REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

(Coram: Onyancha J & Khaminwa CA)

CRIMINAL APPEAL NO 317 OF 1998

SULEIMAN JUMA (ALIAS) TOM ……..……APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

(From Original Conviction and Sentence in Criminal Case No 2777 of 1997 of

the Principal Magistrate's Court at Mombasa – Joyce Matu, Mrs – Ag P M)

JUDGMENT

The appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code. The charge read as follows:-

"Suleiman Juma alias Tom: On the 28th day of August, 1997 at Shimanzi area within Mombasa district of the Coast province, jointly with others not before the Court, while armed with a sword, robbed Pascal Muasya Mbinda of his cash Kshs 370,000/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Pascal Muasya Mbinda."

The prosecution case was that on the 28.8.97 at 7.30 am PW 1 arrived at Shimanzi area of Mombasa to deliver castor oil seeds accompanied by his turnboy, PW 2. He was carrying with him a sum of Kshs 370,000/- with which he intended to purchase wholesale goods for his shop at Kibwezi. The two parked their lorry registration No KAD 442 Z outside the gate of High Ree Exporters where they intended to unload the castor oil seeds which they were carrying. The latter were still closed and PW 2 went to check on them as PW 1 read a newspaper.

It was at this point that a man later to be identified as the appellant appeared and stood at PW 1's lorry front door. The time is said to have been 8 am but the man and PW1 did not speak to each other. The man went towards the back of the lorry and there ended the encounter until thirty minutes later when PW2 returned and informed PW1 that there was a man cutting the tarpaulin of their lorry at the back. PW1 went to the back of the lorry to see what was happening whereupon the appellant took out a sword from under his dress and started to chase PW1 with it around the lorry.

PW1 dropped the lorry keys as he was still being chased and ran away to a distance of fifteen steps and stopped where he could still see his lorry. The appellant picked the keys, entered the lorry and drove it away. PW1 followed him with the help of another person not called as a witness to the Railway Quarters

where they found the lorry stuck in the mud. As they arrived they saw the appellant and two other people who on seeing PW1's group, walked away and disappeared. PW1 left PW2 and security guards guarding the lorry and went and reported the incident to Makupa Police Station. Police accompanied him back to where the lorry was and on inspection found that all the goods that had been carried on the lorry were intact except that a sum of money amounting to Kshs 370,000/- which PW1 had hidden under a mattress of a bed carried on the lorry in the cabin, was missing. The lorry keys were found on the ground near the lorry. The lorry was then towed away for off-loading. Before leaving the Railway Quarters PW1 got information from the members of the public that the appellant was known as "Juma". An identification parade was conducted on 23.9.97 where only PW1 attended and he identified the appellant. When recording his statement at the Police Station on the same day PW1 appears to have stated that the appellant was also known as

"Tom". He identified the appellant at the identification parade. The robbery was staged in broad daylight and in the presence of PW2 and members of the public who did not help PW1. The appellant appealed against conviction and sentence. He raised five grounds. He was unrepresented by counsel but he however tendered in Court a written submission which we allowed. We understand that in recent times this method of submission by prisoners has become common and has so far not been questioned.

In ground one the appellant argued that the circumstances under which the robbery took place were so unfavourable that PW1 could not have been in a good position to effectively register in his own mind the true and correct identity of the attacker. He argued that the evidence on record shows that the time taken by the attacker was too short. The witness was suddenly attacked and immediately got so shocked that his mind had no adequate opportunity to register well the identity of the attacker. PW1 had not paid attention on to the person who a few minutes earlier hovered around the lorry's door and so it is argued, so he could not have registered properly his appearance then and later when the attack took place.

Appellant argued further that the attacker carried a knife with which he threatened and chased PW1 who therefore was under so much fear that he could not be expected to think about the appearance of the attacker when his life was in danger.

We however hold that the conditions for identification when this incident occurred were positive. It was 8 am and therefore in broad daylight. PW1 had already looked at the intruder who had stood by the door of his lorry although he had no reason to examine him carefully. PW1 approached and faced the attacker at the back of his lorry when PW2 warned him that someone was cutting the tarpaulin. He ran and stood about 15 paces away and continued watching the attacker as the attacker entered the lorry and drove it away. He followed the lorry with the help of another motorist and at the Railway Quarters he once more saw the attacker walk away from the lorry as PW1 approached. While we do agree that PW1 was put under stress during the attack, we however agree with the trial magistrate that PW1 had ample opportunity to identify the attacker. His evidence was supported by the testimony of PW2 who was with him most of the relevant period.

PW2 was not himself under direct attack as was PW1. His evidence corroborates that of PW1. We accordingly dismiss the appellant's ground one and two.

The appellant appeals against circumstances surrounding the identification parade. He says the same was so faulty and irregular that the findings therefrom should not have been relied upon by the trial magistrate. The evidence of identification parade was given by PW4, No 218454 IP Jimmy Kaminga. We have carefully considered his evidence as did the trial magistrate. We have come to the conclusion that the parade was properly conducted. The witness's evidence that he took eight men who tended to ressemble the appellant did not prejudice the appellant. The persons attending parades should as much as can be available tend to ressemble the suspect in features or dress. This cannot however be overstretched. Suffice it to say that we uphold the trial magistrate's finding on this ground that the parade was properly conducted and that PW1 properly identified the appellant at the parade.

The appellant in his fourth ground of appeal stated that the trial magistrate failed to consider the circumstances surrounding his arrest. He argued that had he done so he would have found that the arrest

was in no way connected with the events that took place on 28.8.1997 and related to this case. He argues that he was arrested for a totally different case and while in police custody PW1 was and must have been tipped to come and look at his face before the identification parade was carried out, which therefore became a mere formality. However, the evidence of PW3 a police witness No 36643 PC Zachary Momanyi shows that PW1 was summoned to attend an identification parade and establish whether the person who had attacked him on 28.8.1997 could be among those in the parade. The appellant had apparently been arrested for a different offence and was in the police custody. There is nothing on record to suggest that the witness was tortured or had prior opportunity before the identification to see the appellant in the police cells until he picked him out at the parade. We note that PW1, when he reported the robbery incident to the Police, indicated that he had been informed by the members of the public that his attacker was known as "Juma". We note also that PW1 reported that he had been informed that his attacker was being referred to as "Tom". The appellant made capital of this minor contradiction. We note from the evidence on record that PW1 did not know the name or identity of his attacker at the time of the robbery. The first time he got wind from members of the public of the attacker's name real or reputed is at the Railway Quarters. If by the time he reached the Police Station to report he had received a fresh tip of the attacker's other name, we will never know. We however find that the issue is not material in so far as the identification of the appellant during the process of the robbery and later at the parade, is concerned.

The fifth ground of appeal is that the charge under which the appellant was tried, convicted and sentenced, was defective. Before considering this ground, we wish to deal with the last ground of appeal which is that the trial magistrate erred in both law and fact in failing to give proper consideration of the appellant's defence evidence. The appellant's defence is on page ten of the typed proceedings. He merely denies having been involved in the alleged robbery after describing the manner of his arrest.

The trial magistrate has considered the appellant's evidence in great depth on page 14 of the typed proceedings. He rejected, and rightly so, the appellant's statement that he was forced to sign the identification parade certificate. He noted that neither the appellant nor his advocate raised those relevant issues during cross-examination. We uphold the trial magistrate's finding in respect to this ground of appeal and reject it. We now turn to the fourth ground of appeal that the charge was defective. We have at the beginning of this judgment quoted the charge as it stood in the lower court. The appellant put in a supplementary ground stating that if the charge of robbery with violence contrary to s 296(2) of the Penal Code does not in its description contain the words "dangerous or offensive weapons", the charge cannot stand.

We note that the charge as quoted at the beginning of this judgment does not contain the words "dangerous or offensive weapons". According to the finding made in the case of *David Lawadede –vs- Republic* in this

Court's Criminal Appeal No 259 of 1998 recently, unless the said words quoted above are in the charge the same should be held defective.

Before we make a finding on this point we wish to examine the provisions of section 296(1) and section 296(2) of the Penal Code.

S 296(1) states:-

"Any person who commits the felony of robbery is liable to imprisonment for fourteen years ……"

S 296(2):-

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with

one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

An offender would therefore be liable to be sentenced to death only if during the robbery –

(1) he is armed with any dangerous or offensive weapon or instrument

or

(2) 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 personal violence to any person ……

We, with respect, accordingly wish to make a finding that being "armed with any dangerous or offensive weapon or instrument" is only one of the three exclusively independent conditions which would make a simple robbery under sub-section (1) of section 296 of the Penal Code become a robbery with violence punishable under section 296(2) of the Penal Code.

It would appear to us therefore that an offender who commits robbery and who at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any violence to the victim, is liable to be punished under section 296(2) of the Penal Code. This would remain so even if the offender at the material time was not armed with any dangerous or offensive weapon or instrument. Oddly also an offender who under the second condition of the section, commits robbery in company with one or more other person or persons would need to be sentenced to death in accordance with the requirement of section 296(2).

The situation would remain the same even if the offender was not armed with any dangerous or offensive weapon or instrument.

We, the Courts, are only interpreters of the law as it is drafted by the legislators. If it were not so, we could boldly suggest that the first "or" on the third line of section 296(2) of the Penal Code should have been "and" so that the rest of the sub-section following would qualify what comes before.

If our interpretation of s 296(2) of the Penal Code as done hereinabove is correct (and we so hold) the words "dangerous or offensive weapons" need not be imperatively included in each charge. The prosecution would include only the words of s 296(2) that the facts of the case would necessarily require. In the case before us the charge stated that the accused was armed with a sword without describing the knife as a dangerous or offensive weapon or instrument. As stated in the Court of Appeal Criminal

Appeal No 86 of 2000, *Daniel Moraa Mose –vs- Republic*, a charge with that ingredient omitted is likely to bring prejudice and lead to injustice and is incurable especially where the accused is not represented by counsel.

We hold that it cannot be said that the appellant was not prejudiced in this case. We hold also that the defect in the charge was material and was not curable. The appellant's appeal therefore succeeds on this ground.

The appellant also argued that the charge was defective on another aspect.

He argued that the trial magistrate erred in convicting him of the robbery of Kshs 370,000/- while the evidence on record would only point to a robbery of the lorry registration No KAG 442 Z belonging to PW1. PW1 in his evidence on page 3 of the typed proceedings stated that as the attacker chased him around the lorry he dropped the keys of the lorry and ran away to a distance of about 15 paces away from where he watched as the attacker (later identified as the appellant) drove the lorry away. There is no evidence on record that shows that the appellant robbed PW1 of Kshs

370,000/-. Apart from the simple allegation that PW1 had the said amount hidden under a mattress in the lorry cabin, no evidence, not even the evidence of PW2, his turnboy corroborates his statement. The charge should have therefore included the lorry as the item robbed from PW1. It failed to do so. We hold therefore that there was no evidence on record sufficient to prove beyond a reasonable doubt that the complainant PW1 was robbed of Kshs 370,000/- by the appellant on the material day. This ground of appeal therefore also succeeds.

The end result therefore is that this appeal succeeds upon the two grounds stated above. We accordingly quash the conviction against the appellant and set aside the related sentence.

The appellant is accordingly set at liberty forthwith unless lawfully held for other reasons.

Dated and delivered at Mombasa this 5th day of November, 2001

D.A.ONYANCHA

……

JUDGE

J.N KHAMINWA

……

JUDGE