REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 413 of 2002

LUCAS KABUTHI NGARIKI……....…APPELLANT

VERSUS

REPUBLIC…………………………RESPONDENT

JUDGMENT

The appellant, LUCAS KABUTHI NGARIKI, was convicted on three counts of ROBBERY WITH VIOLENCE, contrary to Section 296(2) of the Penal Code, and then sentenced to suffer death, in accordance with the law. He felt aggrieved with the judgment of the learned trial Magistrate and therefore petitioned this court, by an appeal, challenging the entire verdict.

In his appeal, the appellant raised the following issues:

1. That the evidence on record did not tally with the charge sheet.

2. Identification was not conclusive, in the circumstances prevailing

3. The learned trial Magistrate erred by not appreciating the grudge which existed between the appellant and PW5

4. There was no nexus between the appellant’s arrest and the offence with which he was charged

5. The trial court failed to give due consideration to the appellant’s defence.

In respect to the first issue, the appellant pointed out that thecharge sheet did not cite any weapons. In the circumstances, he said that the weapons with which he was allegedly arrested could not be held to be those that were used during the commission of the crime.

In order to appreciate the submissions, it is important that we set out herein the details of the three counts, as they appear in the charge sheet. They are as follows:”

“Count 1: ROBERY WITH VIOLENCE CONTRARY TOS ECTION 296(2) OF THE PENAL CODE

PARTICULARS: 1. James Ngungi Kinuthia

2. LUKAS KABUTHI NGARIKI

3. BENSON GITHIA:-

On the 1st day of December 2000, at Gichunga Village in Nairobi, within the Nairobi Area, jointly with others not before court, robbed TABITHA MBARIE of cash Kshs 4,100/=, pool table balls, one radio cassette and speakers, several beers and assorted clothes all valued at Kshs 22,350/=, and at or immediately before or immediately after the time of such robbery used actual violence on the said TABITHE MBAIRE".

The complainant above, Tabitha Mbaire, was PW1.

The particulars of count 2 are similar to the ones above save only as relates to the person who was robbed, being CHRISTINE WANJA, rather than Tabithe Mbaire. The other difference with count 1 was to the effect that Christine Wanja was only threatened with actual violence.

Then, in count 3, the complainant was JAMES MASERE. He too was robbed of money and a radio cassette. And the robbers used violence on the complainant.

All the three incidents occurred on the night of 1st December 2000.

PW1, Tabithe Mbairu Kamau, testified that on the material night, she was at her place of work, Gichungo Corner Bar, where she was a barmaid. After closing the bar that night, PW1 went to her room, which was behind the bar. Before she fell asleep, PW1 heard movements outside her room, and was then ordered to open the door. She refused to comply.

PW1 then heard the robbers order the butchery attendant to open his room. The said room was next to that occupied by PW1. When the said attendant, named John, declined to open, the robbers broke down his door. The robbers then demanded money from John, and then instructed him to call PW1. Although the robbers threatened to kill PW1, she refused to open her door. An attempt by the robbers to break the window, was unsuccessful. At that was hoisted onto the roof, where he gained entry by cutting the iron sheets.

The robber who entered PW1's room, through the roof, thereafter opened the door for three others. A fifth person was stationed at the door.

Two of the robbers were armed with an axe, Somali sword, tyre lever and the butcher's knife. They pushed PW1 to the wall, where they beat her up. The robbers the demanded money, and PW1 gave them Kshs 2,100/= which she had counted earlier. Also the robbers took a "Sanyo" radio cassette; pool balls, speakers and some clothes.

The whole incident is said to have lasted over an hour. During that time, PW1 says that she recognized the appellant. She said that the appellant had visited the bar on the day before the robber. He is said to have stood at the counter, whilst looking around the bar. When PW1 asked what he wanted, the appellant reportedly asked for "***Rooster"*** cigarettes. When PW1 said that they did not have that brand of cigarettes, the appellant left.

On the day of the robbery, the appellant is said to have been slapping PW1 on her neck. In his hand, the appellant was carrying a sheathed Somali sword.

PW2, Chiristine Wanza, was asleep at her house, on the material night. Her said house is made of timber.

At about 1.00 a.m., PW2 heard people hitting doors of the bar. She got up and sat on her bed. Later the robbers told her to put on the lights, and PW2 complied. Three people entered the room, which was then lit with one electricity bulb. The three were drinking beer, and they were also carrying bags which were loaded.

The robbers demanded money. They robbers rummaged through her belongings, looking for money but

only left with PW2's shoes and cap.

Next the robbers went into the room occupied by PW2's neighbour. The lights in that room were also put on. That enabled PW2 to see the robbers stab the neighbour on the head and elsewhere.

According to PW2, she knew the appellant very well. She even knew the appellant's home, as she had known him for many years.

PW2 testified that the appellant was armed with an iron bar, when the robbers went to her room. Later, PW2 saw the appellant hit the neighbour, who finally succumbed to his injuries.

The appellant and his accomplices are said to have stayed in PW2's room for about 30 minutes, during which time the lights were on. Then the appellant took PW2's shoes and cap.

Several days after the incident, people were gathered at a prayer meeting, for the deceased. Both PW1 and PW2 saw the three accused at the said gathering. The two witnesses alerted some other people about the presence of the robbers, and police were called. When the police arrived and arrested the three people, they were searched and found with weapons. However, none of the stolen items were recovered from the three people who were arrested.

During cross examination, PW2 said that in her statement to the police, she stated that she knew the appellant before.

PW3, James Masere, was asleep, at his house, on the material night. He heard the robbers hitting doors, demanding that the occupants of the various rooms should open up. After a while, PW3 heard noise from the iron sheets. Later still, the robbers went round to PW3's room. They broke the door and the appellant entered. The electricity light was on.

When the appellant demanded money, PW3 gave him Kshs 700/= The appellant also took PW3's "***SONNY"*** radio cassette and a weighing machine.

According to PW3, he knew the appellant very well, as he (appellant) used to go to the bar to drink.

Several days later, PW3 was told that some of the robbers had gone to a prayer meeting. PW3 went there and identified the appellant.

Also when PW3 went to the police station, he said that he had known the appellant from the time before the incident.

PW4 Regina Mueni, testified that she too was robbed of Kshs 350/= some clothes and a traveling bag. PW4 said that the robbers gained entry into PW1's house by demolishing that wall.

Later, at a funeral gathering, PW4 identified the appellant as one of the robbers. But she also testified that PW1 told her that she did not know the robbers, although PW1 could identify them, if she saw them.

PW5, Christopher Karanja Kihara, was attending a funeral gathering on 7th December 2000. When the complainants told him that three of their attackers were present at the said gathering. PW5 had them locked up and then called the police.

PW6, PC Seth Ngeresa, was on duty at Kabete Police Station at about 2.00 a.m. on 8th December 2000, when he received a report. The report was to the effect that three persons who had been involved in a robbery on 1st December 2000, had been arrested. He went to the place of arrest, and re-arrested the three including the appellant.

PW7, CPL Geodfrey Ndatho, was the Investigating Officers. On the morning of 2nd December 2000,

PW7 received a report of a robbery at Gitungo Frading center. He went there, with a colleague, and found that a kiosk and a barber shop had been broken into and things scatted all over. He also learnt that one Augustine Ndungu suffered fatal injuries during the robbery.

On 8th December 2000, PW7 was at Kabete Police Station when his colleagues brought in three people who had been arrested in connection with the incident of 1st December 2000.

When the appellant was put on his defence, he talked about his mode of arrest, on 7th December 2000. he confirmed having been arrested at a funeral gathering, but denied all knowledge about the robbery.

In her judgment, the learned trial magistrate stated inter alia, as follows:

"No doubt some thugs went on a robbery orgy on the night in question and terrorized the witnesses herein. They were in a group and they were armed with dangerous weapons. They used violence on their victims and indeed Killed one of the victims. That robberies were committed against PW1, 2 and 3 is therefore not an issue."

However, the appellant contends that as the evidence did not tally with the particulars of the charge, there was an issue as to whether or not a robbery took place.

To my mind, the learned trial magistrate cannot be faulted for arriving at the conclusion above. I s ay so because regardless of whether or not the group of persons who robbed the complainants were armed with dangerous weapons, the fact that they were more than one in number, and also as they visited violence on PW1 and PW3, those facts constitute two distinct ingredients of the offence of Robbery with Violence.

Pursuant to the provisions of Section 296(2) of the Penal Code, the offence of Robbery with Violence is deemed to be proved if any one of the following three ingredients are established:

1. The offender is armed with any dangerous or offensive weapon or instrument, or

2. The offender is in company with one or more other person or persons or

3. 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."

In this case, the charge sheet did indicate that the robbers were more than one. If the evidence tendered in court proved that fact, the prosecution would have proved the offence.

Also the charge sheet indicated that PW1 and PW3 were assaulted during the robbery. The evidence supported those particulars. Therefore the prosecution had proved yet another ingredient of the offence.

For those reasons there is no merit in the appellant's first ground of appeal.

As regards the issue of identification, we note that during the incident, the electricity lights were on inside the rooms occupied by PW1, PW2 and PW3. All the three complainants knew the appellant before the incident, and the said witnesses testified that they identified the appellant at the scene of crime. In effect, this was a case of re cognition, as far as the complainants were concerned.

But at the same time we find that according to PW7, who was the investigating officer, none of the complainants had earlier said that they had identified the suspects.

The failure by the complainants to state, in their first reports, that they had recognized on otherwise identified the appellant at the scene of crime, casts some doubt on the issue of identification.

In ***BOSCO LEWA MBABU & ANOTHER V REPUBLIC, CRIMINAL APPELA NO. 83 OF 2001 (AT***

MOMBASA) KWACH, BOSIRE and KIQUA JJA, held as follows:

"If indeed they had been robbed by people they knew they would have informed the police or their employer at once. We believe that they did not tell the whole story and it would be unjust to punish the appellants for a crime which may well have been committed by the driver and his conductor."

In the light of those illuminating words, which are binding on this court, we too, do this court, we too do conclude that it may be dangerous to uphold the appellant's conviction, whilst the complainants did not name or describe him in their first reports to the police.

We are fortified in our decision by the fact that the appellant was resident in the immediate neighbourhood of the incident which was also place where the complainant's lived. There was no evidence that the appellant went into hiding after the robbery. If anything he was arrested (along with his co-accused) when they went to attend a funeral gathering of the person who met his death at the hands of the robbers. First, the conduct of the appellant was not consistent with that of a person who was involved in the incident. However, we are fully aware that such conduct alone could not vitiate criminal liability, if the rest of the prosecution evidence was sufficient to found conviction.

Secondly, had the complainants named or described the appellant in their first report to the police, the appellant should have been arrested promptly.

Thirdly, none of the items which were stolen from the victims was recovered from the appellant or his accomplices. In the circumstances, the conviction was founded solely on the identification. That therefore made it even more important to treat the said evidence (on identification) with circumspection, so as to be sure that there was no possibility of mistaken identity.

It is for that reason that we have re-evaluated the evidence, in that respect, with a fine tooth-comb. In the final analysis, we find that there is some doubt about the appellant's identification. We therefore hold that it would be unsafe to uphold his conviction. Accordingly, we now quash the conviction, set aside the sentence, and order that the appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 19th day of May, 2005

O.K. MUTUNGI

JUDGE

FRED A. OCHIENG

JUDGE