REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL 323 OF 2003

DOMINIC MUSILA ETIMBO.....APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was with two others charged with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. Upon trial before the Principal Magistrate at Mombasa his confederates were acquitted, one under section 210 and the other under section 215 of the Criminal Procedure Code (the CPC). The Appellant was convicted and handed down the mandatory death sentence. He has appealed against both the conviction and sentence.

The prosecution case was that during the night of 29th/30th December 2002 Reuben Nzenge, a radio controller with Hammer Group Security of Kenya was deployed at Baobab farm Bamburi. While there, at about 1.50 a.m. a gang of about ten robbers armed with pangas, clubs, bows and arrows burst into the control room where he was and ordered him to lie down without making any noise. After tying him with a string they went out and brought a colleague whom they similarly tied. They then broke into the Administration Block next door and attempted to crack open a safe using axes and explosives.

The guards who were outside the building and who had seen the robbers go in and heard them attempting to break the safe blew whistles and police were alerted. Police went into the premises and fired into the office where the robbers were causing them to flee. The Appellant was trapped in a thicket near the Administration Block but still within the Baobab farm. He was, after a search, arrested by the police and some of the guards and taken to the offices. The second accused in the lower court was arrested at Mtopanga about two kilometers away and also taken to the Baobab farm offices. The two were identified by Reuben Nzenge and the other guards as being in the gang of robbers who had attempted to rob from their premises. The other fellow was arrested a few days later and they were all later charged with attempted robbery with violence contrary to section 297(2) of the Penal Code.

Upon being put on his defence the Appellant gave an unsworn statement in which he denied any involvement in the attempted robbery and claimed that he was arrested on 29th December 2002 at about 11.30 p.m. at Baobab bus stage where he had gone to wait for a friend, allegedly for being drunk and disorderly. He also claimed that he was taken to court because he failed to bribe the investigating officer and that it is that officer who hired the prosecution witnesses who testified against him.

In his amended petition of appeal the Appellant has listed 11 grounds of appeal in some of which he has raised very interesting legal points. Paraphrasing and combining some, the grounds of appeal are as

follows:-

1. That the charge as framed was incurably defective.

2. That the learned trial magistrate erred in convicting him without the evidence of the complainant.

3. That the learned trial magistrate failed to write a judgment as required by section 169 of the CPC.

4. That the trial was a nullity for failure to accord the Appellant an opportunity to address the court as required by section 213 of the CPC.

5. That the learned trial magistrate erred in convicting the Appellant on a flawed identification.

6. That the learned trial magistrate erred in failing to realize that there was no independent corroborative evidence and based the conviction of the Appellant on insufficient and malicious evidence.

7. That the learned trial magistrate erred in shifting the burden of proof to the Appellant.

The Appellant filed written submissions and addressed us. Mr. Monda, learned state counsel also addressed us in opposing the appeal. We shall deal with these grounds of appeal as we consider the submissions made by both sides on them.

In the first ground of appeal the Appellant argued that the charge as framed was incurably defective for failure to state the time at which the alleged offence was committed as required by section 137(f) of the CPC and for failing to include in the charge sheet the police occurance Book (OB) number, the court file number and the list of witnesses. To start with the latter aspect of this argument, it is true that the charge sheet forms used by the prosecution in the subordinate courts provide space for these details. We would, however, wish to state and make it clear that failure to state in the charge sheet the OB number, court file number and or list the prosecution witnesses does not in any way render the charge defective. A charge is only defective if it fails to state the essential ingredients of the offence charged.

As to the failure to state the time at which the offence was committed after carefully considering the provisions of section 137(f) we are of the view that that it is not mandatory. Whereas it is advisable to state the time or approximate time at which the offence was committed failure to do so does not render the charge defective. This is because there are situations in which it is impossible to know the time or even the date when the offence was committed. In a robbery case for instance it is in our view outrageous to demand of a robbery victim woken up from his sleep to state the time he was robbed and failing which to dismiss the charge on that score. When dealing with section 137 (c) (i) of the CPC the Court of Appeal in Ogaro Vs Republic [1984] KLR 641 held that failure to give the value of the property stolen was not fatal to the charge. In the circumstances we are satisfied charge in this case was not defective and even if it was we are satisfied that the same has not occasioned any failure of justice and is curable by section 382 of the CPC. Ground 1 of the appeal therefore fails.

Ground 2 is to the effect that the Appellant was convicted without the complainant being called to testify. The Appellant argued that the charge sheet gives the name and address of the complainant as Gibson Kirubai of Box 81995 Mombasa whom the court should have summoned pursuant to the provisions of section 150 of the CPC to testify. That person having not testified he submitted that his conviction was irregular.

The particulars of the charge state that the person whom the Appellant and others attempted to rob of Sh. 549,375/= was Reuben Nzenge. As we have already stated Reuben Nzenge was one of the security men detailed to guard the building housing the safe containing the said sum of money. In our view he is the complainant in this case and he testified. Even if he had not that would not in any way vitiate the conviction of the Appellant if there was sufficient evidence against him. There are numerous cases where complainants are killed or maimed and never testify. The second ground also fails.

The Appellant contends that the trial magistrate's judgment does not comply with section 169 of the CPC for failure to cite any authority. The section does not provide for any such requirement. We have perused the judgment and are satisfied that it complies with the section and the authority in Kigotho Vs Republic [1967] EA 445. We accordingly dismiss this ground of appeal too.

The Appellant contends that he was not given an opportunity to address the court as required by section 213 of the CPC. That is the section that deals with final submissions. When put on his defence the Appellant gave an unsworn statement. The record does not show that he requested but was denied an opportunity to submit. He has not told us that he had anything else he wanted to add to what he had said in his unsworn statement. Ideally the learned trial magistrate should have asked him if he wanted to submit. She did not. That omission, however, has not cause any failure of justice and this ground also fails.

Grounds 5, 6 and 7 raise issues of identification insufficiency of evidence and shifting the burden of proof. Starting with the last one the learned trial magistrate, in her judgment, noted that the Appellant did not put to any of the witnesses that he was arrested at a bus stage as he claimed in his unsworn statement. The Appellant contended that that was tantamount to requiring him to prove that he was arrested at the bus stage thus shifting the burden of proof to him. The trial magistrate made that remark when considering the evidence of the prosecution witnesses who said that they saw the appellant at the Baobab offices and soon thereafter they found him trapped in the nearby thicket. We find that she did not shift the burden of proof to the Appellant.

The Appellant also submitted that he was not properly identified. This is because, he said, the prosecution witnesses were not only shocked on being invaded suddenly but they were also ordered to lie on the floor facing down and the lights were switched off making it impossible for any of them to identify the robbers.

The Appellant also submitted that a man by the name Kitengo Wambua who was also arrested as a suspect was later released. He reads into that act conspiracy on the part of the prosecution witnesses to frame him up and justify the release of that man.

As a first Appellate court we have carefully examined and re-evaluated the evidence on record as we are duty bound to do – Peter Liningushu & Others Vs Republic Criminal App. No. 52 of 2005 (Nakuru) (CA). The Baobab premises broken into were well lit by security lights. Some of the guards like P.W.3, P.W.4, and P.W.5 were outside the building at various points. They saw the robbers enter the premises and proceed to the control room without themselves being seen except for P.W.6. who was at one of the gates. The robbers frog marched him into the control room tied him and ordered him to lie down. Before the lights were switched off he and P.W.1 had sufficient time to see the robbers especially the Appellant who was the one left behind to guard them when the others went into the Administration Block where the safe was. They had more time to observe him.

We agree with Mr. Monda that the conditions at the scene were favourable for a positive identification of the Appellant. P.W.1, P.W.3, P.W.4, P.W.5 and P.W.6 all identified the Appellant. When the robbers fled following the gun shots from the police these witnesses together with police pursued them and found the Appellant trapped in a thicket in the Baobab compound a few metres away. As the trial magistrate remarked that was no place for anyone waiting for a friend could be. We find no reason whatsoever why the prosecution witnesses would want to frame up the Appellant whom they did not even know. This appeal is totally unmeritorious and we accordingly dismiss it in its entirety.

DATED and delivered this 28th day of June 2005.

J. KHAMINWA

JUDGE

D.K. MARAGA

JUDGE