REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 337 OF 2002
(From Original Conviction and Sentence in Criminal Case No. 561 of 2001 of the Senior Principal Magistrate's Court at Malindi J. Manyasi, SPM)

KARISA KAZUNGU

KARABU CHARO

KENGA KARISA……. APPELLANTS

Versus

REPUBLIC ……. RESPONDENT

J U D G M E N T

KARISA KAZUNGU, KARABU CHERO and KENGA KARISA (THE Appellants) were jointly tried and convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code by the Senior Principal Magistrate at Malindi and sentenced to suffer death. They have all appealed against the convictions and sentence.

The Appellants have have all their respective Amended Petitions of Appeal raised two common grounds. The first one is that the charge against them is incurably defective. The second one is that the trial magistrate erred in failing to take their respective pleas before commencing the trial.

As the first ground alleges that the charge is incurably defective, we will set out the charge and the particulars thereof in extenso. It reads:-

"ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE"

The particulars thereof were:-

> "KARISA KAZUNGU, KENGA RARISA and KARABU CHARO: On the 4th day of March 2001 at around 8.30 p.m. at Malanga Village in Lango Baya Location within Malindi District of the Coast Province, jointly robbed EMMANUEL KATANA MLEWA of a bicycle make Avon S/No. 782015 valued at Ksh. 4,500/= and at or immediately before or immediately after the time of such robbery used personal violence to the said EMMANUEL KATANA MLEWA"

In their respective written submissions the Appellants stated that the omission of the words "while armed with dangerous or offensive weapons" in the particulars of the charge rendered it incurably defective and cited the Court of Appeal decisions in Daniel Morara Mose Vs Republic Criminal Appeal No. 86 of 2000 and Said Bakari Ali & 2 Others Vs Republic Criminal Appeal No. 90 of 2003 in support of their arguments.

Our understanding of section 296(2) of the Penal Code under which the Appellants were charged is that the charge is complete and proper if the offender:-

> "(a) is armed with a dangerous or offensive weapon;
>
> OR
>
> (b) is in the company of one or more other person or persons;
>
> OR
>
> (c) if, at or immediately before or immediately after the time of robbery, wounds, beats strikes or uses any other personal violence against any person".

The particulars of a charge under that section must contain any one of these sub-heads in order to be legally valid.

In this case the robbers were three and the charge states that they used personal violence against the complainant. Two of the above sub-heads are therefore incorporated in the charge. The omission of the first sub-head does not, in our view render the charge defective. In the circumstances ground 1 of the Appellants' grounds of appeal fails.

The second ground of appeal common to all the Appellants is to the effect that their pleas were not taken. They have pointed us to the typed record which does not show that any pleas were taken. The record starts with a mention on 28/3/2001 when the case was fixed for hearing on 30/5/2001. A perusal of the original lower court record, however, shows that the case was registered on the 14/3/2001 when the plea was taken and all the accused persons plead not guilty. We are satisfied that error arose during the typing of the proceedings. The typist omitted the proceedings for 14/3/2001 which were recorded on the flap of the court file and started with page 2 of the handwritten record. The Appellants are therefore not being candid in asserting that their pleas were not taken. That ground of appeal also fails.

After the second ground of appeal the first Appellant parts company with the other two. His third ground of appeal attacks the learned trial magistrate's reliance on the evidence of the shoe found at the scene of robbery which was alleged to be his. On this ground the first Appellant submitted that there is nothing to prove that the shoe was his and that the evidence of P.W.3 being the sole evidence against him on this point cannot be relied upon. He also wondered why the people who arrested him did not carry out a search in his house to see if they could find the other shoe.

We would like to point out that evidence of a single witness if believed can found a conviction. In this case therefore if the evidence of P.W.3 which was to the effect that the single shoe found at the scene belonged to the first Appellant can be believed his third ground of appeal is for dismissing. We would like to consider the evidence of that witness.

P.W. 3 testified that he identified the shoe as belonging to the first Appellant. He said he had seen the first Appellant wearing it many times before, the last time being on the 4/3/2001 when the witness was drinking mnazi with the first Appellant. He further stated that when the first Appellant was arrested by police he confessed that the shoe belonged to him.

We have carefully examined the evidence of P.W.3. To start with, the alleged confession made by the first Appellant on 7/3/2001 at the time of arrest which the learned trial magistrate relied on is not

admissible. Although allegedly made and received by court before the enactment of the Criminal Law (Amendment) Act of 2003 it was not made to a police officer of or above the rank of inspector and the judges rules were not followed. Secondly, there is nothing to prove that the shoe belonged to the first Appellant. During cross-examination P.W.3 stated that the shoe was made of tyre material and that there was written on it the name "Tototo" which is not the first Appellant's name but that of a shop in the first Appellant's village. The witness also said that there are many people who wear shoes made of tyre and that he had not seen the first Appellant with anything having that name. We are not told whether or not the shop with that name sells that type of shoes but in our view it must for how else could its name be on the shoe if it does not sell them. If that be so the shoe could belong to any of the many people that P.W.3 said wear such shoes in the village. In the circumstances the first Appellant's third ground of appeal must succeed.

All the Appellants' other grounds of appeal attack the evidence adduced against them with the second Appellant in addition attacking the evidence of P.W.7 who said that he took the complainant's bicycle to her.

Mr. Monda submitted that the finding of the stolen bicycle with the aunt of the second Appellant P.W.7 satisfies the doctrine of recent possession and that the second Appellant's appeal should be dismissed.

At the time of recovering of the stolen bicycle from the house of P.W.7 the second Appellant was not even there. It was the third Appellant who allegedly led police to the house of P.W.7 where the bicycle was hidden. The second Appellant was thereafter arrested at a wedding near there.

We have anxiously analysed and re-evaluated this piece of evidence. It is, in our view, too tenuous to support a criminal conviction especially a conviction on a capital charge like this. The third Appellant denied taking the police to the house of P.W.7. The second Appellant also denied taking the stolen bicycle to that witness. The bicycle having been found with P.W.7 and not the second Appelant in our view, it cannot be said that the stolen bicycle was found with the second Appellant or in his possession for the doctrine of recent possession to come into play.

In the circumstances we find that there was no sufficient evidence adduced against the Appellants. Consequently their convictions are unsafe and cannot be allowed to stand. We therefore allow the three Appellants' appeals quash the convictions and set aside the sentence. The Appellants shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 7th day of December 2004.

J.W. MWERA

JUDGE

D.K. MARAGA

AG. JUDGE