REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 227 OF 2010

(From original conviction and sentence in Criminal case No. 3177 of 2008 of the Chief Magistrate Court Mombasa)

HESBORN OTIENO OMOLLO .....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

JUDGMENT

The Appellant in this case appealed against the conviction and sentence of death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The appellant was charged with three counts of robbery with violence contrary to sections 296 (2) of the Penal code and a fourth count of handling stolen property.

In count 1, the particulars were that on the 15th day of October, 2008 at about 10.30 pm, at Flats area in Likoni location of Mombasa district within Coast Province, the appellant jointly with others not before court and while armed with dangerous weapons, to wit, guns and rungus robbed VICTOR NYANGWESO OKILLA of his LG DVD player, underwater camera, mobile phone make Nokia 6260, and pair of Black shoes , all valued at Ksh 42,000/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said VICTOR NYANGWESO OKILLA.

In count II, the particulars were that on the 15th day of October, 2008 at about 10.30 pm at Flat Area in Likoni location of Mombasa District within Coast Province, the appellant jointly with others not before court and while armed with dangerous weapons namely guns and rungus robbed TERESA FELLINGER of her power shot camera, disc-man Sony colour, Sony MP3 player, mobile phone make Nokia Scout, sports shoes and cash ksh 6,500 , all valued at Ksh 86,000 and at or immediately before or immediately after the time of such robbery used personal violence to the said TERESA FELLINGER.

In count III, the facts were that on the 15th day of October, 2008, at about 10.30 pm at Flats area in Likoni location of Mombasa District within Coast province, the appellant jointly with others not before court while armed with dangerous weapons namely guns and rungus robbed FLORIAN RIESENBERG, his canon camera, IPCD-MP3 player, Mobile phone make Sagem, rack sack and cash ksh 8,000, all valued at Ksh 50,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said FLORIAN RIESENBERG.

In count IV, the facts were that on the 16th day of October, 2008 at about 5.00pm at Ujamaa village in

Shika adabu location Mombasa District within the Coast Province, the appellant otherwise than in the course of stealing handled one Sony Ericson mobile phone and two head speakers knowing or having reason to believe them to be stolen property.

The case proceeded to full hearing whereby the appellant was convicted, and sentenced to suffer death in count 1. The sentences in respect of counts 2 and 3 were ordered to remain in abeyance and so was the sentence in respect of count 4.

Aggrieved with the conviction and sentence, the appellant filed an appeal in which he cited the following grounds (he later amended and sequenced them in order as follows);

(1) The learned trial magistrate erred and seriously misdirected himself by failing to consider that evidence of identification by Pw5 was unsafe to rely on as the same was at free from a possibility of error;

(2) That, the learned trial magistrate erred and seriously misdirected himself by convicting the appellant on charges of robbery while the evidence on record showed that he would have been a mere handler of the stolen goods;

(3) That, the learned trial magistrate erred and seriously misdirected himself by shifting the burden of proof from the prosecution to the appellant to prove by identification documents of the goods received yet the complainants, Pw1 and Pw2, did not produce any identification documents to prove beyond reasonable doubt that the recovered items belonged to them given that;

(i) They failed to properly identify those items as belonging to them and nobody else.

(ii)They failed to adequately describe the items. And whether or not they had specific identification marks on them.

(4) That the learned trial magistrate erred and seriously misdirected himself by concluding that Pw5 was a credible and honest witness without properly finding that he was never sworn to administer the usual oath contrary to what the law provides in section 151 of the Criminal Procedure Code.

(5)That, the learned trial magistrate erred and seriously misdirected himself by failing to inform the appellant of his rights to have the previous witnesses be recalled to give evidence a fresh or to be further cross examined by the appellant before rejecting his application therefore he lost his legitimate right or expectation contrary to what the law provides in section 200(3) of the Criminal Procedure Code.

(6) That, the learned trial magistrate instead of addressing and probably eliminating the doubt, he merely dismissed his defence as out of hand. This amounted to a serious error on the part of the trial court.

The prosecution adduced evidence of eight (8) witnesses.

PW1, TERESA FELLINGER, testified that she was a volunteer from Germany working with Neighbour’s Children’s centre and staying at Likoni flats. She recalled that on 1.9.2008,is the day she came to Kenya and was staying in the said flats with Timothy Okinyo, the manager of the Orphanage. She stated that on 15.10.2008 at about 10.30 pm, she, one Victor and another volunteer by the name Florian Riesenber were in the sitting room when the door opened and a man with a gun entered the house and ordered them to keep quiet. That a second man came into the room with the security guard who guards the house and both men ordered them to lie down. Pw1 said that Florian was beaten with the gun butt on the head while another beat her with a stick as she lay on the floor that they got scared. She said that they were about 4 to 5 robbers and others entered their rooms and started looking for things, which took about 5 minutes. She went on, to testify that one of the men ordered her to stand up and go to her

room where two people asked her for her things and phone. She was ordered to lie down in her room as they rummaged every corner of the room and one put a plastic bag with rubbish on the head to see if anything had been left. Pw1 said that the lights in her room were off but the ones in the sitting room were on and enough to enable one see the other rooms . She said that they stole her camera, canon power shot; Sony disk-man grey, Sony MP3 player (black), a Sony head set, a bag (rack sack), a torch (grey), Sony box for listening, brown wallet with ID cards and 6,500/= in cash, shampoo and shower gel, shaver, money card, bent card and sports shoes (Puma), Nokia phone, make up set, a nail set all valued at ksh 80,000/=. That after they left, Pw1 and the others were still lying on the floor. She said she could not recognize any one of them. The next day on 16.10.2008, she reported the matter to Likoni police station. Later, she learnt a person had been arrested over the offence. She identified a brown wallet which had kshs. 4000/= believed to be part of the Kshs. 6,500/= that had been in the wallet (Exhibit P1), a white Sony music box (Exhibit P2) and a Nokia phone.

On cross examination, Pw1's testimony was not shaken. She said that although the wallet did not have special identification and the music box no special mark, the items were still hers. As for the money it was just normal money.

Pw2, SANDRA WEBER, told court that she was a volunteer and stayed in Nyali. That on 15th October, 2008, she had visited others in Likoni and at around 9.45 pm, she and Timothy went to buy things at Likoni and returned to the house after about 20 minutes. They found Triza standing outside the door of the house and was agitated while saying that things had been taken. They entered the house and found things strewn all over and realized they had been robbed. Pw2 stated that she noticed Florian had blood on the head and there was some blood on the floor. She said that her belongings were in this house and some, while the lap top computer, Panasonic Digital camera, mobile phone make Sony Ericson, her bag, her bank card and some money whose sum she could not remember. Later, she was informed that her phone had been recovered and she went to Likoni police station where she was shown a mobile phone make Sony Ericson which she identified using her numbers and the German songs inside it. (Exhibit P3). She also said that she did not see anybody as we came back after it had happened.

During cross examination, Pw2 confirmed the phone to be hers and her testimony too was not shaken.

Pw3, FLORIAN WESSINGER, stated that he resided at Diani and was on holiday. He then stated that on 14.10.2008 about 9.45 pm, he was in a house at Likoni with Victor and Triza and the door was open. That suddenly the Maasai watchman came into the room while being held on the neck by a person and was forced to lie down. That two other men came in and he was pointing a gun in the air as another ordered him to keep quiet and put his hands above his head. That one of them hit him on the head with a pistol several times that he bled. He was forced to face down under the chair as one asked him where the money was. Pw3 told the man he could show him in his room and he started searching him in the pockets. He also told court that the man kept beating him and demanded for his cell phone make Sagem which he gave him. He further said that they took his Kshs. 8,000/= in cash, music player, ipad a digital camera and a DVD player from his personal room. He then said he was injured that he went to hospital for treatment then Likoni police station where he made a report. He indentified the P3 form dated 18.10.2008 (exhibit P4). He then said that he could not identify any of the robbers.

PW4 was No. 63299 PC. TIBERIUS MUREITHI, a police officer who was attached to Likoni police station at the crime section. His evidence was that on 15.10.2008 at about 11.50 pm, he was on crime stand by duties when he received a report from some complainant that they had been robbed by a person armed with a gun. That upon receiving the report, he was accompanied by duty officer to the scene of crime at Likoni flats where the said complainants were staying. Pw4 said that they found things strewn all over the house and one person injured. He started investigations the next day. He was at the station when he received a call from one Timothy that there were two suspects who had been seen at Shika Adabu area carrying some of the things that were said to be stolen. He rushed to Ujamaa where it was alleged the suspect was and found him. They arrested the suspect who was seated outside and playing draft. They conducted a quick search and found him with Sony Ericson, a speaker, a wallet with money in his pocket. He was taken to the police station after he declined to talk about the other suspect on interrogations. Pw4 said that the suspect insisted that the items were his but he could not produce any identification

documents for them. He then called the complainants to identify the recovered items. Pw4 said that an identification parade was conducted and he opted to charge the suspect, now appellant, with the offences of robbery with violence. He identified the wallet which had kshs. 4,000 in cash (Exhibit P1) a phone which was identified by one Sandra (Exhibit P3), a stereo speaker system (“Exhibit P2)

In cross-examination, Pw4 said that they arrested two people at the place where the draft was being played but released one as he had no items on him. He said that the other suspect who was said to have carried the bag escaped before they could arrest him.

Pw5, VICTOR OKILA NYANGWESO, testified that he was a student aged 15 years old. He stated that on 15.10.2008, at around 10.00pm, they had two visitors namely Florian and Teresa from Germany, with whom they were watching movies. He then stated that a group of thugs burst into the room and ordered them to lie down. He said that three of the thugs had guns while 2 had rungus and they asked him where the money was. That these people started collecting things which they did for about 10 minutes and then left, while carrying items which included a laptop, a DVD, Ipod, money Ksh 6,000/=. Pw5 said that his bother Timo returned and after being told what had happened, went to report the matter to the police station. Pw5 said that Florian was hit with a gun butt. He also said that the TV and lights were on and he would see the thugs as they ransacked. He was later called to record a statement with the police and attend an identification parade from where he identified one person from the beard he had and the clothes he was wearing which were the same ones he wore on the night of the raid. The man he identified, he told court was the appellant who he said was the ring leader and had a pistol, plus some of the items were recovered from him.

In cross examination, Pw5 said that the other complainants also attended identification parade. He said that he knew the appellant by physical appearance and that he was arrested the following day when he could freshly remember his face.

Pw6, TIMOTHY OKILA testified that he was on holiday from Dar-es Salaam and was a his flat in Likoni with visitors. He said that he left with two (2) of the visitors namely Triza and Sandra to go to the shops about 200 meters away leaving three (3) others being Teresa, Florian and Victor in the house. On returning to the house, he found it in a mess and Florian was bleeding while Teresa was crying. He said that things were broken, suit cases open and things strewn all over the place. He inquired what had happened and was told that thugs had attacked them and stolen several items. He escorted Florian to hospital for treatment, took the guests to the ACK Guest house in Likoni and then went to report the incident to Likoni police station. And on 16.10.2008, with his friend Charles, they went around seeking information on what had happened when he stopped a young man with a rack sack he identified as Florian’s as he had used it before. They then followed the man who went and joined a group of people. He then called the OCS, Likoni police station with the information. The police came, raided the group but the bag was not found. The rest of the people in the group ran away except two who were arrested and they included the appellant. That the appellant was searched and found with a phone, speakers, phone Sony Ericson, speaker, plus a wallet belonging to Teresa (Pw1) which had money. Pw6 said he identified the phones and when the owners opened them, his number 0731449446 popped up. He recorded his statement with police.

Pw6 remained steadfast in cross examination.

Pw7, No. 232321 INSEPCTOR BERNARD MUTUA, of Sewapi police post told court that on 22.10.2009 he was based at Likoni police station as the Deputy O.C.S. He said that he conducted the identification parade where Hesborn Otieno Omollo , the appellant was identified. He testified that he followed the rules and regulations in identification parades and Pw5 was able to identify the appellant. He said that the appellant then signed the parade form and he counter signed the same parade form and he counter signed the same, which he produced as exhibit 4.

When cross examined, he asserted that the parade was conducted as per the regulations and it was only the appellant who was identified from the 8 people on the parade.

Pw8, DOCTOR LAWRENCE NGONE, who was based at Coast General Hospital, testified that he filled the P3 form in respect of FLORIAN RIESENBERG who claimed to have been injured in a robbery incident on 15.10.2008. He filled the P3 form 34 days after the incident because the patient had been examined and treated at Egesa medical clinic on the same 15.10.2008. He found the injures had been caused by a blunt object and classified them as harm. He signed the P3 form on 18.11.2008 which he produced as exhibit P4.

The prosecution closed their case and the trial magistrate, upon evaluating the evidence that was adduced by the prosecution's witnesses, found he appellant had a case to answer and placed him on defence.

The appellant, HESBORN OTIENO OMOLLO opted to give an unsworn testimony in his defence and called no witness. He testified as Dw1 and stated that he is a barber and lives a distance from his place of work. He said that on 16th in the year 2008, he closed his business at 4.00pm and decided to buy food stuff at the ferry side then boarded a vehicle to his house. That on arrival at his home, he found his wife. He asked his wife to prepare water for his bath but before his wife could do this, his uncle called him on phone asking him to go where he was so they could arrange how to go for a funeral. He left without showering to go and meet his said uncle at the business shop where he sells traditional brew. He found customers and sat down to wait for his uncle. That after half an hour, he saw a small white car and people alighted from it and removed their guns. That these people arrested four (4) people who included him. They were taken to the O.C.S where they stayed for 3 days and the three co suspects were released. An identification parade was then conducted and none identified him but the OCS did not release him. He was then arraigned in court having been charged with and offence, he said, he knew nothing about.

At page 6 of the judgment, the trial magistrate correctly summarized the issue in dispute;

> **"There is no doubt that a robbery took place on the material day and time where the victims were Pw1, Pw3 and Pw5. What is in doubt is whether the accused person was among the people who committed the same".**

After evaluating the evidence, the Honourable trial magistrate concluded this;

> **"Having considered the totality of the evidence adduced by the prosecution, I am satisfied with the corroborative evidence adduced that the accused person was one of the people who violently robbed the complaints and was found in possession of the said stolen items. I do find that the prosecution has proved its case beyond reasonable doubt against the accused on all the counts and find him guilty as charged and convict him."**

In considering the appeal, I have carefully analyzed the evidence that was adduced before the trial court, the submissions by the appellant and learned state counsel, and the law with regard to the grounds of appeal upon which the appellant has based his said appeal.

I find that the learned trial magistrate decided to rely on the evidence of identification and the doctrine of recent possession.

Pw5 said that he Clearly saw the robbers as he was lying down as the rooms were well lit and the television set light was also on and bright.

He stated that the appellant appeared to be the ring leader of the group and he had pistol. But in cross examination, he stated that;

> **"I identified three people in that parade. We were shocked when confronted with gun trotting thugs. We were ordered to lie down. I lay facing downwards in the room."**

With this testimony, one wonders how Pw5 was able to see the appellant when he was facing down. Pw1 testified that they continued to lie down until the robbers left.

There is another aspect in the evidence of the prosecution's witness which is in regard to the watchman. It was in evidence that he was the first to be confronted by the robbers before they entered the house and it would be assumed he had the opportunity to see the robbers. He was however not called as a witness to shed light on how he was sub dued, frog-marched into the room and made to lie down as the rest.

Pw6 testified that he saw a man carrying a rack sack which he identified as belonging to Florian (Pw3) and he followed him until he saw him settle with a group of people. That he then called the OCS and gave him this information and policemen were released to come to where he was. He said he pointed out the man to the police and he was arrested together with the appellant as the rest of the people in the group fled. He stated:

> **"I told police that I am suspecting the bag to be the same as this OCS sent police to whom I showed the bag plus the youth who had it.**
>
> **Officers decided to raid the group but the bag was not found. Others ran away and only two were arrested. The accused was in the group and was arrested. The one I had seen with the bag was also arrested".**

I find it surprising and unbelievable that the police would be shown a suspect with a bag identified as having been among stolen items but fail to recover the same but arrest the suspect, who was again released without being charged.

The principles governing identification and recognition are well established. In the case of ABDALLA BIN WENDOH & ANOTHER VRS REGINA (1953) 20 EACA 166, the principles of identification and recognition, which have been tested time and time again, were first established. The major factor to be considered here is whether the description of the person was captured in the investigations. In the evidence adduced in the instant case, in evidence that was adduced, it has not been shown Pw5 recorded any statement to compare with his statement and the other evidence , to reveal any nexus. Had the young man been arrested and the bag recovered from him so that he is charged jointly with the appellant, who was also said to have been found with others connected with the alleged robbery, then circumstantial evidence would have connected the appellant to the charge of robbery with violence which was alleged to have been committed by a group of men. (See case of KERISHOLE MASAKU VRS REPUBLIC (2011) e KLR (C.A) where principles were restated). I therefore hold that the evidence of identification did not meet the standard required to connect the appellant to the group that attacked and robbed the complainants.

There is then the issue of the contested section 200 (3) of the Criminal Procedure code and why the case did not start de novo. Section 200 (3) of the Criminal Procedure Code provides as follows;

> **"Where a succeeding of magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused of that right".**

Hon. Ole Tanchu took over the hearing of this case before the trial court on 10.2.2010 and on 18.2.2010,the appellant sought to have the matter begin de novo. In his layman language the appellant put it thus

> **"I pray that my case do start a fresh so that the court can freshly understand the case"**

To which the prosecution reacted thus;

> **"I am not comfortable with starting the matter a fresh. All witnesses have testified and the accused had an opportunity to cross examine all the witnesses before a competent court of law. No reason has been given why matter should start a fresh. I object".**

The Appellant retorted to this reply as follows;

> **"I did the case in court No 11 and there are two witnesses who the prosecution has not called".**

The learned Senior Resident Magistrate, (as he then was) replied as follows;

> **"...........in view of section 200 of the criminal procedure Code, this case has reached defence stage and in my view this court is equally competent to read the proceedings and proceed with the matter where it has reached. In my view the provisions of section 200 are not mandatory. I find that the accused has not given sufficient reason as to why the matter should begin de novo as he had an opportunity to cross examine all the prosecution witnesses.**
>
> **I therefore decline to accord his application and order that the case to proceed from where it has reached. Right of appeal within 14 days".**

Section 200 of the Criminal Procedure code is intended to guarantee fair trial and it guards the right of an accused person, in this case the appellant. It is sub-section (3) which is operative. One cannot refer to section 200 and purport to be referring to section 200(3) of the Criminal Procedure code.

What the court is required to do under this section is to weigh the prejudice the carrying on with proceedings from where they have reached will cause the accused person. And it is not whether the case has reached the defence stage or whether the prosecution opposes.

The right for a case to start de novo is a right reserved for the accused person to guarantee fair trial in instances where judicial officers change. It is for the accused person to elect whether or not the case should be re opened. This is the reason why the rest of the subsections of section 200 of the Criminal Procedure Code are subject to sub-section (3). And it is the duty of the court to explain the prejudice it would cause if the case proceeded and whether the accused need to re-examine the witness.

The appellant indicated that there were two witnesses who the prosecution had not called to testify and he wanted them called. This ought to have raised a red flag. I find the reasons given by the prosecution in objecting and the court in rejecting application to have the case begin de novo not valid and supported by law.

In my view, I would have set aside the trial, save for the time it has taken, the witnesses that testified, who were said to have come from Germany, may have scattered and probably left the county.

Accordingly, I uphold the appeal and quash the conviction with regard to the charges of robbery with violence contrary to section 296 (2) of the Criminal Procedure Code. and set aside the sentence of death that was imposed upon the appellant.

With regard to the alternative charge where the appellant was charged with handling stolen property contrary to section 322 (2) of the Penal Code, I find that the appellant failed to explain how he came into possession of the property that was alleged to have been found on his body and identified as belonging to some of the complainants. He in fact did not object to their being restored to the owners. I therefore find that the prosecution managed to prove their case against the appellant with regard to the said charge.

The sentence provided for the offence of handling stolen property contrary to section 322 (2) of the Penal Code is a maximum of fourteen (14) years. I therefore substitute the suspended sentence and sentence the appellant to seven (7) years imprisonment.

And since he has been in remand and prison for over 8 years, I find he has served and equivalent sentence and direct that he be released forewith unless he is lawfully held.

It is so ordered.

D. O. CHEPKWONY

JUDGE

Judgement delivered, signed and dated this 13th day of February 2017.

In the presence of:

M/s Ocholla for the state

The Appellant – Present

C/clerk- Kiarie