REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 54 OF 2009

(From the original conviction and sentence in criminal case no. 532 of 2008 of the Chief Magistrate's Court at Malindi before Hon. B T Jaden – SPM)

JEFFERSON KALAMA MLEWA .....…..……....…… APPELLANT

VERSUS

REPUBLIC.....….....….....……..RESPONDENT

JUDGMENT

1. The appellant, was charged before the Chief Magistrate's Court Malindi with Robbery with Violence contrary to Section 296 (2) of the Penal Code. In that on the 19th day of April, 2008 at Msabaha village in Malindi Location within Malindi District of the Coast Province, while armed with a dangerous weapon namely a knife robbed Nicholas Mweni John a motor cycle registration No. KBB 261E make Hadjan valued at Kshs, 72,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Nicholas Mweni John. He denied the charge. Following a full trial he was convicted and sentenced to death.

2. Aggrieved by the conviction and sentence, he lodged an appeal to this court. The first appeal was heard before Omondi and Odero JJ. The appeal was dismissed and conviction and sentence were respectively confirmed and upheld on 23rd November, 2010. Subsequently, the appellant filed an appeal in the Court of Appeal. Judgment was delivered in the Court of Appeal on 26th June, 2013.

3. The Court of Appeal allowed the appeal having found that the judgment of Omondi and Odero JJ was a nullity as it was not signed by the two judges as required by Section 169(1) of the Criminal Procedure Code. A retrial was ordered.

4. In his appeal to the High Court the appellant listed six grounds of appeal as follows:

1. ***That the learned trial magistrate erred in law and in fact when he joined a previous ordinary case with the current ordinary stealing from a person case after changing it into robbery with violence stroke two and convicted the appellant to serve a condemn sentence.***

2. ***That the learned trial magistrate erred in law and in fact when he failed to see that there was no parade (identification) conducted to identify the alleged suspect.***

3. ***That the learned trial magistrate erred in law and in fact when he held that there was competent evidence from the prosecution witnesses without seeing that some of the witnesses thus the mother to the suspect and the brother to the suspect who brought the suspect to the police as per the investigating officer's report were not brought to court to testify.***

4. ***That the learned trial magistrate erred in law and in fact when he failed to see that there was no weapon used, no threats neither force were used hence this case was not properly investigated by PW1 – the investigating officer.***

5. ***That the learned trial magistrate erred in law and in fact when he failed to see that this case was not proved beyond any reasonable doubt.***

6. ***That the learned trial magistrate erred in law and fact when he failed to see that the condemn sentence imposed upon me is too harsh compared to the offence alleged to have been committed which was to be stealing but not robbery with violence."***

5. The appeal was heard before us during the Judicial Service week hence the appellant benefited from free legal representation through Mr. Obaga advocate. He pleaded that the conviction be varied to one for the reduced charge of simple robbery. The State Counsel Mr. Oyiembo effectively conceded to grounds 1, 4 and 6 which assail the conviction for robbery with violence on the evidence tendered. Mr. Oyiembo submitted that as the complainant was not injured during the robbery, he was willing to concede to a reduction of the charge to simple robbery.

6. As obligated to do, on a first appeal, we have perused the record of the trial before the Lower Court in order to draw at our own conclusion (See **Okeno v R [1972] EA 322; Ajode v R [2004 KLR 82**). The prosecution case in the Lower Court was as follows: In the material period, Nicholas Mweni John (PW1) had in his possession a motor cycle registration no. KBB 261E make Hajan. He used the motorcycle to operate a *bodaboda* business in Malindi town. The registered owner was Kazungu Dadu Surya (PW3). On 19th April, 2008 at 12.00 noon PW1 was at Mbuzi Wengi area. The appellant posing as a customer approached him and requested to be taken to Matsangoni. The charges were agreed at shs. 700/-. The duo started the journey. On the way, the appellant convinced the complainant to divert into a minor road to enable him collect a message from his sister. The complainant agreed.

7. As the complainant waited for the appellant in order to resume the trip, he turned around to relieve himself. Upon turning around a second time, he was confronted by the appellant who was advancing menacingly toward him, while armed with a knife, and demanding money and the mobile phone. The appellant seized the motor cycle and successfully made good his escape despite the complainant raising an alarm. The matter was reported to the area assistant chief Joseph Kahindi (PW2) and eventually to police.

8. In the evening of the same date, the appellant visited a palm wine drinking place better known locally as "*mangwe*" with the motor cycle but following a dispute over an outstanding debt, the appellant left and went away to get money. The creditor detained the motorcycle. The appellant did not return. The wine seller, Dama Sulubu (PW4) and two patrons including Keshi Baya (PW6) took the motor cycle to PW2. Police were notified and Pc Peter Karanja (PW7) took possession of the motor cycle on 22nd April, 2008. The complainant and the registered owner (Pw3) saw the motor cycle and positively identified it to police. The appellant was arrested and charged.

9. The appellant's defence was that on the day of his arrest, he had gone to Malindi Police station to report the loss of his identity card but police officers he found there accused him of theft and placed him in custody. After several days he was arraigned before the Court.

10. The question before us is whether the evidence of the trial proved beyond reasonable doubt all the elements of the preferred charge. The definition of the offence of robbery is set out in Section 295

of the Penal Code which reads:

> ***"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

11. Further section 296(2) contains the ingredients of the offence of Robbery with Violence. It states:

> ***"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."***

The foregoing was restated in **Oluoch vs R [1985] KLR**. A plain reading of the above section shows that the prosecution need only prove any one of the three ingredients.

12. The appellant in this case may not have wounded, struck or used personal violence on the complainant but he was armed with a knife. He wielded it effectively to subdue the complainant in order to seize the motor cycle. That is because the knife is a dangerous and offensive weapon. In ordering this retrial the Court of Appeal observed the following:

> ***"This is a case where the complainant was brazenly and in broad daylight robbed of his means of livelihood by somebody whether the appellant or any other person. Justice must be done to this complainant and in accordance with the law."***

Having reviewed the proven circumstances of the offence, we can find no legal justification for the reduction of the charge.

13. Following a careful evaluation of the evidence there is overwhelming evidence in our opinion that the appellant is the one who robbed the complainant and within hours was seen by people known to him in possession of the stolen motorcycle. The robbery had occurred earlier during the day. PW4 and PW6 were well known to the appellant and recognized him when he visited the palm wine den in possession of the motor cycle. They engaged him in conversation. Their recognition evidence is reliable (See **Anjononi vs R (1980) KLR 59**). Such possession of recently stolen property raises a presumption of fact that the one in possession is either the thief or guilty receiver.

> ***"The doctrine of recent possession being one of presumption of fact is rebuttable and in the event the person called upon to offer an explanation fails to do so an inference can be drawn that he is either the thief or a guilty receiver" (see Hassan s/o Mohamed (1948)25 EACA 121)."***

14. The appellant's defence was a mere denial which was properly dismissed by the Lower Court. In the circumstances of this case it does not matter that no identification parade was conducted as the appellant's unexplained possession of the motor cycle within hours of its violent theft leads to the correct inference that he was the robber, as was asserted by the complainant.

15. In light of the foregoing we find no merit in this appeal and dismiss it in its entirety. The conviction in the Lower Court is confirmed and sentence upheld.

Delivered and signed at Malindi this **7th** day of **March, 2014** in the presence of Mr. Nyongesa for the State, Appellant.

Court clerk – Samwel

C. W. Meoli **O. Angote**

JUDGE **JUDGE**