REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 161 OF 2010

(Being an appeal from original conviction and sentence in Criminal Case No. 717 of 2009 of the Senior Principal Magistrate's Court at Narok)

WESLEY OSEBE OGASA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Wesley Osebe Agasa, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code *(Cap. 63, Laws of Kenya)*, but the trial court found that the evidence presented before it disclosed only the lesser offence of simple robbery contrary to Section 295 as read with Section 296(1) of the Penal Code. Applying the provisions of Section 179(2) of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)*, the trial court reduced the charge accordingly, convicted and sentenced the Appellant to serve ten (10) years imprisonment.

Being aggrieved with both his conviction and sentence, the Appellant came to this court on appeal and his Petition of Appeal cited fourteen (14) grounds on the basis of which he sought his appeal be allowed, his conviction be quashed and the sentence of imprisonment be set aside, and he be set free.

The Appellant had been charged with a capital offence, robbery with violence, and he was unrepresented by counsel during his entire trial before the lower court. However following a successful application under Article 50(2) of the Constitution of Kenya 2010, this court granted orders for appointment of counsel for the Appellant at State expense. The orders are dated 27.07.2012. Mr. Munene was accordingly appointed counsel for the Appellant and argued the Appellant's appeal before us on 20/03/2013. Mr. Omutelema, Senior Principal Litigation Counsel urged against the appeal on behalf of the Director of Public Prosecutions (DPP).

Although Mr. Munene, learned counsel for the Appellant, stated that there were nine (9) grounds of appeal, there were in fact fourteen (14) such grounds, and he argued them altogether in the form of one proposition, namely, that there was no evidence upon which to found a conviction even of simple robbery under Section 295 as read with Section 296(1) of the Penal Code. These were his grounds -

- ***the Appellant was not arrested with or in possession of motor vehicle Toyota Registration Number KBB 769Z, allegedly robbed from PW1, the complainant.***

- ***the Appellant was not identified as suggested by the evidence of PW1 and PW3 (the star witnesses).***

- ***that the chain of evidence between PW1 and PW3 was broken as PW3 only testified that he "suspected the appellant and his colleague were being chased," and that his colleague escaped from custody.***

- ***That the evidence of PW4 (that the offence was committed on 25.10.2008 was not in tandem with the charge sheet) that the offence was committed on 20.10.2008.***

- ***that no dusting (for fingerprints) was carried out thus showing no thorough investigations were carried out, by the investigating officer.***

- ***No evidence was led to show that the shs 300/= found on the Appellant did not belong to him.***

- ***No evidence was led to show ownership of the vehicle, such as a certificate from the Registrar of Motor Vehicles of the Kenya Revenue Authority.***

- ***That the trial court did not consider the Appellant's evidence, that he was at Maasai Girls High School at the time when he allegedly committed the offence at Olerai in Narok Town.***

Contrary to the contention by the Appellant's counsel, learned State Counsel opposed the appeal and argued that -

- ***there was sufficient evidence for the conviction of the Appellant,***

- ***the complainant, talked to him (the Appellant),***

- ***the chain of events between the commission of the offence and the arrest of the Appellant was restored by the evidence of PW1 and PW3.***

- ***When asked to identify himself the Appellant stated to PW3 that he was a Police Officer.***

- ***The Police on arrival established that the Appellant was not one of them i.e. a Police Officer.***

- ***The conviction was not based upon the finding of Sh 300/= on the Appellant but upon his arrest soon after the commission of the offence.***

- ***Ownership of the motor vehicle was irrelevant as the person driving was the person robbed, and he was therefore the right complainant.***

And for those reasons counsel urged the court to find that the conviction was safe and dismiss the appeal.

We have considered the respective arguments, and submissions. We have also considered the entire evidence before the trial court and save as hereinafter stated on sentence, we find and hold that the conviction of the Appellant was lawful, and in tandem with the evidence. These are our reasons.

Firstly, the Appellant was positively identified by PW1 and PW2 both before and after the robbery. PW1's evidence was simple and straightforward. The time was about 10.45 a.m. The date was 20/10/2008. He was at Olerai stage in Narok Town. He was operating a taxi-cab, Registration No. KBB 769Z, Toyota Corolla. He was approached by the Appellant *(the tall man)*, and another man *(the short man)* who asked to be taken to Redeemed Church within Narok Town. They agreed on a price of Ksh 100/= and the Appellant and his companion entered the Taxi, and he drove to Redeemed Church. Upon arrival at the designated destination, his passengers or one of them called someone on phone and asked that person to come to the road. Immediately thereafter the man at the front grabbed him, while the man at the rear of the car, grabbed him by the neck, and wrestled him to the back seat. PW1 however managed to open the rear door of the car, and dashed out to freedom. The Appellant and his companion drove off, but PW1 followed them in hot pursuit screaming that he had been robbed of his motor vheicle

which had proceeded towards London Estate in Narok.

With the assistance of an uncle who had a vehicle, PW1 raced towards London Estate where they found his motor vehicle abandoned at the gate of PW2 Rahel Sadera.

PW2 corroborated the evidence of PW2, and testified that the car stopped near her gate and two men came out, ***"a tall man came out. He was the one who had been driving the car. He had the car keys. He told me to watch over his car as they went to check on someone nearby ….The other man was short."***

And further testified -

> ***"... one of them who came in the car is the accused in the dock … He is one who had the keys. He is the one who talked to me ….".***

Secondly, PW3 described how he met the Appellant and his companion. PW3 was a resident of Mashaniani near Ole Tipis Girls Secondary School in Narok Town. At about 11.30 a.m. he saw a man running across the valley followed by a second person, on a footpath, as there is no road in the area. The Appellant and his companion ***"emerged from the bushes … one of them was tall and the other short."*** The tall man was sweating profusely. I suspected they being chased. I asked them where they were going and the tall man answered they were going to Suswa, and he is the accused in the dock, and had come from Redeemed Church and wanted to go to Suswa. The accused told me he was a Police Officer, the short man told me he was a tailor, and they proceeded towards the tarmac.

On the way, PW3 seeking further information of the Appellant and his companion, told his fellow Maasai, in their language that "***the two men were suspicious"***, and that by that time, a crowd had gathered and Police also arrived in a Taxi, and ***"one civilian man jumped at the accused and said he is the one who robbed him of his car and the two men were arrested..."***

The evidence of PW4, PW5 and PW6, related respectively to the coordination of information as to the robbery, the response thereto, and finding the motor vehicle at London Estate, (PW4), the photographing of the motor vehicle (PW5), and the arrest of the Appellant and his companion and the subsequent escape from custody of the second suspect (PW6).

From the above, we find and hold that there was overwhelming evidence against the Appellant. The Appellant's evidence that he had gone to visit a sister-in-law *(whose name he did not disclose)* at Ole Tipis Girls High School, and could not have been at Olerai at the same time, is wholly displaced by the evidence of PW3.

The Appellant came running across the valley towards Ole Tipis Girls Secondary School, and was sweating profusely as a person who was being chased and thus running away from mortal danger.He was closely followed by another man – his companion whom he denies in his evidence as having been put together with him, but he did not know.

For a charge of robbery with violence to stand the prosecution must show -

1. ***the offender was armed with a dangerous or offensive weapon or instrument, or***

2. ***or is in company with one or more other person or persons, or***

3. ***at or immediately before or immediately after the robbery he wounds, beats, strikes or uses any other personal violence to any person.***

In this case, the dangerous and offensive weapon or instrument was never recovered. PW1 says it was a sword, that they injured him on the neck and back. The Appellant and his companion may or may not have been armed with a sword, and that they may or may not have injured PW1 in the course of the

robbery. PW2 before whose gate the car was parked and witnessed the Appellant come out of the car, saw the Appellant come out holding the car keys. No mention was made of the sword. To make a finding that the Appellant or his companion was armed with a sword or other offensive weapon or instrument that weapon should either be recovered or other evidence of injury caused by that weapon. In this case PW1 testified that he was injured in the neck and back, but led no evidence as to the nature or extent or cause of such injuries. The element of being armed with a dangerous or offensive weapon or instrument was therefore not proved.

There is however no question but that the other elements of robbery with violence were proved. The evidence of PW1, PW2 and PW3 and even PW4 and PW6 the investigating officers said and refer to two men, the Appellant and his companion. There is therefore evidence for a finding that the Appellant was in the company of another person. The learned trial magistrate erred in concluding that since the second man had not been at the trial, he therefore did not exist. The law merely provides that the accused be in the company of one or more other persons. The existence of such other person is established by evidence, and not by his presence or being charged in court. Of course his physical presence in court would put matters beyond any question. That however is not the requirement of the law. The element of the other person is therefore proved.

The evidence of violence immediately before the robbery was well established by PW1.

The elements of the offence of robbery with violence are disjunctive and not conjunctive for evidential purposes. Any one of those elements may prove that offence. In this case, the evidence of both violence before and/or in the course of the robbery was established by PW1. He was grabbed by the neck by the short man, while his companion the tall man must have wrestled and bundled him to the back of the car but being physically fit, managed to open the back door and escaped from further injury.

There was thus proof beyond reasonable doubt that the Appellant committed the offence of robbery with violence hence the particulars of offence in the charge sheet, ***"Wesley Osebe Agasa on 20th day of October 2008 at Majengo Estate in Narok North District within Rift Valley Province, jointly with another not before court … immediately before the time of the robbery used violence to the said Joseph Chege Nganga"*** **(PW1).**

For those reasons we do not agree with the learned trial magistrate's finding that the Appellant was guilty of simple robbery contrary to Section 295 as read with Section 296(1) of the Penal Code.

In exercise therefore of the jurisdiction conferred upon this court by Section 354(3) and (ii) of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)*, we find the Appellant guilty of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code and convict him accordingly.

The punishment for the offence of robbery with violence is prescribed by Section 296(2) of the Penal Code to be death. Apart from the provision of Article 26(1) of the Constitution of Kenya 2010, which guarantee the right to life, there was no fatal injury to the complainant herein. The complainant lost keys to his car but recovered the car.

In the circumstances we maintain the sentence of ten (10) years imposed by the learned trial magistrate but to run from the date of his arrest and detention.

Safe as aforesaid, the appeal is dismissed.

It is so ordered.

Dated, signed and delivered at Nakuru this 3rd day of May, 2013

M. J. ANYARA EMUKULE

JUDGE

H. A. OMONDI

JUDGE