REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 47 OF 2000

(From original conviction and sentence in Criminal Case No. 483 of 1998 of the Principal Magistrate's Court at Kericho –S. G. O'NGANYI

ALIMAIDA KIPYEGON SAINA…………………APPELLANT

VERSUS

REPUBLIC……………………………...…….RESPONDENT

JUDGMENT OF THE COURT

The Appellant, Alimaida Kipyegon Saina, was charged with three other accused persons who were acquitted by the lower Court with seven counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the said offences were that on the 27th of February 1998 at Kericho township within Kericho District jointly with others not before Court being armed with dangerous or offensive weapons namely Somali swords, knives and a toy pistol robbed Simon Kipkosgei Kiprono, William Cheruiyot Bore, Julius Kiprono Barchok, Ezra Odondi, James Emuron, Aggrey Kaboya and Samuel Odhina Achiro of various cash amounts and other personal items and at or immediately before or immediately after the said robbery used personal violence on the said Complainants. The Appellant pleaded not guilty to the charge. After a full trial the Appellant was convicted as charged on all the seven counts. He was sentenced to death as mandatorily provided by the law. Being aggrieved by the said conviction and sentence, the Appellant has appealed to this Court against the said conviction and sentence.

In his Petition of Appeal, the Appellant raised several grounds of Appeal faulting his conviction by the trial magistrate. His eight grounds of Appeal may however be summarised as follows:- that the trial magistrate erred in convicting him on the evidence of PW 1 who knew the Appellant prior to the incident and therefore the said witness gave false and baseless evidence against him; that the trial magistrate erred in finding that the radio (produced as an exhibit) belonging to one of the Complainants was found in his house yet the same had been planted in his house by the said Complainants; that the alleged robbery incident took place at night and therefore none of the Complainants could positively identify him as having been involved in the said robbery; that the trial magistrate erred in finding that the knife recovered from his house resembled with the knife which was used in the robbery and finally that the trial magistrate convicted him on contradictory and weak evidence which could not sustain a conviction.

During the hearing of the Appeal, the Appellant, with the leave of the Court presented the Court with written submissions which we have considered in our judgment. Mr Koech, Learned State Counsel, made oral submissions urging this Court to uphold the convictions and the sentence imposed.

Before making our decision, we hereby briefly state the facts of this case. PW 1 Simon Kiprono Arap

Kosgei, PW 2 William Cheruiyot Bore, PW 3 James Emuron, PW 4 Julius Kiprono Barchok, PW 5 Aggrey Kaboya and PW 7 Ezra Odondi Adera all working for Saramek Tea Estate, Kericho, were walking from Kericho town to their houses just outside Kericho town. The day was the 27th of February 1998. The time was about 7.30 p.m. All the above witnesses testified that while they were walking along a foot path near a forest, they were accosted by a group of about eleven people. They were ordered to lie down on the ground. The people claimed that they were Police Officers. They then robbed all the said witnesses the cash which they had in their pockets. They were also relieved of the personal items that they were carrying. PW 1, PW 2, PW 4 and PW 5 were assaulted using sharp objects and whips and were injured in the course of the said robbery. PW 6 Joseph Ngetich, a clinical officer examined the said four complainants and confirmed that indeed the said complainantshad been injured. He produced the P3 forms duly filled confirming the injuries that the said Complainants had sustained.

All the above Complainants testified that they were able to identify their assailants. Of particular importance was the evidence of PW 1 who testified that he was able to identify the Appellant by the light of the torches that the assailants had. PW 1 testified that he was able to identify the Appellant having known him as a cobbler who had mended his shoes. PW 1 knew the house of the Appellant. After the attack, PW 1 went and reported the matter to the Police. He also volunteered to show the Police the house of the Appellant. Another significant piece of evidence was the evidence of PW 2 who testified that during the robbery incident a pocket radio was stolen from him. When PW 2 testified in Court, he was able to produce a cover for the radio and the receipt that was issued to him when he purchased the radio. PW 8 Police constable Johana Tanui testified that upon receiving the report about the robbery, he went to the house of the Appellant accompanied by PW 1 and Police Constable Omondi. He recovered a knife which PW 1 identified as being similar to the knife that was used by his attackers to stab him on his thighs.

A radio which was later identified by PW 2 as belonging to him was also recovered from the Appellants house. PW 8 testified that the Appellant on interrogation stated that the radio was his, but could not produce a receipt for it. When put on his defence, the Appellant denied that he was involved in the robbery. In his testimony, the Appellant gave what in effect amounted an alibi defence. He testified that on the material day after finishing his day’s work, he went to his house. He arrived at his house about 6.00 p.m. and did not go out of the house until 3.00 a.m. when he was arrested by the Police. The Appellant’s wife Janet Saina corroborated the Appellant’s evidence. The Appellant denied that the radio was recovered from his house.

This is a first Appeal. As the first Appellate Court in Criminal Cases, the High Court is mandated to look at the evidence adduced by the witnesses before the trial magistrate’s Court, re-evaluate and re-examine the same and reach its own independent conclusion whether or not to uphold the conviction of the Appellant. In reaching its decision, the High Court has to put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore could be expected to make any decision as the demeanour of the witnesses. The High Court is further mandated to consider the grounds of Appeal put forward by the Appellant in his Appeal before arriving at its decision **(See Okeno –versus- Republic 1972 E.A. 32 and Njoroge – versus- Republic 1987 K.L.R. 19).**

In the instant Appeal, the issues for determination is whether the Complainants were able to identify the Appellant as the scene of the robbery. The other issue for determination is whether the radio which was identified as belonging to PW 2 was recovered from the house of the Appellant a few hours after the robbery incident. The final issue for determination is whether the Prosecution, on the evidence on record, proved its case against the Appellant beyond any reasonable doubt. We have considered the written submissions of the Appellant and also considered the oral submissions made by the learned State Counsel. We have also re-evaluated the evidence adduced before the trial magistrate. PW 1’s evidence which was crucial and critical to the Prosecution’s case was that he and his colleagues were attacked in a footpath near a forest while they were walking from Kericho township to their houses at Saramek Estate. It was PW 1’s evidence (evidence which was corroborated by PW 2, PW 3, PW 4, PW 5 an d PW 7) that they were accosted by about eleven people at about 7.30 p.m. The people claimed that they were Police Officers. They robbed them of the cash that they had in their pockets. They also robbed them of other personal items that they were carrying. PW 1, PW 2, PW 4 and PW 5 were assaulted and injured during

the robbery to the extent that they required medical attention.

PW 1 testified that he was able to identify the Appellant having known him prior to the robbery incident. He testified that he knew the Appellant as a cobbler whose services he had utilised prior to the robbery incident. He testified that he was able to recognise the Appellant from the torch light that the Appellant and the other assailants were carrying. After the robbery, PW 1 made a report to the Police. He led the Police to the house of the Appellant where upon a search being conducted a knife, similar to the one that PW 1 was stabbed with was recovered. A radio, which was later identified as belonging to PW 2, was also recovered.

We have re-evaluated this evidence and find that indeed PW 1 positively identified the Appellant. If there was any doubt as to the Appellant's identification at the scene of the robbery, by the Complainants, then the doubt was resolved when the radio belonging to PW 2 was recovered from the house of the Appellant. This radio was positively identified as belonging to PW 2. He produced the cover of the radio and a receipt that was issued to him when he purchased the radio as exhibits in the case. The Appellant was therefore found in possession of a recently stolen radio, about eight hours after the robbery. The Appellant's explanation to PW 8, Police Constable Johanna Tanui was that he had purchased the radio from someone whom he could not name. The Appellant could not produce a receipt for it.

On our re-evaluation of this evidence it is our finding that PW 2 proved that he owned the radio, which radio was robbed from him at about 7.30 p.m. on the material and recovered at about 3.00 a.m. on the following day in the house of the Appellant. The doctrine of recent possession applied in this case. The presumption that it was the Appellant who robbed the said radio from PW 2 was not displaced by the evidence offered by the Appellant in his defence. It is our finding that the Prosecution had proved its case as against the Appellant beyond any reasonable doubt. The finding of the trial magistrate as page 5 of his judgment cannot therefore be faulted. The trial magistrate stated as follows:

> ***"I believe PW 2. This radio belonged to him. He purchased it the***
>
> ***same day he was robbed of it. He produced a receipt to that effect***
>
> ***(Exhibit No. 6). The 1 st accused (the Appellant) and his wife (DW 1)***
>
> ***stated that nothing was found in their house. I believ e in the circumstances***
>
> ***of the case the radio was found on the following day, when the Police***
>
> ***in company of the 1 st Accused (Appellant) found (it) in the 1 st Accused's***
>
> ***(Appellant) house. On interrogation the 1 st accused (Appellant) told***
>
> ***PW 8 he had bought the radio in Kericho town from a person he did not***
>
> ***name. PW 8 (said) the radio they received on 1.3.98 was the same one***
>
> ***they had left hanging on the wall the previous day. The document (sic)***
>
> ***(doctrine?) of recent possession is applicable in the circumsta nces and***
>
> ***I find that the 1 st accused (Appellant) was found in possession of recently***
>
> ***stolen property namely a pocket radio (exhibit No. 3) the property of PW 2".***

The analysis of the evidence by the trial magistrate could not have been better stated. In the circumstances therefore the grounds of Appeal put forward by the Appellant lacks merit. The Prosecution proved beyond any reasonable doubt that the Appellant, in company of others, while armed with

dangerous and offensive weapons robbed the Complainants of cash and other personal properties and in the process injured some of them. The ingredients to establish the offence of robbery with violence were proved.

The Appeal is therefore dismissed and the conviction and sentence imposed by

the trial magistrate upheld.

It is so ordered.

DATED at NAKURU this 19th day of October, 2004.

D. K. MUSINGA

AG. JUDGE

L. KIMARU

AG. JUDGE