REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 54 OF 2011

(Coram: Hon. Fred A. Ochieng and Hon. G. W. Ngenye – Macharia, JJ.)

VINCENT SHATUMA NASTE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence contained in the decision of the Hon. A. Lorot H. R. (Senior Resident Magistrate) delivered on 10th March, 2011 in Kapsabet Principal Magistrate's Criminal Case No. 5301 of 2009)

JUDGMENT

The Appellant, Vincent Shatuma Naste, was, in the main count charged alongside another, with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.

Particulars of the same were that on the 18th day of December, 2009 at Kapsabet Location in Nandi Central District of the Rift Valley Province while armed with a dangerous weapon namely knives and rungus robbed Shadrack Ekume Namuyenga of his three pairs of shoes, calculator, one trouser, two television remote controls, 26 CD's and CD holder all valued at Kshs. 15,000/= and at or before the time of such robbery used actual violence to the said Shadrack Ekume Namuyenga.

Alternatively, he was charged with handling stolen property contrary to section 322 (2) of the Penal Code.

Particulars of the offence were that on the 18th day of December, 2009 at Kapsabet Location in Nandi Central District of the Rift Valley Province otherwise than in the course of stealing dishonestly handled two television remote controls, three pairs of shoes, 26 CD's, one trouser, one CD holder and a calculator knowing or having reasons to believe them to be stolen property.

Both accused persons were found guilty of the offence of robbery with violence. But before the learned trial Magistrate called upon each one of them to mitigate, he released the 2nd accused without giving any specific reasons for doing so. The Appellant, who was the 1st accused was sentenced to serve fourteen (14) years imprisonment.

We duplicate the Appellant's grounds of appeal as under:-

"1. That the learned trial Magistrate erred in both law and facts by convicting me on substituted charges in which I was to be called to plead upon the altered charge in contravention to Section 214 (1) (i) of the Criminal Procedure Code Cap 75 Laws of Kenya.

2. That the trial Magistrate failed in both law and facts by convicting me on prosecution case full of contradictions.

3. That the trial Magistrate erred in law and facts by failing to consider that the P3 form in relation to PW2 has doubtful authenticity.

4. That the trial Magistrate erred in law and fats by not considering lack of comprehensive and confirmatory procedure of my identification by the prosecution witnesses.

5. That the trial Magistrate erred in both law and facts by convicting me while relying on recovery of exhibits in the instant case without considering that the recovery was questionable and incredible.

6. That the trial Magistrate erred in both law and facts by convicting me without considering the investigation in the instance case was shoddy and conducted by unqualified personnel.

7. That the trial Magistrate erred in both law and facts by convicting me while relying on incomplete charge sheet due to omission of Occurrence Book (OB).

8. That the trial Magistrate erred in law and facts by convicting me while relying on the evidence of PW3, whose evidence was doubtful."

The Appellant submitted that the prosecution substituted the charge sheet but he was not called to plead afresh as required by section 214 (1) (i) of the Criminal Procedure Code.

He submitted that the prosecution's evidence was contradictory and was not water tight against him. He said, for instance, the complainant gave contradicting names of the person who untied him after the robbery. At one time he said he was untied by Solomon. He later said he was untied by Nick Khamadi.

He also submitted that the complainant testified that he was hit with a metal bar on the right hand fingers and right leg below the knee. In contrast, the doctor who filled the P3 form said that the complainant was injured on his left two digit fingers and bruised on the left lower leg.

He further stated that the court ought not to have relied on the P3 form that was produced as an exhibit as it did not have an official stamp of the hospital in which it was filled.

It was also his submissions that the conditions of identification at the time of the alleged robbery were not favourable. He said that the complainant told the court that the robbery took place at night, and although there was moonlight he did not identify his attackers at the scene. For this reason, he submitted, he was arrested based on mere suspicion.

As regards investigation of the case, the Appellant stated that the same was shoddy. He singled out the failure of police to visit the scene of crime where crucial evidence would have been collected, including, the dusting for finger prints.

He also said that the failure of the investigating officer to testify also heavily weakened the prosecution's case.

He further said that the failure by the police to write the Occurence Book's (O.B) number in the charge sheet made the charge sheet incomplete.

Learned state counsel, Mr. Munene, opposed the appeal. He submitted that the prosecution's evidence was water tight and the conviction sound.

His submission was that on 18th December, 2009 the complainant who testified as PW2 was attacked in his house at Surungai and hit on his knees with a metal bar. He was tied with a rope and forced to lie down. He was then blind-folded.

He stated that PW3 who was PW2's neighbour who was then asleep heard people walking outside his house. He switched on the electricity light and saw four (4) men armed with pangas and rungus. He called out PW2 who did not answer. He went to his house where he found the Appellant trying to escape from his (PW2's) house while armed with a kitchen knife and he carried a sack. PW3 screamed and other neighbours milled around and apprehended the Appellant.

Mr. Munene submitted that, while PW2 was blind-folded, he heard neighbours shouting 'thief'.

He submitted that, PW4 and 5 who were also PW2's neighbours corroborated the evidence of PW2 and 3. They rescued PW2 and took the Appellant to Kamwongo Police Station. The sack that was handed over to the police contained six items which had been stolen from PW2's house. PW2 in turn identified them as his.

Mr. Munene further submitted that the Appellant's defence was a mere denial and he was unable to explain how he was found in possession of the sack.

He stated that, although the court did not fully comply with Section 214 of the Criminal Procedure Code, the non-compliance did not in any way prejudice the Appellant. In this regard, he referred the court to the case of **JOSPHAT KARANJA MUNA -VS- REPUBLIC (2009) e KLR**.

He said that there is no need for the police to dust for finger prints at the scene because the Appellant was caught red-handed.

He stated that all the ingredients of the offence of robbery with violence was proved as provided under section 134 of the Criminal Procedure Code.

Finally, Mr. Munene submitted that the fourteen (14) years imprisonment jail term should be set aside and substituted with the mandatory death sentence. He said that at the time of sentencing, death sentence was not mandatory but that this position has been overturned. The only form of sentencing available upon conviction is death sentence.

In rejoinder, the Appellant maintained that he was not arrested in possession of any stolen property. He also maintained that the charge sheet was defective.

We have re-evaluated all the evidence on record and come up with our own findings.

Back to the charge sheet, the Appellant submitted that its substitution was unprocedural because he was not given an opportunity to plead afresh. Section 214 (1) (i) of the Criminal Procedure Code under which prosecution has powers to amend a charge sheet reads;

"214 (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that-

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge."

Under Sub-Section (i) above, it is important that the trial court calls upon the accused to plead afresh to the amended charge(s).

From the record of the lower court, the initial charge sheet only contained a charge of robbery with violence contrary to section 295 as read with Section 296 (2) of the Penal. A closer look at it shows that it bears an unclear date of the month of December, 2009. It is cancelled by crossing with a pen. Against

the lines is the words '***subs on 12/5/2010***' which we think should read in full as, '***substituted on 12/5/2010***'.

The substituted charge sheet which bears the alternative charge is dated 12th May, 2010. This means that the amendment and substitution were done on this date.

This substitution is also clearly reflected in the court proceedings of 12th May, 2010 when the prosecutor applied to substitute the charge sheet. None of the accused persons opposed the application. That application was allowed. Unfortunately, the trial court did not call on the accused person to plead to the fresh charges.

We then graple with the question as to whether this omission by the court in any way prejudiced the Appellant.

In the case of **JULIUS OREMO -VS- REPUBLIC CRIMINAL APPEAL NO. 176 OF 2010 (unreported)** as cited in the case of **BENJAMIN KARIUKI WAIRIMU -VS- REPUBLIC CRIMINAL APPEAL NO. 217 OF 2008 (NAIROBI)** the Court of Appeal stated as follows:-

"As correctly observed by M/s. Nyamosi, the trial proceeded as if a plea of not guilty had been entered and the Appellant was given full opportunity to cross examine all the witnesses and to testify on his own behalf. At no stage of the trial was there any indication that the Appellant was ready to plead guilty nor was any complaint raised at all. We think in all the circumstances, therefore, that there was no failure of justice occasioned by the irregularity belatedly complained of and we find it was curable under Section 282 of the Criminal Procedure Code."

Also cited therein is the case of **DAVID IRUNGU MURAGE & ANTONY KARIUKI KARURI -VS- REPUBLIC CRIMINAL NO. 184 OF 2004**, in which the court said;

"We have carefully scrutinized the records of the two courts below and are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under Section 382 of the Criminal Procedure Code."

The learned state counsel referred us to the case of **JOSPHAT KARANJA MUNA -VS- REPUBLIC (2009) e KLR**. The Court of Appeal sitting in Nyeri said as follows:-

"On non compliance with Section 214 of the Criminal Procedure Code, we observed that as far as the Appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant …. That the spirit of Section 214 is to afford an accused person opportunity to recall and cross examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person was charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of the name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of Section 214 of the Criminal Procedure Code resulted into injustice to the Appellant."

The scenario presented in the case of **JOSEPHAT KARANJA MUNA -VS- REPUBLIC** contrasts with that presented in the instant one. In the latter, the Appellant decries the failure by the trial court to accord him an opportunity to plead afresh after the substitution of the charge sheet. As at the date of the substitution (12/5/2010), no prosecution witness had testified. But in the **JOSPHAT KARANJA MUNA -VS- REPUBLIC** case, some prosecution witnesses had testified by the time of the substitution of the charge sheet. It was the view of the Appellant that, after the amendment, and in line with Section 214 of the Criminal Procedure Code, he ought to have been accorded the opportunity to recall those witnesses for further cross examination.

Nevertheless, both in the **JOSPHAT KARANJA MUNA -VS- REPUBLIC** and **BENJAMIN KARIUKI WARURU -VS- REPUBLIC (Supra)** cases, the Court of Appeal was emphatic that the non compliance with Section 214 of the Criminal Procedure Code did not in any way prejudice an accused.

We hold a similar view, that, although the Appellant herein was not called to plead afresh to the substituted charges, this did not occasion him any prejudice. He gave no indication after the amendment that he wished to change the plea. The trial was conducted on the basis that he had pleaded not guilty and no flaw is noted in the manner in which the trial was conducted. As such, we overrule the first ground of appeal.

We shall consider grounds of appeal numbers 2 and 4 simultaneously as both are intertwined. This calls for careful evaluation of the witness testimonies.

The complainant testified as PW2. He said that on 18th December, 2009 at about 5.30 p.m. while in his house, he was attacked by a group of people. The 1st accused had a kitchen knife. It was dark and there was moonlight.

We pose and ask, if the time of the attack was at 5.30 p.m., where did darkness and moonlight come from? We have reverted to the hand-written proceedings to erase any doubts about this time. The same is poorly written and it is difficult to distinguish letter 'A' from 'P', either of which would stand for A.M and P.M respectively.

Since the description of the lighting by PW2 reflects night time, we have concluded that the time of the alleged attack was 5.30 a.m. In any event, all other witnesses referred to the time of the attack to be in the morning.

PW2 then proceeded to testify that he did not identify the attackers at the scene. They tied his hands behind and hit him with a metal bar on the right hand fingers and right leg below the knee. They also blind folded him with blankets and threatened to hit him if he screamed.

He testified that he then heard Solomon, a neighbour shouting 'thief'. Solomon caught one of them and then untied him.

He stated that he lost the following items;

- A pair of black boots
- 2 pairs of black shoes
- 26 CDs
- A CD holder
- A blue jeans trouser
- One (1) radio calculator
- 2 TV remotes – make LG

It was PW2's further testimony that the 1st accused was arrested with a kitchen knife. The same was produced in court as a exhibit. He said he did not know how the other exhibits were recovered.

PW3, Solomon Kemboi, a teacher and neighbour to PW2 said he was asleep in his house when he heard people walking outside. He tried to talk to PW2 whose house was adjacent but he did not talk back. He lit a light and saw four people outside with pangas and rungus. He then went into the house of PW2. There, he found the 1st accused who tried to run away. He was holding a kitchen knife. He also had a

sack.

PW3 stated that he screamed and another neighbour, one Fredrick Andwati went to the scene and apprehended the 1st accused. He said he knew the Appellant by name as Vincent Shatuma who hailed from Kamobo area.

He stated that Nick Khamadi untied his hands. He then called police constable Wanyonyi who told them to take the Appellant to Kapsabet Police Station, which they did. At the Police Station, police Contable Chamwada opened the sack and it had the following items:-

- One (1) pair of boots
- Two (2) pairs of black shoes
- Two (2) TV remotes
- One (1) blue jeans trousers
- A CD holder
- 26 CDs

PW4, Fredrick Adwati testified that he was asleep when PW3 called him to help as there was a thief. He woke up and found him (PW3) struggling with a thief, who he referred to as the Appellant. They escorted him to Kapsabet Police Station.

PW4 said that the other accused had a sack which had CD holder, shoes, trouser and remote control.

PW5 Nick Khamadi, testified that he had gone to visit his mum when at about 4.30 a.m. he heard screams. He proceeded to PW1's (we think he was referring to PW2) house where he found him tied up. At the same time PW3 was struggling with the Appellant. He untied PW2 and escorted him to Police Station together with the exhibits. He identified the following items;

- CDs
- CD holder
- Jeans trouser
- Two (2) pairs of shoes
- Sack

PW6, police officer Caleb Okoth of Kapsabet Police Station said he took over the investigations from Police Constable Chamwada who had since moved to Narok. He said PC Chamwada left behind the police file and exhibits which he named as follows:-

- 3 pairs of shoes
- A calculator
- Two (2) TV remote controls
- One (1) pair of jeans trouser
- One (1) sack

- A manilla rope
- A piece of wire
- A manilla bag
- 26 music CDs
- A CD holder

He produced them as exhibits.

He stated that after recording the witness statements, he was able to recount how the robbery occurred. That PW2 was attacked by five (5) men on the night of 18th December, 2009. They tied him with a manilla rope and covered his mouth with a blanket and ordered him to lie on the bed. They threatened him with a knife and stole some items from his house.

He went on to state that PW2's neighbours heard the commotion in his house and came out of their houses. When the robbers saw the neighbours, they ran away. One of them was caught and beaten by members of the public. He was then escorted to the Police Station. He was later taken to hospital for treatment. It was at this point he named an accomplice, the 2nd accused. The latter was arrested on 22nd December, 2009 and charged alongside the Appellant.

He said the Appellant was the suspect who was beaten by members of public and charged as the 1st accused.

None of the above witnesses contradicted the evidence of the other. It is doubtless the Appellant was caught red-handed at the scene. He was inside PW2's house. He had just tied PW2 with a rope after the theft. As fate had it, he tried to escape from the house when PW3 pounced on him. Futhermore, PW2 knew the Appellant by name. He also knew where he came from. He was frog-matched to the Police Station alongside the exhibits which were inside the sack he was arrested in possession of.

It is important at this juncture we clear the error of the identification of the Appellant by PW4. He first testified as follows;

"He was alleged to have attacked PW2, other accused was having some items in a sack which had CDs holder, shoes, trouser and remote control. I heard he was armed with a knife – MFI-9."

This statement gave the impression that, in addition to the Appellant (1st accused), there was another accused who was also arrested in possession of a sack with the above named items.

After PW4 made this statement, he proceeded to identify all the items.

He then went on to physically identify the person who he said had the items. In this respect, the court noted as follows;

"The 1st accused named 2nd accused."

This implies that PW4 while pointing at the 1st accused (Appellant) in the dock, was of the impression that he was the 2nd accused. Therefore, he made no error in identifying the person they arrested and escorted to the police station.

On identification, the Appellant submitted that the complainant did not identify him at the scene. It is on record that PW2 was accosted by a gang of people who proceeded to blind-fold him. It was hence, not possible for PW2 to see the person who had entered into his house while on blind-fold. But as the drama was unfolding, PW3 entered into PW2's house. It is him who caught the Appellant still inside the house

although he had attempted to flee. PW3 was soon after joined by PW4 after they removed the blind-fold from PW2's face. At this juncture, PW2 identified the Appellant as a person he knew by name and where he hailed from. From this point, the Appellant did not escape from the hands of PW2, 3, 4 and 5 upto the point he was taken to the Police Station.

As such, the identification of the Appellant was not based on circumstantial evidence as he submitted. It was direct identification which required no further prove than as accounted by PW2-5.

With regard to PW2, we wish to point out that he identified the Appellant was by recognition, which is most assuring and reliable than any other form of identification – See case of **ANJONONI & OTHERS -VS- REPUBLIC (1976 – 180) KLR, 1566** as cited in **BERNARD MUNYAU NDUNGE & ANOTHER -VS- REPUBLIC CR. APPEALS NO. 555 AND 556 OF 2009**, in which the court stated;

"..... when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other."

We are, in the circumstances, satisfied that the trial court properly arrived at the conclusion that the Appellant was properly identified. Moreso, we note that all the recovered items were those stolen from PW2's house which he positively identified as his. The additional items being the manilla bag and manilla paper were those used to wrap up the stolen items and tie PW2's hands respectively. They were also produced as exhibits.

With respect to the P3 form, the Appellant alluded that it was not authentic as it did not bear a hospital official stamps.

The said P3 form was produced as P. Exhibit 3(b). A closer scrutiny of it shows that it bears the signature of the police officer who issued it. It also bears (on page 2) the name of the clinical officer who examined PW2. His name is shown as Lagat K. Benard. PW1, Josephat Embeko a clinical officer from Kapsabet District Hospital produced the said P3 form. He was categorical in his evidence that the same was filled by Bernard Lagat whose name appears on it.

In addition, there is an official stamp from Kapsabet District Hospital appended against the name of Lagat K. Bernard. Although the stamp details are not quite legible from the copy in the record of appeal, those details are clear in the original record. And there is no doubt that the P3 form was issued at Kapsabet District Hospital. We are accordingly convinced that the P3 form is an authentic document; and that its authenticity was confirmed by PW1 whose evidence in this regard was unchallenged.

The Appellant also asserted that the investigations were not properly conducted. He, in particular, singled out that the police officer who initially conducted the investigations, namely Caleb Okoth did not testify. Instead, it is PC Chamwada who testified. According to the Appellant, PC Chamwada was below the rank of an Inspector of Police. He stated that since the offence with which he was charged was serious, a senior officer ought to have investigated the case.

He also challenged the failure by police in visiting the scene to dust for finger prints.

PC Chamwada testified as PW6. He confirmed that the case was majorly investigated by Caleb Okoth. His summary of the case was based on the statements the witnesses recorded. These statements formed the basis of the evidence the witnesses gave. The said PC Chamwada also produced as exhibits all the recovered items. His investigations can be said, were limited to bonding of witnesses and production of exhibits.

The trial court, in arriving at its finding also relied on the evidence of the witnesses. From the testimony of PW6, it is our view that, Caleb Okoth would not have added any further value to what PC Chamwada said. And so no prejudice was occasioned to the Appellant by the failure of the said Caleb Okoth in not testifying.

There is also no legal provision that a serious offence should be investigated by a senior police officer. Although Caleb Okoth may not have been an Inspector of Police, this court and the one below have relied on the weight of evidence. That is the evidence we shall base our findings on.

Moreover, the dusting of the scene would have served no evidential value. As we have noted, the Appellant was caught re-handed at the scene. Evidence linking him to the scene was direct. No further evidence was required to prove that he was among the robbers who attacked PW2.

The Appellant further asserted that the charge sheet was incomplete because it did not bear the Occurrence Book number.

We have looked at the charge sheet and it is factual the OB number was not written. But the question that flows therefrom is, did this omission in any way prejudice the Appellant?

It is our candid view that no prejudice was caused to the Appellant by the omission. All along he knew the charges facing him. This is a case that was also properly reported to the police and no challenge was raised in this respect.

Perhaps we would be concerned if there is a discrepancy between the date the offence was committed and the said date as written in the OB. But again, this discrepancy would have only been tested during the trial. Had the Appellant raised his concern during the trial, the prosecution would have had the opportunity of producing the O.B in court for clarification of any information the Appellant required.

The Appellant's defence on the other hand did not dislodge the prosecution's strong evidence.

On the question of sentence, the decision in the **MUTISO -VS- REPUBLIC (2010) e KLR (CR. APPEAL NO. 17 OF 2008**, in which death sentence was declared as being not mandatory at the time. We believe the learned trial Magistrate sentenced the Appellant to fourteen (14) years imprisonment based on this decision.

However, the decision in **GODFREY MUTISO -VS- REPUBLIC** was overturned by the Court of Appeal in **JOSEPH NJUGUNA MWAURA & 2 OTHERS -VS- REPUBLIC CR. APPEAL NO. 5 OF 2008** in which the court said;

"We hold that the decision in GODFREY MUTISO -VS- R. to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences."

Therefore, the only available sentence for the Appellant, and ought to have been handed is the death sentence.

The Appellant was properly warned about the sentence, but he nevertheless opted to argue the appeal.

In the result, we find that the conviction was founded on sound, concrete and water-tight evidence. The prosecution proved its case to the required standards; beyond all reasonable doubts. We uphold the conviction. We substitute the fourteen (14) years imprisonment term with a death sentence. The appeal is accordingly dismissed.

DATED and **DELIVERED** at **ELDORET** this 5th day of June, 2014.

FRED A. OCHIENG

JUDGE

G. W. NGENYE - MACHAIRA

JUDGE

In the presence of:-

Appellant in person

Mr. Mulati for the State/Respondent