REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 183 OF 2002

1. JULIUS MATHEKA

2. FRANCIS IRERI KIVUTI

3. MALAKI LESHAN OLE NGAI …….…… APPELLANTS

AND

REPUBLIC ……...…….……..RESPONDENT

JUDGMENT OF THE COURT

Although the three appellants in this appeal had filed separate memoranda of appeal raising some 17 grounds of appeal between them, learned counsel, Mr. Ngumbau Mutua who appeared for them before us, abandoned all those grounds and argued only one ground in a supplementary memorandum of appeal filed by his firm. It is simply stated, thus: "That the proceedings in the trial court were a nullity". It was also simply argued, but first, the background to the appeal. The three appellants were jointly and severally convicted before Kibera Senior Resident Magistrate on one count of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. As the particulars of the charge are the focus of this appeal, we reproduce them in full: - "PARTICULARS:

MALAKI LESANI OLE NGAI (2) JULIUS MATHEKA(3) FRANCIS IRERI (4) PETER MBATHI MAINA (5) DAVID MAINA MWANGI: On the 7th day of January 1998 at Ongata Rongai in Kajiado District of the Rift Valley Province, robbed Dennis Jalang'o two television sets, a radio cassette, a video machine, cooking fat, radio cassette, 2 sufurias, one umbrella, 5 shirts, 2 t-shirts, an electric fuel pump, and cash Kshs.10,350/= all valued at Kshs.191,800/= and at or immediately after the time of such robbery wounded the said Dennis Jalang'o."

The appellant Francis Ireri Kivuti was on his own convicted for the offence of being in possession of narcotic drugs contrary to section 5(1) (a) of the Narcotic Drugs and Psychotropic Substances Control Act, No. 4/94. It had been alleged that on the 7th day of January, 1998 at Ongata Rongai township in Kajiado District he was found in possession of four (4) rolls and 300 grams of Canabis Sativa which was not in medical preparation.

For the offence of robbery with violence all three appellants were sentenced to death while the appellant Francis Ireri Kivuti was sentenced to 24 months imprisonment for the non-capital offence, but the sentence was suspended. Their appeals to the superior court (Mbogholi & Mbito JJ) were dismissed and the sentences were confirmed. This is therefore a second appeal which may only raise issues of law for consideration by this Court as provided for in section 361 of the Criminal Procedure Code.

The facts established concurrently by the two courts below were that on the 7th January, 1998 at about 4

a.m. Dennis Jalang'o Ongonge (PW1) and his wife Zeprose (PW4) were sleeping in their house at Ongata Rongai township. In the same house but in different rooms were their nephew Oscar Otieno (PW2) and other younger children. As Oscar went out of his bedroom to a toilet within the house, he was cut on the head with a panga by a person who was already inside the house. He fled towards his uncle's bedroom screaming and was followed by two people one of whom had a torch. Those people immediately ordered PW1, his wife and Oscar to lie down as they demanded money.

One of the intruders cut PW1 on the head with a panga and PW1 started bleeding profusely. The assailants said they had come to kill and destroy. They started collecting some items from the bedroom as they asked for money. In one of PW1's clothing was Shs.10,350/= which they took together with the clothes. There were other robbers too inside the rest of the house who within a space of about 30 minutes ransacked it collecting a large number of household items and personal effects of the occupants which they carted away. The gangsters had gained access into the house by cutting away a window metal grille.

PW1 and PW2 were given medical first-aid for their injuries and at 6 a.m. headed for Ongata Rongai Police post to report the incident. At about the same time the report was being made to the police at 6.30 a.m., information was received at the police post that some people had been seen at Bagladesh village within Ongata Rongai township ferrying some goods in a suspicious manner. A description of the people was given and the place was described. Immediately, Corporal Garishon Maina (PW6), PC Joshua Lencesh Awino (PW5) and PC Owino Omondi ,who were at the police post at the time the information was received, set off in a police land-rover and surprised the three appellants as they slept in different but adjacent rooms in one building.

From each room they collected an assortment of household goods and personal effects and arrested the appellants together with two other persons who the appellants said were accomplices, but these two were not found in possession of any property. They are the two co-accused released at the trial under section 210 of the Criminal Procedure Code. The appellants and the recovered items were ferried to the police post where the complainants were found waiting. The complainants positively identified most of the property that had been stolen from their house less than 3 hours earlier. They also attempted to identify the appellants whom they had seen in difficult circumstances but had noted their sizes and clothing. None of the appellants claimed any of the recovered property to be his. The appellant Malaki Leshan ole Ngai who was a car-washer in Ongata Rongai said in his defence that he was at his place of work when police took a blood-stained vehicle to him for washing but he refused. He was then arrested, thrown into the bloodstained vehicle and taken to the police station where he was charged with an offence he knew nothing about. The appellant Julius Matheka who was a turn-boy at the same township said the police found him asleep in his house in Bangladesh village but they found nothing in his house on searching it. One of the officers in the search team had a grudge with him and that is why he was arrested and charged falsely.

The last appellant, Francis Ireri Kivuti was a charcoal seller. He said he was standing on the roadside waiting for charcoal to buy when police arrived in a vehicle and arrested him on suspicion that he was carrying motor vehicle wheels. He was later charged with the two offences falsely. In view of the prosecution evidence which both courts found truthful, the defences of the appellants were rejected, hence their conviction.

We must now advert to the appeal before us. The submission made by Mr. Mutua to justify his contention that the entire trial was a nullity was firstly, that the charge laid against the appellants said nothing about the robbers having been armed with any dangerous weapon, although the evidence tendered disclosed that two of the victims saw and were cut with pangas on their heads. The charge was therefore incurably defective and did not disclose the offence for which the appellants were convicted. Secondly, Mr. Mutua referred us to the record of proceedings before the trial court and pointed out three occasions when the record of the court did not disclose the coram. It simply recorded "Coram as before".

The possibility that the trial could have been conducted without the court clerk, or the accused or by a prosecutor or magistrate who was not qualified cannot therefore be ruled out. On both scores Mr. Mutua did not cite any authority. Nor did learned senior state counsel Mr. Kaigai who submitted that the

occasions when the court abbreviated the coram was immediately preceded by the full coram and there could therefore be no mistake as to what the coram was. As for the omission to state that the robbers were armed with a dangerous weapon, he submitted that it did not absolve the appellants of the offence of simple robbery which this Court may impose if it is satisfied that any prejudice was caused to the appellants. We have anxiously considered those submissions but we think, with respect, that there is no substance in the claim that the trial was a nullity. We first examine the claim that the coram was uncertain.

The record, it is true to say, shows on three occasions that the learned trial magistrate abbreviated the "coram" but it is clear from the record that the previous coram immediately preceding such abbreviation expressly disclosed who was present in court. For full appreciation of the matter we reproduce the record as follows: - "23.2. 98. Coram - Mrs. Bondi SRM Court Prosecutor – IP Kagambi Court Clerk - Waweru Accused present

Court: Remanded in custody for hearing on 27.2.98. I. BONDI S.R.M 23.2.98" "27.2.98 Coram – as above Accused present

Court Prosecutor: There are some additional items stolen omitted in full charge sheet. I do wish to substitute the charge sheet. I. BONDI S.R.M

COURT: Substitution granted and substituted charge read over and explained to the accused to which they Plead." "16.3.98 Coram - Mrs. Bondi SRM Court Prosecutor - IP Kagambi Court Clerk - Waweru Accused present. 4th accused absent. Court - Remanded in custody for hearing on 26.3.98.

COURT ORDER: Production Order issued for the 4th Accused for the 17.3.98. I. BONDI S.R.M 16.3.98" "26.3.98 Coram as before. Accused present all." "23.7.98. Coram – Mrs. Bondi SRM Court Prosecutor – IP Kagambi Court Clerk – Waweru Accused present

COURT: Remanded in custody for hearing on 24.7.98. I. BONDI S.R.M 23.7.98" "24.7.98 Coram as above Accused present all."

The trial commenced on 19.01.98 when the pleas were taken to 01.09.98 when the judgment of the trial court was delivered. There were several adjournments of the case over that period and on each resumed hearing or mention, the coram was fully recorded. Except on the three occasions. The proximity of the dates on those occasions however, as is evident, do not admit of any grave doubts that the coram was as recorded fully on the previous occasion. Any such doubts are cleared by what transpired in court on those occasions when the coram was abbreviated. We see no valid reason to declare the trial a nullity on account of those irregularities.

Although no authority was referred to us on the submission, we are aware of this Court's decision in Benard Lolimo Ekimat v R. Cr. A. 151/04 (ur) where the trial was declared a nullity on account of the failure by the trial magistrate to record the coram the one day the trial commenced and was concluded. The only record visible on that day was "order: hearing to proceed". The preceding record made 12 days earlier was simply "Coram as before", while a week earlier the case was for mention only and no full coram was recorded.

The full record of the coram appears to have been made only at the time of taking the plea in the case. With respect, the appeal before us is distinguishable on the facts and we are not inclined to apply our earlier decision to this appeal. This Court has nonetheless had occasion to stress, and it bears repeating, the need to keep clear records of proceedings and has, in particular, deprecated the use of such abbreviations as are complained about in this matter. They betray unacceptable levels of indolence even when it is appreciated that trial magistrates work under pressure from the numerous trials and mentions of cases that come before them daily.

As for the second complaint raised by Mr. Mutua, it is evident that there was omission to state in the charge sheet that the appellants were armed with any dangerous or offensive weapon or instrument. The

submission is perhaps a misapprehension of the decision of this Court in Juma v Republic [2003] 2 EA 471 where it was held that where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was a dangerous or offensive one. The example given in that case was a knife or a stone which are not inherently dangerous or offensive items but the use to which they are put would make all the difference.

For the submission now made before us to be valid, it must be shown that the prosecution relied only on that limb of the charge to prove their case, since the offence under section 296(2) of the Penal Code may be constituted in several ways. We take it from the decision of this Court in Johana Ndungu v R Cr. A. 116/95: "In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the subsection in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing.

Therefore, the existence of the afore-described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in s.296(2) which we give below and any one of which if proved will constitute the offence under the sub-section: 1. If the offender is armed with any dangerous or offensive weapon or instrument, or 2. If he is in company with one or more other person or persons, or 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

The Court continued after explaining the essential ingredients under the first two sets of circumstances: - "With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

The particulars of the charge reproduced at the beginning of this Judgment state that the appellants "robbed" the complainant. The word "robbed" is a tem of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat of use of actual violence to any person or property in order to obtain or retain the stolen thing. The predecessor of this Court said so in Opoya v Uganda [1967] EA 752. The use of the word spells out simple robbery under section 295 of the Penal Code. The particulars however go further, and it was subsequently proved in evidence, that the robbers were more than one and that they wounded the complainant at or immediately after the robbery.

This constitutes the offence of aggravated robbery under section 296(2) as elaborated in the Ndungu case. We see no reason therefore to declare the charge incurably defective or the trial a nullity. For those reasons the appeal is dismissed.

Dated and delivered at Nairobi this 11th day of November, 2005.

P.K. TUNOI

JUDGE OF APPEAL

E.M. GITHINJI

JUDGE OF APPEAL

P.N. WAKI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR