REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 47 OF 2014

FARAH HUSSEIN ALI HAYANESH..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 2004 of 2012 B.J. Ndeda – Senior Principal Magistrate)

J U D G M E N T

The appellant was charged in the subordinate court with six counts. Count 1 was for robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were was that on 29th November 2012, at Dagahaley refugee Camp in Dadaab District within Garissa County robbed one Abdi Kamal Abdullahi Omar one Nokia mobile phone valued at 8,500/- while armed with a rifle and at or immediately before or immediately after the time of such robbery threatened to use personal violence against the said Abdi Kamal Abdullahi Omar.

Count II was also for robbery with violence.

The particulars of the offence were that on the same day and place, robbed Dahir Maalim Mohamed one Nokia mobile phone make 1680 valued at Ksh. 5000/- while armed with a rifle and at or immediately before or immediately after the time of such robbery threatened to use personal violence against the said Dahir Maalim Mohamed.

Count III was also for robbery with violence.

The particulars of the offence were that on the same day and place robbed Abdilaziz Ahmed Muktar one Nokia mobile phone make C2 valued at Ksh. 7,500/- while armed with a rifle and at or immediately before or immediately after the time of the said robbery threatened to use personal violence against the said Abdilaziz Ahmed Muktar.

Count IV was again for robbery with violence.

The particulars of the offence were that on the same day and place, robbed Abdirahman Mohamed Hassan one Nokia mobile phone make 1260 valued at 2,000/- while armed with a rifle and at or immediately before or immediately after the time of the said robbery threatened to use personal violence against the

said Abdirahman Mohamed Hassan.

Count V was also for robbery with violence.

The particulars of the offence were on the same day and place, robbed Abdigane Ibrahim Hussein one Nokia mobile phone make X2 valued at Ksh. 8,000/- while armed with a rifle and at or immediately before or immediately after the time of the said robbery threatened to use personal violence against the said Abdigane Ibrahim Hussein.

Count VI was for possession of a firearm without a certificate contrary to Section 4(2) (a) of the Firearms Act Cap 114.

The particulars of the offence were that on 30th November 2012 at Dagahaley Refugee Camp in Dadaab District within Garissa County was found in possession of three rounds of ammunition (7.62 X 39) mm caliber without a firearm certificate.

He denied all the six charges. After a full trial he was convicted of count 1 and count II of robbery with violence and acquitted of count 3, 4, 5 and 6 under Section 215 of the Criminal Procedure Code. He was sentenced to death on both count I and II. However, the trial court noted that since the appellant had only one life, he would serve the sentence on count I, and discharged him of count II under Section 35 (1) of the Penal Code.

Dissatisfied with the decision of the trial court, the appellant filed his appeal on 2nd July 2014.

His grounds of appeal are as follows:

1. ***The charge was defective.***
2. ***His identification was not positive.***
3. ***That the first report to the police did not show that he was the culprit.***
4. ***That the mode of his arrest did not show that he was the culprit.***
5. ***That the prosecution evidence was inconsistent and contradictory.***
6. ***That no ballistic report was produced and as such he was not proved to be guilty.***

Before the appeal was heard, the appellant with the permission of the court filed written submissions, which we have perused and considered.

At the hearing of the appeal, the appellant relied on his written submissions and added that his home was at Lagdera Refugee Camp Block A5. He stated that his mother had died and he thus travelled to another refugee camp to chew miraa and the police emerged, assaulted him and took him to a house where they conducted a search led by Senior Sergeant Idriss, and that the said Senior Sergeant Idriss produced bullets from his pockets and stated that they found the same in his house, thus implicating him wrongly.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that the charge sheet was not defective and that the charges were read to him in Kisomali language which he understood, and fully participated in the trial through cross examination of all prosecution witnesses. Counsel submitted further that in case there were any contradictions, the same were curable under Section 382 of the Criminal Procedure Code (cap.75) as well as Article 159 (2) (d) of the Constitution of Kenya 2010.

Counsel submitted further that the incident occurred at 8.30 P.m., but PW1 said that there was sufficient light and that he clearly saw the appellant who was person of brown complexion. In addition, PW4 also confirmed that there was light from a shop and that he could see the appellant well and both witnesses said that the appellant did not cover his face. Counsel further submitted that the two witnesses identified the appellant at a parade and did not collude to fix the appellant. According to counsel PW2, 3 and 5 corroborated the evidence of PW1 and PW4. Counsel submitted also that PW6 gave an explanation on how the identification parade was conducted and also that the signature of the appellant appeared on the last page of the identification parade form.

Regarding the mode of arrest, counsel submitted that no law was violated in arresting the appellant and that the appellant took the police to his house on his own volition. According to counsel, the appellant was neither coerced nor tortured.

With regard to contradictions, counsel submitted that there were none. Counsel emphasized that the identification parade was conducted 2 days after the incident, and that PW5 was not part of the parade nor was he involved in conducting the same as alleged by the appellant.

On ballistic examiner's report, counsel submitted that the production of the report by PW6 was not objected to by the appellant at the trial, therefore, the same should not be objected on appeal.

Counsel submitted further that the exhibits or ammunition were recovered in the appellant's house under a mattress, and though other people were present in the house, the appellant did not call as witnesses.

Counsel lastly, submitted that in his defence the appellant admitted taking police officers to his house, and as such the allegation of torture brought out in his defence statement, was an afterthought. Counsel urged this court to dismiss the appeal.

In response to the submissions of Prosecuting Counsel, the appellant stated that police officers beat and forcefully took him to a house which was not his. He also stated that it was usual for the Prosecuting Counsel to oppose appeals.

During the trial, the prosecution called six witnesses. PW1 was Dahir Maalim Mohamed, the complainant in count 2. It was his evidence that on 29th November 2012 at 8.30 p.m, he was proceeding to the mosque at Dagahaley Refugee Camp when he met a man carrying an AK47 rifle. That man ordered him to stop and he saw his face in the light. The man was of brown complexion and almost his height, and told him to give him his mobile phone which he gave but pleaded with him to return his sim card but he refused and moved away. The witness feared for his life, went home and on the following day reported the incident to the police. Later, he was shown 8 men on a parade and he identified by touching the appellant as the person who had robbed him.

In cross examination, he stated that there was light at the scene and that he could see and identify the appellant. He said that he identified the appellant in a parade in the cells. In re-examination, he maintained that the appellant was identified by him in the cells at an identification parade consisting 8 people in the cells.

PW2 was No. 69495, Senior Sergent Elkano Idriss. It was his evidence that on 30th of November 2012 at midday, while at Dagahaley Police Patrol Base, they received information from members of the public that robberies had occurred the previous night and that a suspect had been seen chewing miraa. He alerted his in-charge Inspector Farah, Cpl Cheruiyot, Cpl Nyogesa, PC Korir and PC Mbaya and they were all mobilized and proceeded to a kiosk which the reportee pointed out. They entered therein and arrested the suspect. They searched the premises but found nothing. They took the suspect to Dagahaley Police Post and interrogated him and he said he lived in Block B5 and E10.

They then went to Block B5 which was nearer and found members of a family therein and conducted a search because the suspect was alleged to have spent a night there. According to this witness, under a mattress they found a soft ground and when they dug, they found a piece of cloth in which were wrapped 3 rounds of ammunition, 7.62 X 39 mm for AK47 rifle. They also found 2 sim cards, one red in colour and one green. He produced the sim cards and the piece of cloth as exhibits. He also produced the two ammunition as exhibits and stated that one had been fired to prove that they were live.

According to him, the people who were allegedly robbed could not identify the sim cards. They then proceeded to Block E10 and found members of a family, conducted a search and found 2 jackets, one light green and another dark brown. He also produced these as exhibits.

It was his evidence that, he was present during the identification parade at Dagahaley Patrol Base where

the appellant was removed from the cells for the identification. He stated that suspects were put in the report office so that they could not see the witnesses. They lined up 8 people of almost equal size and complexion and the appellant was identified positively by pointing. He denied that the appellant was identified in the cells. He stated that the appellant signed the identification parade form and said he was satisfied with the process. He lastly said that a total of 4 witnesses identified the appellant positively.

In cross examination, he stated that only one identification parade was conducted and 4 witnesses identified the appellant. He said that he arrested the appellant from the description given by the reporter who described the kiosk. He stated that the people found in Block B5 and E10 said that the appellant was their guest and others disowned him. He said that when they removed the mattress from where he slept that night, they found the items or ammunitions.

PW3 was No. 77600 PC Humprey Kipngetich. It was his evidence that on 30th November 2012 at 10.00 a.m, he was at the report office at Dagahaley Police Station when he received a report at 10 a.m. from members of public that they had been robbed the previous night of their mobile phones by a man who had a gun. Among them were Abdiaziz Mohamed, Abdirahman Mohamed and Abdiga. Each of the complainant claimed to have been robbed in the same location Block AB at Dagahaley Refugee Camp. The people said they were able to identify the suspect.

In the company of one complainant, they assembled themselves and proceeded to a kiosk where they arrested a suspect. Upon interrogation, he said he would show them the person who had sold him a gun and they proceeded to a house but did not recover anything. He then took them to his house and showed them where he had slept and when they removed a mattress, the Senior Sergeant noticed loose soil and they dug and found a piece of cloth and also 2 sim cards. The suspect then told them he had another house at Block E10, and they proceeded there and recovered 2 jackets. It was his evidence that the occupants said that the appellant was fond of wearing the brown jacket. They then proceeded back to the police station, filled an exhibit memo and requested the expert to ascertain whether the ammunition recover was real. He produced the exhibit memo form and the expert report as exhibits. According to him, the expert confirmed that they were live ammunition as per the Firearms Act.

In cross examination, he stated that many witnesses said that they saw the appellant. He said that the complainants appeared to identify the appellant by voice. He maintained that the appellant took them to the house in Block B5 where the ammunition was recovered. He stated that the host in that house said the appellant was a visitor. He said that the identification parade was conducted at Dagahaley Police Patrol Base.

PW4 was Abdi Kamal Abdullahi Omar, the complainant in count I. He was a caretaker and on 29th of November 2012, he was coming from Block AA to AB camp when he met the appellant with 2 other people standing on the roadside. According to him, the appellant then told him to go near him and when he went there, he noted that he wore a big jacket and had a gun on his shoulder. The appellant then told him to remove all that he had and place it down and he obeyed and put down his Nokia C3 mobile phone and turban as ordered. When he requested for his sim card, the appellant refused to give it to him and ordered him to go away. According to this witness, there was electric light from a shop but it was scanty, and that he could see the accused person about 10 metres away.

The following morning, he reported the incident to the police who recorded his statement. On the 1st December 2012, police asked him to go for an identification parade, and he pointed at the accused in a line of 8 people. He recognized his body as the appellant did not cover his face during the incident. He identified the brown jacket as the jacket the appellant was wearing that night.

In cross examination, he maintained that the appellant called him, and that at the scene of crime there were a total of 4 people. He maintained that he touched the appellant at the identification parade.

PW5 was Abdigani Ibrahim Hussein a class 7 pupil at Dagahaley. It was his evidence that on 29th November 2012 at 8.00 pm he left his home at Block AD, and while walking to the mosque, somebody snatched his mobile phone. He could not however say who took his phone though there was moonlight.

According to him, the person talked to him and shone a torch, before robbing him of his Nokia X2 mobile phone.

In cross examination, he stated that he did not know if the appellant was the culprit.

PW6 was No. 60728 Inspector Felix Nkonge. It was his evidence that in 2012, 2nd December he was instructed by the OCS Ifo to conduct an identification parade at Dagahaley Police patrol base where he found Senior Sergent Idriss who had already prepared 4 witnesses, and 8 people who were to stand in the parade.

According to him, the 1st witness, 2nd witness, 3rd witness and 4th witness all positively identified the appellant. The appellant did not give any comments after the parade. He produced the identification parade form as an exhibit.

In cross examination, he stated that the identification parade was conducted in the offices at the cells. He also stated that 2 suspects were involved in the identification parade.

When put on his defence, the appellant gave unsworn testimony. He stated that he was a herdsman and one day as he rested chewing miraa in a hotel, the police came and arrested him and took him to his house. They beat him up and Sergeant Idriss dug inside the house and found no guns. Sergeant Idriss then took 3 bullets from his own bullets and fixed him and demanded that he hands over to him his gun.

The police then took him back to Dagahaley, beat him and told him that he must be shows them the person who sold him the gun. He thus lied to the police by taking them to someone after that torture. He denied the charge. He did not call any witnesses.

Faced with the above evidence, the learned magistrate found that the prosecution had proved count I and count II of robbery with violence beyond any reasonable doubt. The court convicted and sentenced the appellant. The court found that the other charges had not been proved.

This is a first appeal. As a first appellate court, we are required to examine the evidence on record afresh and come to our own conclusions and inferences, bearing in mind that we did not have the opportunity to see witnesses testify to determine their demeanour. See the case of **Okeno – Vs – Republic (1972) EA 32**, **Pandy –vs- R(1957)EA 336, Gabriel Kamau Njoroge –vs- R (1982 – 88) KLR.**

We have re-evaluated the evidence on record. We have considered the submissions on both sides. The appellant has complained about a defective charge. He has not specifically pointed at the defects. We note that the appellant has not specifically stated the defects of the charge. We note that the charge had some corrections done in hand. These changes, in our view, it did not prejudice the appellant. The corrections were meant to correct words which had appeared in wrong places and to add some words which were necessary for clearer reading. The handwritten amends did not go to the substance of the charge. In our view, the charge was not defective. But if these were defects, then they were curable under provisions of Sections 382 of the Criminal Procedure Code(cap.75). We dismiss that ground.

The appellant's contention that the charge should have been brought under Section 296 (1) of the Penal Code cannot be sustained as he was said to have been armed with an AK47 rifle. A charge for robbery with violence under section 296(2) of the Penal Code can be sustained provided the accused was armed with a dangerous weapon. An Ak47 rifle is such a weapon.

The appellant has complained about the first report which he says did not describe him properly. He says that no description of him was given to the police. We note that the appellant did not call for the OB report at the trial. The police merely stated that one of the complainants said that the appellant was in a kiosk and that the said complainant actually took them there. This complaint relates generally to the positive identification of the appellant as the culprit, and we will come back to this later.

The appellant has complained about his mode of arrest. The appellant was arrested in a kiosk because

one of the complainants took the police to a kiosk,

where he was found. In our view, the arrest was meant to restrain him and enable the police conduct proper investigations before being charged. No law was contravened in the mode of arrest.

The appellant has complained about the production of the ballistics report, by a person who did not carry out the ballistic examination or test. Indeed the ballistics report was produced by a police officer PW2 Snr Sgt. Elkano Idriss who did not conduct the ballistic test. However, section 77 of the Evidence Act (cap. 80) allows the production of a ballistics examiner report in the absence of the maker, unless the court decides otherwise. The appellant did not object to that production by a person who was the ballistics expert. The evidence however regarding the chain of handling the ammunition from place of recovery to the ballistics examiner and back to the police was very scanty. The Magistrate did not convict on the offence of possession of ammunition and in our view he was correct.

The appellant has complained about identification and contradictions in the evidence. These two grounds go together in this case.

The burden is always on the prosecution in a criminal case to prove an accused person guilty beyond any reasonable doubt. In the case of ***WAMUNGA –vs- REPUBLIC (1989) KLR 424 at page 430*** the court stated as follows:-

> ***"Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification was succinctly stated by Widgery C J in the well known case of R –vs- Turnbull (1976)ALLER 549".***

The appellant was convicted of 2 counts of robbery with violence because he was said to have been identified by complainant. The evidence on record does not indicate that any of the victims described the appearance of the appellant. The incident occurred at night 8.30 Pm. PW4 claimed that he could identify the culprit by appearance, but no evidence was given that he described him to the police before arrest. Though there is evidence of electric light from a shop, the distance and intensity was not described. PW5 who was a victim, said there was only moonlight. He could not identify the culprit.

PW3 PC Henry Kipngetich said that the complainants could only identify the culprits by voice. The reportee who led the police to the kiosk where the appellant was arrested was also concealed, and no details as to how he identified or knew the appellant were given in evidence.

There is evidence of an identification parade. However, the way it was conducted and where it was conducted leaves room for a lot of doubt. In our view, Sergeant Idriss should never have been at the patrol base arranging witnesses for the identification of the appellant. He was an investigating officer and should have left that to other police officers. The evidence on record is also that the identification was done in the cells or in offices, which in our view was wrong. That should not have been the case. Those to be lined up in the parade should have been brought out in an open place protected for them to be identified by one witness after another. There were also two suspects in the same parade, and the court was not given the identity of the other suspect.

We are not even sure whether the witnesses did not see the appellant during his day time arrest and his being taken to two houses to find out whether he had ammunition. If they had seen him prior to the identification then the identification parade would have just been an academic exercise and of no evidential value.

The prosecution evidence on the identification of the appellant is so scanty in detail, that it cannot be said that the appellant was positively identified free from the possibility of a mistake.

We come to the conclusion that the identification of the appellant as the robber was not positive or conclusive. As such the prosecution failed to prove beyond reasonable doubt that he was the robber in counts I and II.

For those reasons, we find that the appeal has merits. We thus quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered this 1st March 2016.

GEORGE DULU **EDWARD MURIITHI**

JUDGE **JUDGE**