REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 160 of 2003

MBEGA RAI ……..……. APPELLANT

- V E R S U S –

REPUBLIC …….……RESPONDENT

(From original conviction and sentence in criminal case no. 2696 of 2001 of the Senior Resident Magistrate's Court – Kwale)

J U D G M E N T

This is an appeal against conviction and sentence on a Charge of Robbery with violence contrary to Section 296 (2) Penal Code. The prosecution evidence is to be found in the testimonies of the prosecution witnesses. The complainant left his house on the night of 24/25th December the year 2001 but returned by midnight. The house was empty as his family was absent.

He opened his window and some people entered inside through the window. One got hold of his throat, others put of the lamp. They were asking for money. They ransacked the house and took away several items. They then pushed him outside his house and left him there. He said he could not identify the robbers due to the ways they were dressed. He said they were wearing what he called Ninja hats.

It is his testimony that after the robbery he and his brother tried to get robbers but in vain and that they both spent the rest of the night awake in the complainants house. He testified that on the following day his children found one ninja hat outside. And that outside there were footsteps which led them to the house of accused. The accused was apprehended by many people and taken to police post. Later on at another date the complainant was recalled to testify and spoke about a mask cut three times – two holes for the eyes and one for the nose. He testified that accused is the one who was wearing it. He also showed the court a T shirt allegedly from where the mask was cut.

It is also the prosecution evidence that the son of complainant PW2, got home at 5 a.m. that morning and found PW1 asleep. That he took out the goats and on returning to the house he noticed the window was broken and he called and informed his father. He noticed that his father had injuries on the hand, head and other parts of the body. He also noticed a mask and recognised it. He followed footsteps which led to accused house where they found accused asleep. They got hold of him and a T- shirt hanging on a rope in his room from where he said the mask had been cut. Further evidence by PC. Salim Mohammed was that the father (PW1) and son (PW2) presented the accused at the police post together with a mask. He arrested the appellant and later on the stolen items were found by police by the roadside leading to a home of one suspects.

The final evidence would have been on medical examination of the complainant but this was not

forthcoming on the grounds that the doctor was never available until the court got tire of waiting.

Regarding the issue of medical evidence the charge sheet did not state that the complainant was wounded. The charge was that there "***was threatened to cut***". Also the complaint did not mention that he was injured at all. Regarding the issue of identification the complainant said in cross-examination that he could not identify his attackers because of the clothes they wore. He said they were wearing Ninja hats. The hats cannot now be also called masks. Furthermore he later said that the accused was wearing a mask. How could he have known this? It is evident the appellant was neighbour at distance of 30 metres nearby. If the complainant had identified the appellant in his house he could certainly have gone directly to his house to confront him. He had testified that after attack he went to his brother for help and that they looked for robbers in vain. Again in the house it was dark because the robbers put out the lamp.

It is quite clear that the evidence of identification was very unsatisfactory. Then there was the issue for recovery of stolen items in the house of appellant nothing was recovered. Later after 2 days the police said that stolen items were recovered in the absence of appellant by the bush on the road leading to home of another suspect.

It cannot be said that the appellant was found with stolen goods or that he led the police to the stolen goods. Why did the police not arrest the other suspects if they knew the road to their homes – one can ask.

After considering the ingredients of this offence and the high standard of proof required to prove a criminal offence we find that neither direct evidence nor circumstantial evidence was led to prove the case beyond reasonable doubt.

We, therefore, allow this appeal and quash conviction and set aside sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully charged.

Dated this 5th day of October, 2004.

J. KHAMINWA

JUDGE

D.K. MARAGA

AG. JUDGE

5.10.04