REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: VISRAM, KARANJA & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 55 OF 2010

BETWEEN

JOMO LOBOYIALE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from conviction and sentence of the High Court of Kenya at Nakuru (**Emukule & Ouko, JJ.**) dated 5th March 2010*

in

H.C.CR.A. NO.97 OF 2006)

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JUDGMENT OF THE COURT

1. **Jomo Loboyiale** herein referred to as the appellant, was charged in the Senior Resident Magistrates court at Nakuru with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge were as follows:

"Jomo Loboyiale: on 27th day of January, 2006 at Maralal township in Samburu district within Rift Valley province jointly with others, robbed Peter Njuguna of one half coat, valued at Ksh.600/-, one pair of shoe valued at Ksh.1,500/- and cash Ksh. 650/- and immediately after the time of such robbery, beat the said Peter Njuguna."

2. During the trial five witnesses testified for the prosecution. The main witness was **Peter Njuguna** hereinafter referred to as the complainant. He testified that he was robbed by the appellant and two others. He stated that the incident occurred at 9.00 p.m. and that when he tried to resist, one of the men hit him on his head with his fist, before hitting him on his hand with an iron bar. The complainant was able to see and recognize one of his assailants with the aid of an electric light which was coming from Sungura supermarket which was near the scene. The complainant identified the appellant as the assailant whom he recognized. He stated that he knew the appellant by appearance. The complainant reported the matter at Maralal police station and was issued with a P3 form. On the evening of the following day, the complainant spotted the appellant. With the assistance of **Joseph Kibalawa** (PW3), and other members of the public, the appellant was apprehended and taken to the police station where he was re-arrested by

police officers. The complainant was later examined by **Peter Lekit** a clinical officer, who confirmed that he had bruises on the forehead, eyes and lips and a fracture of the left hand.

3. In his unsworn defence, the appellant denied having robbed the complainant. He explained that the complainant lured him to accompany him to the police station by telling him that his cousin i.e. appellant's cousin, was at the police station and wanted to see him. On arrival at the police station the appellant was arrested.

4. In his judgment the senior resident magistrate having warned himself of the danger of relying on the evidence of one witness, found the evidence of recognition by the complainant to be supported by the evidence of **Peter Lekit**, the clinical officer and **Joseph Kibalawa** (PW3) who assisted the complainant in arresting the appellant. He therefore rejected the appellant's defence and convicted him of the offence as charged.

5. Being aggrieved, the appellant appealed to the High Court. His appeal was heard by **Emukule** and **Ouko, JJ**. In their judgment, the High Court judges found that the appellant was properly identified by recognition, and that the trial magistrate warned himself about the danger of relying on the evidence of a single witness. They therefore confirmed the lower court's judgment and dismissed the appeal.

6. The appellant has now lodged this second appeal. Learned counsel **Mr. Ombati**, who argued the appeal on behalf of the appellant relied on the supplementary memorandum of appeal dated 1st August, 2012 which raised three grounds as follows:

(i) The learned appellate judges erred in law by relying on the identification by recognition without considering possibility of mistaken identity.

(ii) The learned appellate judges erred in law by shifting the burden of proof to the appellant.

(iii) The learned appellate judges erred in law and fact by relying on a defective charge sheet.

7. Mr. Ombati submitted that the identification of the appellant by the complainant was doubtful, as the incident occurred at night and the attack was sudden. Further, although the complainant claimed that he was able to identify the appellant with the aid of light coming from a nearby supermarket, he did not testify as to the distance between the scene and the supermarket, or the intensity of the light. **Mr. Ombati** pointed out that the complainant contradicted himself, claiming to know the appellant by appearance, and later calling him by name as **Jomo**. The complainant did not also give any description to the police which could connect the appellant with the offence. In support of his submissions **Mr. Ombati** relied on *Criminal Appeal No. 279 of 2005*, *Norman Ambich Miero & Henry K. Anjili vs. Republic* and *Criminal Appeal No. 5 of 2005*, *David Odhiambo & George Omondi vs. Republic*. Finally, **Mr. Ombati** submitted that the charge was defective as the weapons allegedly used in the robbery were not described in the particulars nor was it stated that the appellant was armed with any dangerous weapon.

8. Learned State Counsel **Ms. Idagwa**, opposed the appeal, maintaining that the charge was not defective because the particulars showed that the assailants were more than two, and that actual violence was used. As regards identification **Ms. Idagwa** submitted that there was sufficient evidence as the appellant was seen through the aid of electric light. **Ms. Idagwa** noted that the witness informed the police that he had recognized one of his assailants, and also identified the alleged assailant to PW3. She maintained that recognition was by appearance.

9. This being a second appeal, we note that our mandate is limited under **Section 361** of the Criminal Procedure Code, to addressing and determining the appeal on issues of law only. The appellant took issue with the particulars of the charge maintaining that the charge as drafted was defective. **Section 295** of the Penal Code defines the offence of robbery as follows:

"295. 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."

10. Under **Section 296 (2**) of the Penal Code, the offence of robbery as defined above, graduates to one of robbery with violence attracting capital punishment in the following circumstances:

"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…."

In this case the particulars of the charge against the appellant shows that the appellant "*jointly with others*" robbed the complainant and that immediately "*after the time of such robbery, beat*" the complainant.

11. In his evidence the complainant testified that he was attacked initially by a lone man who was later joined by two others, and that he was hit and he fell down, and that the men thereafter took his jacket and Ksh.650/- and continued beating him asking for more money before taking his pair of shoes. Thus, it is evident that the particulars of the charge as pleaded were consistent with the ingredients of the offence of robbery with violence under **Section 296(2)** of the Penal Code. The circumstances in which the offence was committed as testified to by the complainant, supported the ingredients of the charge of robbery with violence under **section 296(2)** of the Penal Code, as the complainant's assailants were more than one, and violence was used during the robbery. The fact that it was not alleged that the appellant was armed with a dangerous weapon, was inconsequential as the ingredients pleaded in the charge and established were sufficient to prove the charge. Therefore, the submission that the charge against the appellant was defective must fail.

12. As regards the issue of identification, the complainant stated that he was able to recognize the appellant as he knew him before by appearance. He stated further under cross-examination that he had been seeing the appellant at the stage for over two years. The complainant also stated in his evidence that the appellant was called **Jomo.** The complainant further stated under cross-examination that he did not know the full names of the appellant. In our view there was no contradiction in the complainant's evidence. He was simply stating that he knew the appellant and could identify him by appearance, although he also knew his name as **Jomo**. We note that both the subordinate court and the High Court were alive to the fact that the identification of the appellant was by a single witness. The trial magistrate cautioned himself before accepting the witness's evidence. The High Court judges also carefully considered and reevaluated the evidence before coming to the conclusion that the trial magistrate properly relied on the evidence of a single witness.

13. In our view, the circumstances were favourable for a positive identification as there was electric light at the scene, the appellant was also a person known to the complainant by appearance, and therefore it was a case of identification by recognition. The complainant not only reported to the police that he was attacked by a person known to him, but also later identified the appellant as the assailant whom he knew, and caused him to be arrested. In the circumstances we are satisfied that the appellant was positively identified as one of the persons who robbed the complainant.

Accordingly, we find no merit in this appeal and do therefore dismiss it in its entirety.

Dated and delivered at Nakuru this 27th day of September 2012.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL