REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CR. APPEAL NO.280 OF 2001

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.102 of 2000 of the Principal Magistrate's Court at Kilifi - P.M. Mutani, SPM)

MWALIMU KARISA ……. APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

Coram: Before Hon. Justice Mwera
Hon. Justice Maraga
Miss Mwaniki for State
Court clerk – Sango/Mitoto

JUDGEMENT

The appellant herein (accused 3 in the lower court) was charged under S. 296(2) Penal Code in that on 20/1/2000 at about 8.30 p.m. with others jointly robbed Joseph Katana Hamisi of cash, cigarettes and other items all valued at Sh.29,000/-. That immediately before or after that robbery they wounded Hamisi on the head, hands and ribs with a panga. After trial the appellant alone was found guilty, convicted and ordered to suffer death – the only sentence available. This was on 19-7-2001.

After the initial appeal amended grounds were filed and that is what this court went by. The appellant adduced further evidence. He incorporated all that in the written submissions he availed to the court on 15-6-04 and the hearing of the appeal followed.

The amended grounds of appeal cited the following: a defective charge because it excluded the words “dangerous or offensive” and unreliable evidence of identification by recognition due to insufficient light at the scene. That a witness (PW.2) was at a place other than where the offence took place; that the first report to the police by (PW.5) referred to a name “MWALIMU” only – a common name; the source of arrest was not connected to the incident. That the defence that the appellant did not come from where the robbery took place was not considered.

The appellant relied on his written submissions. He began by going off the amended grounds of appeal by bringing in the argument that the shop said to have been robbed belonged to Josephine Dama Kazungu (PW.3), whom we were told, was the wife of Hamisi (PW.1). Hamisi stated in the charge sheet as the victim/complainant. And that that did prejudice the appellant. We do not agree. If PW.1 and 3 are

husband and wife owning a shop that was robbed, then either is a complainant. Here Hamisi was some distance at his brother's home when the shop was raided with his wife present. His evidence was that it was the appellant who came armed and frog marched him to the shop only to find that it had been ransacked by the appellant and his mates. We did not find that because Hamisi was listed as the complainant, and not his wife, did prejudice the appellant (see S. 382 Criminal procedure Code) and in any case the appellant was departing from his appeal.

However on the issue of the words "dangerous or offensive" missing from the charge, we considered that in the light of S.296 (2) Penal Code and the case of **JOHN NDUNGU V. R. CR. A. 115/95 (C.A.)**. We found that that ground had no merit. Evidence has had it that the appellant was in company of others and they wounded the complainant (Hamisi). S. 296 (2) Penal Code says that if the robber is armed with a dangerous or offensive weapon or is in a company of other(s) or the victim is wounded, either ingredient is sufficient on its own to be a basis of a charge S.296 (2) Penal Code.

On the ground of identification and/or recognition, the appellant submitted that the robbery took place at night and the learned trial magistrate did not caution himself before relying on the evidence given in this regard. That evidence basically came from Hamisi PW.1, his brother Kadenge Hamisi (PW.2) and his wife Josephine (PW.3). The source of light used to identify was termed insufficient.

In this connection we examined the evidence of the witnesses given w.e.f. 23-1- 2001. Although he gave the date of the incident as 10-1-2000, it took place at 9 p.m. He was at his young brother's (PW.2) house for supper. They lit a big fire and were warming themselves when the appellant whom both knew very well appeared and greeted them. He wanted PW.1 and ordered him to leave the supper. He then produced a panga. PW.2 fled but the appellant chased and caught PW.1. He cut him with a panga all over the body. PW.2 raised alarm. That the appellant dragged PW.1 to his house-cum-shop demanding for money. That on arrival there the appellants mates had already ransacked the place stealing money, shop goods and other property. That the appellant whose voice PW.1 also knew was about to cut him (PW.1) again but his co-accused stopped him because they had carried away everything. That PW.1 and the appellant were agemates. PW.1's evidence is that he knew and recognized all the other co-accused before the learned trial magistrate. He was not shaken in cross examination about recognizing the appellant as someone he knew very well.

We then went over the evidence of PW.2 where the attack started. It is similar to what PW.1 said from the arrival at the spot where there was a fire to the attacking PW.1. PW.2 said that he knew the appellant before and when he came to the bonfire, he saw him in the light that radiated and they invited him to sit and eat with them, but when the appellant turned criminal PW.2 fled and raised alarm. People came but robbers had fled.

As per Josephine (PW.3, PW.1's wife) she was the one at the shop-house. The 6 robbers came and knocked on the door as she was having her supper. They asked for cigarettes. The appellant whom she knew by name came in first. She had lit a lamp which gave out bright light by which PW.3 saw the appellant. That before PW.3 would dispense the cigarettes accused 1 (Kaingu) directed the appellant to go and look for PW.1. He went. The rest whom PW.3 knew well then stole money, shop goods etc. They were armed with-a long knife, rungu and a panga. The robbery took 15 min. That the appellant then returned dragging along PW.1 who was bleeding. An alarm had been raised but by the time rescue came the robbers had fled. She maintained that she had seen and known the appellant for over 2 years before this incident. The learned trial magistrate did accept all the evidence on the identification by recognition of the appellant at the scene. It all started at the home of PW.2 where there was a big bright fire burning to the shop where a lamp was also brightly burning. PW.1, 2, 3 recognised the appellant. What is not clear to us is why the leanred trial magistrate did not similarly find against the appellants' co-accused persons whom he felt they were with the appellant but still concluded their identification was in doubt. The learned trial magistrate did not state this doubt yet the evidence of PW.1 and 3 was that they knew all these people before, and they recognized them in the lamp light at the shop.

The appellant then submitted that the name "Mwalimu" is common among the Coast people. But we did not see much turning on this. He was recognized by PW.1, 2, 3 – his villagers/neighbours.

We were also satisfied from the evidence of P.C. Katana (PW.5) that the robbery matter was reported to them when PW.1 went to the Kijipwa police station with injuries. They began a long hunt definitely on information given, including the assistance of the local assistant chief Henry Ngala (PW.4) The culprits were arrested one by one. That the appellant was arrested in Mombasa. It is not in our view that all this was fabricated or something was to falsely implicate the appellant with his mates. He did not challenge PW.5 on his arrest at all. And be it noted that even in his unsworn statement the appellant simply began with the day of his arrest – on 17-4-200 at Mombasa. To us, giving the name of the offender to police should only be seen along with other evidence or lack of it tending to the doubt of identifying an offender. It cannot be a principle of law that even with other cogent evidence obtaining omission to give the name at the first instance is fatal.

The learned trial magistrate was rather economical with his drafting of the judgment but in our own assessment of the evidence, the conclusion on the appellant is the same. Only that it does not appear that on evidence before him and how he concluded in the judgement, the co-accused ought to have been acquitted. But be that as it may, this appeal is dismissed.

Judgement accordingly.

Delivered on 30th November 2004.

J.W. MWERA

JUDGE

D. MARAGA

AG. JUDGE