REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Criminal Appeal 286 of 2010

HARUM STEPHEN MESHACK.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein **HARUN STEPHEN MESHACK** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at Kwale Law Courts. The Appellant had been arraigned in the lower court on 17th March 2009 facing four counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The Appellant entered a plea of 'not guilty' to all the charges and his trial commenced on 21st July 2009. The prosecution led by **INSPECTOR GITONGA** called a total of five (5) witnesses in support of their case.

The prosecution case revolved around a robbery incident which occurred on the night of 10th March 2009 at Likizo Cottages in Diani Beach in Msambweni District within Coast province. **PW1 MBITHI JOEL MUASYA** who works at the Likizo Cottages as a driver-cum-manager told the court that on 10th March 2009 the proprietor of the cottages ***'Dr. Kurt Lux'*** went out to have dinner at Ushago Restaurant with two of his friends ***'Martin'*** and ***'Wolf gang'***. The party left the cottages at about 7.00 p.m. They returned at about 10.00 p.m. At the gate **PW1** hooted and the watchman **ALI ALFAN PW2** opened the gate to let them in. As the vehicle drove into the compound four men one of whom was armed with a pistol also forced their way into the premises. The four men began to drag the said Dr. Lux and his companions out of the vehicle. **PW1** told the court that he too was dragged out of the vehicle. The men roughed them up and stole various items which included cash documents and mobile phones. **PW1** told court that he lost his driving licence and cash Kshs.3,000/-. **PW2** managed to press the security alarm button. Group 4 security personnel arrived. The robbers began to scatter and to run away. However the Appellant fell down in his attempt to escape and was apprehended. He was taken to the police station where upon conclusion of the investigations he was charged with these offences.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied any and all involvement in the robbery in question. On 7th June 2010 the learned trial magistrate delivered his judgment in which he convicted the Appellant only of the 4th count of Robbery with Violence and thereafter sentenced him to death. Being aggrieved by both his conviction and sentence the Appellant filed this present appeal. **MR. TANUI** learned State Counsel who appeared for the Respondent State opposed the appeal.

We have carefully perused the grounds of appeal set out by the Appellant in his written submissions. We find that the grounds raised may for convenience be condensed into three main grounds as follows:

(1) Defective charge sheet

(2) Identification

(3) Failure by trial magistrate to consider the defence raised by Appellant.

With respect to the first ground we have anxiously examined the charge sheet and find in it no defect worthy of note. In our view the charges were properly laid and the charge sheet does comply with the provisions of Section 137 of the Criminal Procedure Code. We therefore do hereby dismiss this ground of the appeal.

With respect to identification the prosecution called two eyewitnesses both of whom positively identified the Appellant as being amongst the group of four men who invaded Likizo Cottages on the night in question. **PW1** stated at page 7 line 18:

"I saw the 4 men. You were one of the 4. You were the one who was in red T-shirt and demanding money from kurt luse …"

On his part **PW2** who was the guard on duty at the gate states:

"I remember accused was in a red T-shirt written 2000"

The two witnesses both recall that Appellant was dressed in a red T-shirt. The incident occurred at 10.15 p.m. No doubt being night time it was dark. However both witnesses explain that they were able to see the Appellant and his companions well as there were bright security lights within the compound.

Both **PW1** and **PW2** told the court that the Appellant was apprehended at the locus in quo before he could escape. **PW1** testified at page 7 line 7:

"As they [the robbers] approached the gate, one of them fell down as they scrambled for the gate. We caught the one who had fallen down. He is the accused before the court. He is the one who had been in the red T-shirt"

On his part **PW2** testified as follows:

"When they saw me they started running away. They had robbed the guests. As they ran accused fell down inside the compound gate. Since I had pressed the alarm Group 4 guards came as we had caught the accused. We handed him over to Group 4"

It is clear therefore that having caught sight of the Appellant **PW1** and **PW2** did not lose sight of him again until he was apprehended and handed over to security personnel. In his defence the appellant conceded that he was indeed arrested at the scene. In these circumstances we find that there can be no possibility of mistaken identification. Both eyewitnesses had ample time and opportunity to see and identify the Appellant. Both were able to describe the colour of clothes that he was wearing. We find that there has been a clear positive and reliable identification of the Appellant as one of the 4 men who invaded the compound on the night in question.

In his defence the Appellant denied that he went to the cottages with any intention of committing a robbery. He claims that the other men kidnapped him as he walked home drunk and forced him to accompany them on their nefarious mission. Contrary to what the Appellant alleges in his submission we find that the trial magistrate did give proper and adequate consideration to the defence raised by the Appellant. In dismissing the defence the trial magistrate observed at page 6 line 19:

"In any case if the accused was drunk and on his way home as alleged, I do not see why the thieves would bother to kidnap him and keep him under guard at the gate while the intended victims had all gone into the compound"

We too would question why persons who were out to commit a robbery would saddle themselves with a drunk man who would only serve to slow them down or even to blow their cover. What purpose would have been achieved by kidnapping the Appellant? This defence is so fanciful as to be totally unbelievable. The trial magistrate was quite correct in dismissing it. The defence witness called by the Appellant **JOHN ODONGO HAGGAI** was only able to confirm to the court that he knew the Appellant as a colleague at work. He had no information to give regarding the events of the night of 10th March 2009 and he has no idea where the Appellant went after work or whom he was with. His evidence was of no assistance to the court. The facts show quite clearly that the Appellant was amongst the group of four men who invaded the compound and proceeded to rough up and rob the occupants. Whilst his companions managed to escape the Appellant's own escape bid was thwarted because he fell down and was thus apprehended by the G4 security.

The next question this court must address is whether the incident in question falls within the ambit of Section 296(2) of the Penal Code. The ingredients of offence of Robbery with Violence were set out by the Court of Appeal in the case of **OLUOCH –VS- REPUBLIC [1989] KLR**. These include:

(1) That more than one perpetrator is involved.

(2) That the perpetrators are armed.

(3) Actual physical harm is inflicted on the victim or there is a real apprehension that physical harm will be inflicted.

Proof of **any one** of the above ingredients will suffice to prove a charge of Robbery with Violence. In this case both **PW1** and **PW2** told the court that four men were involved in the incident. The perpetrators were armed with rungus and a toy pistol. **PW5 SAMUEL GATHII** a clinical officer attached to Msambweni District Hospital produced P3 forms in respect of the injuries sustained by **PW1** and **PW2**. This shows that actual force was used in furtherance of the crime. We are satisfied that the incident does fall within Section 296(2) of the Penal Code. We therefore find that the conviction of the Appellant was sound and we do confirm the same. The subsequent death penalty imposed by the trial court was also lawful and we do uphold the same. Finally this appeal fails in its entirety.

Dated and Delivered in Mombasa this 7th day of September 2012.

M. ODERO **G. NZIOKA**

JUDGE **JUDGE**

In the presence of:

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