IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 326 of 2006

ABDI SHUKURE GURE ……..……..APPELLANT

AND

REPUBLIC ……..…….RESPONDENT

(An appeal from a judgment of the High Court of Kenya

at Meru (Lenaola & Sitati, JJ.) DATED 23RD November, 2006

in

H.C.CR.A. NO. 5 OF 2003)

****

JUDGMENT OF THE COURT

The appellant, *ABDI SHUKURE GURE*, was charged in the Senior Principal Magistrate's Court at Garissa with one count of robbery with violence contrary to *section 296 (2)* of the Penal Code and the second count of grievous harm contrary to *section 234* of the Penal Code.

The particulars of the offence in the first count were that: -

"On the 7th day of November, 2004 at Anglican Church of Kenya within Garissa Municipality in Garissa District in North Eastern Province, jointly with another not before court while armed with a metal bar and a rungu robbed LIVINGSTONE PHILIP OMBISA of 2 packets of maize flour of 1kg each, ½ kg of meat, sukuma wiki, 1kg of potatoes and ½ kg of tomatoes all valued at Ksh.245/= and at or immediately before or immediately after the time of such robbery caused actual bodily harm to the said LIVINGSTONE PHILIP OMBISA."

And the particulars in respect of the second count were that: -

"**On the 7th day of November, 2001 at Garissa Municipality in Garissa District within the North Eastern Province, jointly with another not before court, unlawfully did grievous harm to Musumbi Muluki Mutisya."**

After a full trial in which the prosecution called six witnesses, the learned Senior Resident Magistrate (J.G. Kingori Esq.) found that the prosecution had proved its case against the appellant beyond reasonable doubt on both counts and consequently convicted the appellant on the two counts. The learned Senior

Resident Magistrate proceeded to sentence the appellant to death on both counts. The appellant was, naturally aggrieved by both conviction and sentence. He therefore lodged an appeal in the superior court which appeal was dismissed by that court.

The summary of the facts as accepted by both the trial court and the first appellate court were that on 7th November, 2001 ***Livingstone Philip Ombisa*** (PW1) left his place of work at Garissa Ndogo at about 6.00 p.m. and went home. ***Ombisa*** then went to the market where he bought two packets of maize meal, 1kg of tomatoes, ½Kg of onions, sukuma wiki and 1kg of potatoes. In purchasing all these items ***Mr. Ombisa*** reckoned that he spent Shs.245/=. He proceeded home but on the way met a man who warned him that there were thugs down the road. As they walked along the road they met ***Musembi*** having been robbed and at the same scene the appellant and his colleague appeared. The appellant hit ***Ombisa*** on the head while the appellant's colleague grabbed the items that ***Ombisa*** had bought from the market and ran away. The appellant was, however, subdued and taken to Garissa Police Station where he was handed over to ***Pc. Ronny Muriithi*** the same evening at about 7.50 p.m.

It was the evidence of ***Jacob Wadema Ngui*** (PW2) that on the same day (7th November, 2001) at about 7.30 p.m. he met the appellant and his colleagues. After the two had exchanged greetings with ***Ngui*** (PW2) the appellant took out a rungu and hit ***Ngui*** on the left hand. Luckily a vehicle appeared and the appellant and his colleague fled. Just then ***Ombisa*** (PW1) arrived and as the two (Ombisa and Ngui) walked along the road the appellant and his colleague appeared again and attacked ***Ombisa***. The appellant was subdued and taken to the police station. This incident was witnessed by yet another victim one ***Musembi Muluki*** (PW3).

When put to his defence during the trial the appellant gave unsworn statement in which he stated that on the material day he encountered people who were shouting "*catch thief*". These people arrested him and in the course of doing so also assaulted him. He was taken to Garissa Police Station where he was charged.

The learned trial magistrate considered the evidence adduced before him and came to the conclusion that the case against the appellant had been proved beyond any reasonable doubt. In the course of his judgment the learned trial magistrate stated: -

"**I have considered the evidence before me carefully. There is absolutely no room for doubt that the men who attacked both PW1 and PW3 is the accused. The evidence on this is just overwhelming. When he attacked them, the 2 with the assistance of PW2 who had been walking with PW1 over-powered him, arrested him and frog matched him to Garissa Police Station. There is not the slightest possibility that the accused is the wrong man. He was arrested right at the scene after committing the offences charged. There is sufficient evidence too that the accused was in the company of another. That is the evidence of PW1, PW2 and PW3 which I have found credit worthy and believe able and truthful. There is evidence also that the accused was armed during the incident. He had with him a rungu to which an iron bar was tied. This is the rungu he had at the very 1st instance attacked PW2 with. It is the same one he had used to hit PW3 on the ear before turning to hit him with it on the head. The stick was recovered at the scene by PW6 in the company of the complainants along with his slipper. There is evidence too that during the incident personal violence was visited on PW1 and PW3. They stated that they were hit with the stick and injured and indeed when they reported to PW5, PW5 found them to be bleeding. He referred them to hospital for treatment where they were attended and their P3 forms duly filled by PW4 who adduced their P3 forms as P. exhibits 6 & 7 detailing injuries consistent with the evidence adduced by the complainants."**

Having so stated the learned trial magistrate concluded his judgment thus:

"**In a nutshell, the prosecution has proved beyond a doubt that complainant was robbed of his shopping by the accused and another, that he was injured by the accused in course of the robbery and that the accused and the other not before court demanded money of PW3 in course of which they injured PW3. The offences of robbery with violence and attempted robbery with violence**

have been proved against the accused. I find him guilty and without hesitation convict him as charged under section 215 of the C.P.C."

As already stated earlier in this judgment the appellant's appeal to the High Court was dismissed. In the course of their judgment delivered on 23rd November, 2006, the learned Judges of the superior court (Lenaola and Sitati, JJ.) said: -

"**We have carefully reconsidered the evidence on record whose summary we have given in the proceeding (sic) pages of this judgment. In our considered view, the appellant's complaints (sic) have no basis. We have of course agreed that the alleged offence took place at 7.30pm without any or any proper lighting. Under normal circumstances, it would be difficult to identify one's attacker(s) at such a time. In this case however, there is evidence by PW1, PW2 and PW3 that the appellant was grabbed and subdued at the very spot where he attacked his victims and immediately thereafter, he was escorted to the police station while wearing one slipper or sandal. The other slipper, together with the metal bar and rungu bearing the appellant's initials were recovered at the scene the next morning. The appellant does not deny that the recovered slipper and the metal bar and rungu were his. He argues in his submissions that as an old man (aged 33 years at time of trial) he needed to have or possess the metal bar and the rungu for protection against attack."**

Having so stated the learned Judges concluded thus: -

"**On the basis of the above findings, we are satisfied that the learned trial magistrate's conclusions as to the guilt of the appellant on both counts were well founded."**

It is that order of the superior court dismissing the appellant's appeal to that court that has given rise to this appeal before us.

When the appeal came up for hearing before us on 12th May, 2009 Mr. A.M. Ng'ang'a the learned counsel for the appellant relied on the Supplementary Memorandum of Appeal which contained the following six grounds: -

"*1. That the learned judges of the superior court erred in law for holding as they did that the appellant was properly identified whereas the circumstances pertaining were impossible for a positive identification.*

2. That the learned judges of the superior court erred in law for failing to consider the appellant's defence before the trial court, analyse the same and come up with their independent conclusion.

3. That the learned judges of the superior court erred in law for failing to consider that the appellant's constitutional rights under section 77 (2) (b) and (f) were violated.

4. That the learned judges of the superior court erred in law for failing to find that the prosecution had failed to prove its case within the required standard as stipulated by law.

5. That the learned judges of the superior court erred in law in failing to consider that the charge sheet was defective in failing to stipulate the time of committing the offence.

6. That the learned judges of the superior court erred in law in failing to consider that the evidence adduced in reference to count II of the supplementary charge was at variance with the said charge."

On the first ground Mr. Ng'ang'a submitted that the circumstances under which the appellant was identified were not favourable for a correct identification as it was about 7.30 p.m. He pointed out that no identification parade was held.

On grounds 2 and 4 Mr. Ng'ang'a submitted that the appellant's defence was not considered by the

two lower courts and that no proper reason was given for rejecting the appellant's defence. He concluded that the prosecution did no prove its case against the appellant beyond reasonable doubt.

On ground 3 it was submitted that the appellant's trial should be declared a nullity on the ground that there was no proper interpretation since it was not shown that one ***Mohamed*** was both a court clerk and interpreter.

Lastly on ground 5 Mr. Ng'ang'a argued that the charge sheet was defective as it did not indicate the weapons used were dangerous, and that the charge did not indicate the time the offence was committed.

Mr. Ng'ang'a abandoned the sixth ground of the Supplementary Memorandum of Appeal.

On his part Mr. J.M. Makura the learned Senior State Counsel conceded the appeal on the ground that there was no proper interpretation during the proceedings in the trial court. Mr. Makura however asked us to order a retrial as, in his view, there was overwhelming evidence against the appellant. Mr. Makura pointed out that the appellant was subdued by the two complainants hence giving the appellant no chance of escaping. He told us that the State would readily avail all the witnesses. In conclusion he submitted that in interest of justice a retrial should be ordered.

This is a second appeal and by *dint* of ***section 361 (1)*** of the ***Criminal Procedure Code (Cap 75 Laws of Kenya)*** only matters of law fall for consideration. That being so, this Court would not interfere with concurrent findings of facts of the two courts below unless they are shown to have not been based on evidence – see **KAINGO v R [1982] KLR 213** and **MWITA v R [2004] 2 KLR 60**.

We may now proceed to consider the submissions of Mr. Ng'ang'a. We shall start with the first ground which related to identification of the appellant. We have already alluded to the evidence in the trial court which clearly indicated that the appellant was subdued by the complainants who took him to Garissa Police Station. It is true that the incident took place at about 7.30 p.m. but the appellant was actually subdued and had no chance of escaping. There was no need for identification parade since the appellant was apprehended by the complainants who handed him over to the police. An identification parade would have served no useful purpose. We therefore find no merit in that ground of appeal.

As regards grounds 2 and 4 we are satisfied that the appellant's defence was considered by the two courts below. We are also satisfied that the case against the appellant was proved. We refer to the judgment of the trial magistrate in which it was stated that the appellant was "*arrested right at the scene after committing the offence charged*." We agree with the learned Senior State Counsel that the evidence against the appellant was overwhelming.

Ground 3 related to the provisions of ***sections 77 (2) (b) (f)*** of the Constitution which provides: -

"**(2) Every person who is charged with a criminal offence –**

(a) …….

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged.

(c)

(d)

(e)

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge."

Mr. Ng'ang'a addressed us at some length on this ground and Mr. Makura was prepared to concede the appeal on that ground only that he pleaded with us to order a retrial on the ground that there was overwhelming evidence against the appellant and that the State would readily avail the witnesses in the event that a retrial is ordered.

The record of the trial court shows that on 9th November, 2001 the appellant appeared before the Senior Principal Magistrate (R.N. Nyakundi) when the charges were read and explained to the appellant. The record of the trial court reads as follows: -

"**Before me: R.N. Nyakundi (SPM)**

Pros. P.C. Boaz

CC: Mohamed

Accd: Present

COURT

The substance of the charges and every element thereof has been stated by the court to the accused person, in the language that he understands, who being asked whether he admits or denies the truth of the charges replies:

ACCUSED

Count 1: It is not true.

Plea of Not Guilty Entered.

Count 2: It is not true.

Plea of Not Guilty entered.

COURT

Further mention on 23.11.2001. Accused be remanded in custody."

From the foregoing it is clear that the appellant understood the charges and pleaded "*Not guilty*". There was a court clerk by the name ***Mohamed***. When the trial commenced before the Senior Resident Magistrate (J.G. King'ori Esq.) on 27th February, 2002 there were two court clerks/interpreters – ***Mohamed*** and ***Bashir***. The appellant cross-examined the witnesses and at the close of prosecution case the appellant chose to defend himself by giving an unsworn statement. In that unsworn statement the appellant is recorded to have stated as follows: -

"**My name is Abdi Shukhuri Gure. I am 33 years old. I have never been to court. I live in Dadaab. On the material day I was in Garissa to see a sick sister. I found she had died. I headed for the area called Province. We buried her at 7.30 p.m. I headed for Bula Adan where my uncle lives. I encountered people who were running and shouting catch thief. 2 people passed me. Their pursuers arrested me. They assaulted me and took me to Garissa police station where I was charged. Pc. Kilonzo claimed he had been looking for me for a long time. He had a grudge with me. I am trained. I deny the charge."**

From the foregoing can it be seriously argued that the appellant's rights under ***section 77 (2) (b)*** and ***(f)*** of the Constitution were violated? We do not think so. At the trial of the appellant there was always a court clerk who served as an interpreter. Again the trial court's record shows that the appellant cross-examined the witnesses and defended himself in a very clear manner.

We are satisfied in the circumstances of this appeal that the appellant understood and fully participated in the proceedings before the trial court. We therefore find no substance in this ground of appeal which must fail.

The fifth ground related to the charge. It was argued that the charge was defective in that it did not stipulate the time of committing the offence. This would appear a novel submission. Our simple answer to that submission is that time is not normally stated in the charge sheet. We refer to the second schedule of the Criminal Procedure Code which sets out forms of stating offences. As regards robbery with violence which is relevant to this appeal the charge should read as follows: -

"**Robbery with violence, contrary to section 296 of the Penal Code.**

PARTICULARS OF OFFENCE

A.B., on the …… day of..…….. 19……in……District within the …….. Province, robbed C.D, of a watch, and at, or immediately before or immediately after, the time of such robbery did use personal valence to the said C.D."

This ground of appeal has no merit.

Since ground 6 was abandoned we think we have said enough in this appeal to demonstrate its fate.

We must point out here that although the learned trial magistrate had sentenced the appellant to death on both counts this was an error since on the second count (grievous harm contrary to section 234 of the Penal Code) the appellant could not be sentenced to death. The maximum sentence under ***section 234*** of the Penal Code is life imprisonment. This was, however, rectified by the learned Judges of the superior court by stating as follows in their judgment: -

"**We however do agree with the learned state counsel that the prescribed sentence for an offence under section 234 of the Penal Code is life imprisonment. Consequently, we set aside the sentence of death imposed upon the appellant in respect of count two and substitute therewith a sentence of life imprisonment.**

Since the appellant is already sentenced to death on the first count, the execution of the sentence on the second count shall abide the outcome of the execution of the sentence on count one."

In view of the foregoing, we are satisfied that the appellant was properly convicted on the first count of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and that his appeal was properly dealt with by the superior court which confirmed that conviction and the mandatory sentence. The error by the trial court as regards the second count of causing grievous ham contrary to ***section 234*** of the Penal Code was rectified by the superior court as indicated above.

The upshot of all the foregoing is that this appeal is dismissed.

Dated and delivered at NYERI this 15th day of May, 2009.

E.O.O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original**.**

DEPUTY REGISTRAR