IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 303 & 304 of 2006

JOHN KUBAI ……..……. 1ST APPELLANT

ABDI ALI GUKO ……..……. 2ND APPELLANT

AND

REPUBLIC …… RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Lenaola & Sitati, JJ)

dated 12th October, 2006

In

H.C. Cr. A. No. 135 & 137 of 2001)

****

JUDGMENT OF THE COURT

The two appellants challenge their conviction for the offence of robbery with violence contrary to *section 296 (2)* of the Penal Code. It had been alleged in the main count before Isiolo Senior Resident Magistrate (Korir Esq.), that the two**, "** *jointly with others not before court, on 14th February, 2003 (sic) at Isiolo township, robbed Hassan Huka of his Jacket valued at Kshs.900 and cash Kshs.1200/- and immediately before the time of such robbery wounded the said Hassan Huka*." There was an alternative charge relating to the first appellant, John Kubai, alleging that he, on 15th February, 2004 at Isiolo Township, otherwise than in the course of stealing, dishonestly received, or retained a jacket worth Kshs.900/- knowing or having reason to believe it to be stolen property. The trial Magistrate found the principal charge proved beyond reasonable doubt, convicted the two appellants and sentenced them to death. No finding was made on the alternative charge, and correctly so. Their appeal to the superior court (Lenaola & Sitati, JJ) was dismissed, hence the second appeal now before us.

The facts and circumstances leading to the conviction of the appellants may be briefly stated:

The complainant, Hassan Huka (PW1) a businessman in Isiolo township had escorted his sister to a bus stage in the town on 14th February, 2004 at about 5.30 a.m. when on his way back he saw seven people standing outside a bar known as Midcity. As he was about to pass them, one of them who was holding a walking stick blocked his way. He then hit Hassan on the nose with the walking stick felling him on the ground. The others held Hassan from behind and in the struggle he lost consciousness. His jacket, Kshs.1200/- were taken by the assailants. Hassan says the sun was about to rise at the time and there was

enough light to identify his assailants, and he did in particular identify the person who hit him as the appellant **Abdi Ali Guko** (Abdi). About 50 metres away from the scene, **Fatuma Lenaitamani** (PW3) was standing outside a milk selling kiosk with the younger sister of the appellant . They heard noise from the direction of the bar and saw someone lying on the ground. They screamed, headed there and saw a group of six people taking off leaving behind one man who was holding a walking stick and hiding something under his jacket. Fatuma saw that man clearly as he looked at her before he followed the others. Hassan was rescued and taken to Isiolo police station where a report of the robbery was recorded. He said one of attackers was a one-eyed man. He was issued with a P3 form to photocopy and return after attending to medical treatment.

The following morning, Hassan was in Isiolo township with Osman Tulu (PW4) looking for a photocopier, when they met the 2nd appellant, **John Kubai** (Kubai). Kubai was wearing a jacket which Hassan immediately recognized as the one stolen from him the previous day. They confronted Kubai and asked him where he got the jacket from. Kubai told them he had bought it for Kshs.200/- from a mono-eyed man in the town, the previous day . They took him to the police station and Kubai once again reiterated before P.C Anthony Maina (PW5) that he had bought the jacket from a one-eyed man for Kshs.200/-. Two days later Abdi was arrested when he was pointed out in Isiolo town by Hassan. The two were then jointly charged with the offence.

In his defence Abdi said he was not involved in the robbery since on the same date and hour it is alleged to have occurred, Abdi was being attacked in the same town as he headed to the Mosque. He went to the police to report the assault at 7.00 a.m. and said he was attacked by three young men one of whom he knew as Hassan. He was referred to hospital for treatment and a P3 form was issued to him. Hospital treatment records produced at his instance by Godfrey Muthee Mwiti (DW4), however, did not bear him out that he was admitted for two days or at all. Kubai's defence was that the jacket was his and he had never seen Abdi before. They were joined in the charge.

Both courts below made the concurrent findings that there was sufficient natural light from the rising sun and also artificial light from adjoining buildings to enable Hassan (PW1) and Fatuma (PW3) to identify the appellant, Abdi. They also made a finding that Kubai was found wearing the jacket stolen from Hassan the previous day and that the jacket did belong to Hassan. The contradictory explanation given by Kubai about possession of the jacket was disbelieved, hence his connection with the robbery through the doctrine of recent possession.

As stated earlier, both appellants contend that the charge was incurably defective. According to Mr. Mahan, the particulars of the charge should have stated that the robbers were "armed with dangerous and offensive weapon or instrument." In the absence of such words, which are a mandatory requirement of the offence, he submitted, the charge as laid was for striking out. In support of that proposition, Mr. Mahan cited this Court's decision in **Juma V. R [2003] 2 EA 471**.

We have considered the legal issue raised and we think, with respect, that it is misconceived. The authority cited in aid of the proposition is also irrelevant. ***Section 296 (2)*** of the Penal Code sets outs several ingredients of the offence of robbery with violence each of which is capable on its own to constitute the offence. Where only one of those ingredients exist and the prosecution relies on it and not on the other ingredients, there is no impropriety in setting out the particulars of the charge limited to that sole ingredient. The offence will be complete, in the words of the section:-

"***a. If the offender is armed with any dangerous or offensive weapon or instrument,***

OR

b. Is in company with one or more persons,

OR

c. 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 the **Juma case** cited before us, the prosecution was relying on the first limb of the section but the particulars of the charge said nothing about the item used to perpetrate the robbery being "*dangerous or offensive*", hence the castigation by the court. Not so in the case before us. The prosecution here relies on the ingredient that the robbery was committed by more than one person and expressly pleaded that offence which they set out to prove. They also rely on the fact of "*wounding*" which is an element of the third ingredient and which was proved in evidence through **Elias Muhidin** (PW2). We find no cause for complaint against the charge as laid and we dismiss that ground of appeal.

The only other ground raised was the identification of the appellant Abdi and the stolen jacket found on Kubai. Mr. Mahan submitted that none of the witnesses positively identified Abdi: not Hassan the complainant, nor Fatuma who was 50 metres away. Hassan too did not offer any proof that the jacket found on Kubai was his since it had no distinguishing features. He cited for support of his submissions, the decisions of this Court in **Ogembo v. R [2006] 1 EA 222 & Arum v. R [2006] 2 EA 10**.

In upholding the finding of the trial court on the positive identification of Abdi, the superior court stated as follows:-

"***There is evidence on record to show that there was sufficient natural light at the time of the attack which enabled PW1 to clearly see and identify the second appellant as one of the robbers. PW1 stated that the second appellant was armed with a walking stick and that it is him (second appellant) who hit PW1 on the nose with the stick, but not before PW1 noticed that his attacker was tall and one-eyed. The medical evidence adduced by PW2 confirmed the injuries suffered by PW1. It was this description of the second appellant that PW1 gave to the police and PW5 testified to this fact when he stated in evidence:-***

"***The report had been booked on 14.2.2004 and minuted to me. I issued him with a P3 form and referred him for treatment. He said he had identified one of these attackers as a one-eyed man."***

It was this same description and feature that enabled PW1 to lead the police to Barclays Bank area in Isiolo town from where the second appellant was arrested. We also have the evidence of PW3 who testified that she was about 50 metres away from where PW1 was being attacked and that when six men ran away, the second appellant did not run away immediately with them. She saw him and that he (second appellant) looked at her (PW3) and others as they arrived at the scene before he (second appellant) took off. She stated further that the second appellant had a walking stick and was hiding something under the jacket. PW3 was categorical in her evidence that she saw all that happened between PW1 and the second appellant. The evidence of PW1 and PW3 coupled with the fact that PW1 gave a description of one of his assailants to the police with (sic) his first report on 14.2.2004 has left us in no doubt whatsoever that the second appellant was one of the seven men who attacked PW1 on that material day."

We agree with that assessment of the evidence. The credibility of the two identifying witnesses was crucial on this aspect of the matter and the trial Magistrate was emphatic that the witnesses were truthful. We find no reason to differ from that view considering that we had no opportunity to see and hear the witnesses ourselves.

The same assessment of credibility goes to the finding made that Hassan was truthful about the identification of his jacket. The superior court stated on this aspect thus:-

"***PW1 told the court that when he saw the first appellant on the morning of 15.2.2004, the first appellant was wearing his (PW1's) stolen jacket. The explanation which the first appellant gave to PW1 at the time was that he (first appellant) had purchased the jacket for Kshs.200/- from a tall one-eyed man. During cross-examination of PW1, the first appellant did not put it to PW1 that the jacket which he was found wearing on the morning of 15.2.2004 belonged to him (first appellant). PW1 further told the court that on being questioned about the jacket, first appellant had described the man***

from whom he (first appellant) had brought the jacket and that the description fitted the person of the second appellant whom PW1 had identified at the scene of the robbery – as the tall one eyed man who was armed with a walking stick and who hit PW1 with the stick on the nose."

The complainant had described the stolen jacket to the police as confirmed by P.c. Anthony Maina (PW5), who also confirmed that Kubai had claimed in his presence to have bought the jacket from a one-eyed man. Kubai's about-face in his defence which was never put to Hassan or P.c. Maina in cross-examination was correctly found to have been an afterthought and was correctly dismissed. The doctrine of recent possession was thus correctly applied. We see nothing in the two authorities cited to dilute the concurrent findings of the two courts below. There was proof that the jacket was found with the suspect, that it belonged to the complainant, that it was stolen from the complainant, and that it was recently stolen from the complainant. All those are elements of the doctrine of recent possession tabulated in the **Arum Case**. It applies in this case and we dismiss that ground of appeal also.

The appeal was strenuously opposed by learned Senior Principal State Counsel, Mr. Orinda, and we thank him for his assistance in distinguishing the authorities cited by the appellants.

The upshot is that the appeal fails in its entirety and we order that it be and is hereby dismissed.

Dated at Nyeri this 16th day of May 2008.

S.E.O. BOSIRE

……..

JUDGE OF APPEAL

E.M. GITHINJI

……..

JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.