REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 46 AND 47 OF 2016 (CONSOLIDATED)

ADAN HUSSEIN AHMED.....1ST APPELLANT

WARSAME ADAN ABDI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Mandera Senior Principal Magistrate Criminal Case No. 404 of 2015 by Hon. P. N. Areri (SRM)

JUDGMENT

1. The two appellants were charge with four (4) counts of robbery with violence in the Magistrate's Court at Mandera contrary to section 296 (2) of the Penal Code. The particulars of Count 1 were that on the 4th March, 2015 at Hagarsu quarry near Koromey Mandera East Sub-County in Mandera County while armed with dangerous and offensive weapons namely AK47 riffle and a panga jointly robbed Adow Ibrahim Ali of his mobile phone make Nokia 1280 valued at Ksh.2,000/= and immediately after the robbery killed Adow Ibrahim Ali.

2. The particulars of Count 2 were that on the same day and place, armed with the same dangerous and offensive weapons jointly robbed Mohamed Hassan Harrow of his mobile phone make Nokia 1280 valued at Ksh.2,000/= and immediately after the time of robbery used actual violence.

3. The particulars of Count 3 were that on the same day and place and armed with the same dangerous and offensive weapons jointly robbed Ali Ibrahim Adan of his mobile phone make Nokia 1280 valued at Ksh.2,000/= and immediately after the time of robbery used actual violence.

4. The particulars of Count 4 were that on the same day and place and armed with the same dangerous and offensive weapons jointly robbed Ahmed Mohamed of his axe and panga all valued at Ksh.800/= and immediately after the time of robbery used actual violence.

5. The appellants were also charged with a fifth count of Promoting and Glorifying of a Terrorist Act contrary to section 9 (A) of the Prevention of the Terrorism Act 2012 as amended by the Security Laws Amendment Act 2014. The particulars of the offence were that on the same day and place uttered words to the effect that *"we will kill you in the same manner we killed the kafirrs working in the quarry"* which words were interpreted to be glorifying and promoting terrorism activities.

6. They denied the offences and after a full trial they were acquitted of the offence of promoting and glorifying terrorism. They were also acquitted of Count 2 of robbery with violence. They were however convicted of Count 1, Count 3 and Count 4 of robbery with violence. They were sentenced to suffer death on Count 1 and the sentences on Count 3 and 4 were left in abeyance.

7. Dissatisfied with the decision of the trial court, the appellants have come to this court on appeal through counsel Mbugua Mureithi & Co. Advocates. Counsel relied on an amended petition of appeal under the following grounds –

(1) That the learned trial magistrate erred in law and in fact in convicting the appellants on none existent tenuous, inconsistent and/or totally unreliable evidence of identification of the appellants.

(2) The learned trial magistrate erred in law and in fact in convicting the appellants when the prosecution failed to call critical material witnesses.

(3) The learned trial magistrate erred in law and in fact in convicting the appellants on insufficient, presumptuous, disjointed, incomplete and inconsistent evidence of the prosecution that was devoid of credibility.

(4) The learned trial magistrate erred in fact and in law in convicting the appellants against the weight of the evidence.

(5) The learned magistrate erred in law and in fact in convicting the appellants by watering down and/or shifting the burden of proof.

(6) The learned magistrate erred in fact and in law in convicting the appellants on the basis of mere suspicion and/or circumstantial evidence that did not on the whole circumstances of the case meet the required legal standard.

(7) The learned magistrate erred in fact and in law in convicting the appellants without according the case a fair, open minded and objective analysis and/or appraisal thereby depriving the appellants a fair trial.

(8) The learned magistrate erred in fact and in law in convicting the appellants without according the defence of the appellants' a fair, open minded and objective analysis and/or appraisal.

(9) The learned magistrate erred in fact and in law in meting out a harsh and excessive sentence in the circumstances of the case.

8. Learned counsel for the appellants also filed written submissions and list of authorities which he relied upon. On the hearing date, Mr. Mbugua Mureithi counsel for the appellants also made oral submissions and highlighted the written submissions. He had raised all the grounds of appeal listed.

9. Mr. Okemwa for the State asked the court to go through the evidence and consider whether these serious offences were proved by the prosecution. He stated that though weapons were mention, no weapon was produced. In addition, the identification parade officer did not testify in court. He said however that the long staying detention before trial was not raised in the trial court.

10. This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences bearing in mind that I did not have the opportunity to see all witnesses testify in order to determine their demeanour and give due allowance to that fact. See the case of **Okeno vs Republic [1972] EA 32.**

11. I have re-evaluated all the evidence on record. I have perused the judgement and I have considered the submissions both written and oral from both sides.

12. The incident occurred at night. It is very clear that the complainants were attacked; one of them killed and others injured and robbed that night. The prosecution had the burden of proving the guilty of the appellants beyond any reasonable doubt. Before convicting on the evidence of visual identification, the court has to carefully consider all the circumstances and warn itself when those circumstances are unfavourable before convicting on such evidence. In the case of **Wamunga vs Republic [1989] KLR 424**, the Court of Appeal stated as follows –

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends whole or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

13. PW2 claimed to have attended an identification parade and identified the 2nd appellant. He stated that he observed that one of the attackers was tall and the other one was short. The identification parade officer did not testify in court. Though PW1 also said he identified the same suspect at the parade as he saw him in the moonlight, the intensitie of the light was not described. In my view, this cannot be proper identification. The first reason being that the identification parade officer should have testified. His failure to do so meant that the prosecution did not prove that there was an identification parade conducted by the police. The second reason why such cannot be a proper identification is that, the description given by PW1 and PW2 did not meet the requirements set in the case of **Wamunga vs Republic (Supra)**. Such identification has a high probability of being mistaken.

14. The appellants were also arrested because of following footprints. The distance was long and it could not be said that they were the only ones who used that road even if they actually used that road. Infact the evidence on record did not establish that they used that road. Therefore in my view, such was another weakness of the prosecution case.

15. In addition to the above, PW6 stated that four (4) people were initially arrested. A blood stained machete was said to have been recovered. However, PW10 P.C Michael Jowi the investigating officer said that the machete was still with the Government Analyst. He also unprocedurally and illegally produced postmortem form and a ballistic report without any basis. No report of the Government Analyst was produced to establish if the machete was blood stained or connect with the offence.

16. The totality of the evidence of the prosecution on record is that it establishes suspicion against the appellants. Suspicion however strong cannot be the basis of a conviction in a criminal case. See the case of **Sawe vs Republic [2003] KLR 364.**

17. With evidence on record, I find that the prosecution did not prove any of the offences preferred against the appellants herein. The conviction and sentence can therefore not be sustained.

18. I allow the appeals, quash the conviction and set aside the sentence. I order that the appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 18th day of October, 2018.

George Dulu

JUDGE