, Assistant Deputy Public Prosecutor submitted that there was no dispute that the complainant was robbed of the said items. The complainant gave evidence that he was robbed of the said items and recognized the appellant as being among the people who robbed him.

In our view, the fact that the charge sheet stated that the complainant was robbed of 15 bundles of cigarettes but testified of having been robbed of 13 bundles is not fatal to the conviction of the appellant by the trial court if there was evidence to suggest that he had been robbed of some bundles of cigarettes, and such evidence was there. In ***KINGORI VS REPUBLIC [2003] KLR 289*** the charge sheet indicated that the appellants were armed with a panga whereas the police produced a sword as the weapon used during the robbery. The Court of Appeal held that the use of the word "panga" instead of 'sword" in the charge sheet was not fatal to the conviction.

Section 382 of the Criminal Procedure Code provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal on account of an error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during the trial unless the error or omission or irregularity has occasioned a failure of justice. We do not think the variation in description of the quantity of the stolen goods occasioned failure of justice in any way and so we reject that ground of appeal.

Mr. Ogola further argued that the ingredients of the offence of robbery with violence under ***section 296(2) of the Penal Code*** were not proved and faulted the trial magistrate for convicting the appellant of the said offence in the absence of such proof. He said that the complainant testified that the assailants had pangas and clubs and that they beat him up thoroughly but the charge sheet did not show that the complainant was wounded neither did it indicate that the robbers were in possession of dangerous and offensive weapons. He added that if the robbers had pangas, the injuries inflicted would have been consistent with such weapons. No P3 form or other medical report was produced to confirm the complainant's injuries, if any. Counsel further submitted that it was not proved that the appellant was in the company of other people.

The offence of robbery with violence as defined in ***section 296 of the Penal Code*** is committed in any one of the following circumstances.

(a) If the offender is armed with any dangerous and offensive weapon or instrument, or

(b) If the offender is in company with one or more other person or persons; or

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person. See OLUOCH VS REPUBLIC [1985] KLR 549.

All the above need not be stated in the charge sheet or be proved provided that at least one of the three is stated in the charge sheet and is proved by the prosecution.

The charge sheet did not show that the appellant was armed with any dangerous or offensive weapon but it showed that he was in the company of other people when the offence was committed and that immediately before or immediately after the robbery actual violence was used against the complainant

and there was sufficient proof by the prosecution to that effect. It was not necessary to produce a P3 form or any other medical report. A person can be beaten or be struck without necessarily causing any visible injury or wounds. We therefore hold that the offence of robbery with violence as defined under ***section 296(2) of the Penal Code*** was proved.

Regarding the appellant's identification by the complainant, the latter said that he had known the appellant very well prior to the commission of the said offence and actually recognised him during the commission of the robbery. He was the only person who saw and recognized the appellant and the trial magistrate relied heavily on that evidence. It is trite law that a fact may be proved by the testimony of a single witness but the court has to test with the greatest care the evidence of a single witness respecting identification as was held in ***MAITANYI VS REPUBLIC [1986] KLR 198***. The robbery took about ten minutes and immediately thereafter the complainant reported to the police that the appellant and four others had robbed him. He identified him by his name and told the police where he worked. After the appellant had resurfaced and the complainant saw him again, he made a further report to the police.

We are satisfied that the trial magistrate convicted the appellant on proper evidence of his recognition by the complainant and particularly after taking into consideration the appellant's conduct after the said robbery.

We find that the appeal has no merits and dismiss the same.

DATED at NAKURU this 3rd day of April, 2006

D. MUSINGA

JUDGE

3/4/2006

L. KIMARU

JUDGE

3/4/2006