REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NOs. 90, 94, 95 of 2010

(From the original Conviction and Sentence in the Criminal Case No. 659 of 2009 of the Chief Magistrate's Court at Mombasa: ***R. Kirui, P.M****.)*

SALIM MOHAMED ALI ……..…...…….…… 1ST APPELLANT

SAID ABDALLA SAID …… 2ND APPELLANT

JULLIET MOHAMED ……...…….. 3RD APPELLANT

VERSUS

REPUBLIC…….....……..……..……..RESPONDENT

JUDGEMENT

The three appellants namely **SALIM MOHAMED ALI** (hereinafter referred to as the '1st Appellant'), **SAID ABDALLA SAID** (hereinafter referred to as the 2nd Appellant) and **JULIET S. MOHAMED** (hereinafter referred to as the 3rd appellant), have jointly filed this appeal challenging their conviction and sentence by the learned Principal Magistrate sitting at Mombasa Law Courts. All three Appellants had been arraigned in court facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the offence were given as follows:

> **"On the 15th day of February 2009 at about 9.00 p.m. at ferry area in Likoni Location of Mombasa District within Coast Province, jointly with others not before court while armed with dangerous weapons namely knives robbed MASMOS KIAMBATI MARETE of cash Kshs.4,000/- of cash Kshs.4,000/-, cellphone make Motorolla C118 valued at Kshs.1,200/-, Zain Subscription line No. 0738603849 all valued at Kshs.5,370/- and at or immediately before or immediately after the time of the robbery used actual violence to the said "MASMOS KIAMBATI MARETE".**

All three Appellants pleaded *'Not Guilty'* to the charge and their trial commenced on 14th September 2009. The prosecution led by **CHIEF INSPECTOR KITUKU** called a total of four (4) witnesses in support of their case. **PW1 MASMOS KIAMBATI MARETE** who was the complainant told the court that on 15th February 2009 at about 9.00 p.m. he was at the Likoni ferry area seeking a boda boda cyclist to ferry him to his home. A lady in the vicinity (whom he later identified as the 3rd Appellant) beckoned

to him. He went to her. Upon completing a conversation on her mobile phone 3rd Appellant told **PW1** that she wished to have a word with him. They moved aside. Suddenly a group of people emerged and surrounded **PW1.** One held his head and neck while the other ransacked his pockets. **PW1** put up a valiant struggle and held on to the 1st Appellant who eventually removed his short and T-shirt leaving the clothes in the hands of **PW1** and escaped bare-chested. The 2nd Appellant had meanwhile stolen a mobile phone, ID Card, wallet containing Kshs.4,000/=, Safaricom line and card from the pockets of **PW1**. He handed these items to the 3rd Appellant who stuffed them into her brassiere. The robbers then all escaped. One **ROSE MBULA** (**PW2**) who had witnessed the incident from her nearby kiosk came and told **PW1** that she knew the 1st and 3rd Appellants. **PW1** went and reported the matter to police. He also went for medical treatment due to injuries sustained during the incident. The 3 Appellants were all arrested at different times and were placed in cells. They were eventually brought to court and charged.

At the close of the prosecution case each Appellant was found to have a case to answer and was placed on his/her defence. They each made statements denying any involvement in the robbery. On 2nd February 2010 the learned trial magistrate delivered his judgement in which he convicted each Appellant of the offence of Robbery with Violence and thereafter sentenced each one to death. Being aggrieved the Appellants filed this appeal.

Our duty as a court of first appeal is to re-examine and re-evaluate the prosecution case and to draw our own conclusions of the same (see **AJODE –VS- REP [2004] KLR 81**]. We have carefully perused the written submissions filed by the Appellants. They each raised similar grounds of appeal which broadly were two:

- Identification
- Insufficiency of evidence
- Failure of Investigating Officer to testify
- Failure to consider defence

The incident complained of happened at night at 9.00 p.m.

to be precise. No doubt it was dark. However **PW1** told the court that he was at the Likoni ferry stage where commuters normally await various forms of transportation and the area was served by electric lights. In his evidence at page 13 line 2 **PW1** explains:

"**It was around 9.00 p.m. but there were security lights as it is the ferry area"**

PW2 who was an eye witness to the incident confirms that the area is served by electric lights. On our part we find that such a busy commuter terminal would definitely be well lit if only to enable commuters to see and properly identify the transport as well as the persons manning the transport. We are satisfied that there was sufficient light to aid in identification.

PW1 told the court that he was able to see and identify all his attackers. In the case of the 3rd Appellant she is the one who called **PW1** to her and they held a conversation. No doubt he was able to see her well. In the case of the 1st Appellant the complainant held onto him and struggled with him forcing the 1st Appellant to remove his shirt and leave it in the hands of **PW1**. The shirt and T-shirt were produced in court as exhibits. **Pexb1** and **Pexb2**. **PW1** further testified that it was the 2nd Appellant who ransacked his pockets and removed his belongings. The fact that **PW1** was able to state with clarity the role that each Appellant played in the robbery shows that he had a clear and unfettered view and was able to see them well. The complainant's evidence on identification is duly corroborated by the testimony of **PW2** who was an eye witness. **PW2** also stated that she saw the 3rd Appellant whom she knew before call the complainant to her. **PW2** also identified the 1st Appellant as the man who ran away leaving his shirt and T-shirt in the hands of **PW1.** **PW2** however was not able to identify the 2nd Appellant. Both witnesses state that the items stolen from **PW1** were handed over to the 3rd Appellant who stuffed them inside her bra. It is clear that the 3rd Appellant was assigned to be the decoy, to woo the complainant to a

secluded area so as to allow her accomplices an opportunity to pounce. **PW1** did go further t identify all 3 appellants at a police identification parade conducted by **PW3 INSPECTOR JAMES TIMA** at Likoni Police Station. All the relevant parade forms were produced as exhibits by **PW3**. None of the Appellants raised any issue with the manner in which the parades were conducted. The identification at the parades confirms and reinforces the identification of the Appellants by **PW1.**

In the case of **PW2** she told the court that the 1st and 3rd Appellants were persons whom she knew prior to this incident. **PW2** told the court that she runs a kiosk at that stage and that she knew the 3rd Appellant as one of her regular customers. With respect to the 1st Appellant **PW2** told the court that she knew him as a tout in the area. Thus in the case of **PW2** There is clear evidence of identification by recognition which was held in the case of **ANJONONI –VS- REPUBLIC [1980] KLR** to be *"more satisfactory more assuring and more reliable than identification of a stranger"*. Indeed given that **PW2** knew the 1st and 3rd Appellants prior to the incidence it was futile for police to include her at the identification parades. All in all we find the evidence on identification to be overwhelming and we find that there is no room for error. We therefore dismiss the first limb of this appeal.

The Appellants submitted that the evidence on record was not sufficient to warrant a conviction. Having anxiously perused the trial record, we find that on the contrary the evidence is weighty and persuasive. The offence charged being that of Robbery with violence contrary to Section 296(2) of the Penal Code the key ingredients are firstly that there be more than one assailant, the assailants be armed and that actual harm is visited on the victim in pursuance of the offence. Neither **PW1** nor **PW2** made any mention of any weapons. However there was clearly more than one assailant and the complainant was assaulted in furtherance of the offence. Proof of **any one** of the key ingredients will suffice to prove the change. The witnesses gave clear, concise and consistent testimony and they both remained unshaken under cross-examination by the Appellants. We are satisfied that the evidence on record was sufficient to prove this charge.

The Appellants submit that failure by the investigating officer to testify was fatal to the prosecution case. We do not agree. The prosecution is obliged to call the witnesses required to prove the charge. In this case this was achieved by the evidence of the complainant and the eye witness. The investigating officer in this case would not have added to their evidence as he was not at the scene and did not witness the incident. There were no anomalies which required the explanation of the investigating officer. This was a straight forward case. In our view the failure of the investigating officer was in no way fatal to the prosecution case and we do dismiss this limb of the appeal.

Finally the Appellants submitted that the learned trial magistrate failed to consider their defences in coming to his decision. We find this submission to be factually incorrect. In his judgment at page 37 line 12 the learned trial magistrate states as follows:

> **"Having considered all the evidence adduced <u>together with the accused's statements</u>, I am convinced beyond reasonable doubt ….** *[our emphasis]***"**

This is a clear indication that the trial magistrate did infact give due consideration to the defence statements made by all three Appellants. He nevertheless proceeded to render convictions – no doubt because he remained unconvinced by the defences raised. We therefore dismiss this ground of the appeal.

After conviction the Appellants were each accorded an opportunity to mitigate. Thereafter each was sentenced to death. This sentence is lawful and we have no inclination to interfere with the same. Based on the foregoing this appeal fails in its entirety.

Dated and Delivered in Mombasa this 18th day of February, 2014.

…….……. ……

M. ODERO **M. MUYA**

JUDGE **JUDGE**