



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NOs. 66 & 67 OF 2011

(From Original Conviction and Sentence in Criminal Case No. 3216 of 2009 of the Chief Magistrate's Court at Mombasa: T. Ole Tanchu – SR.M.)

SALIM SHABAN WANJA 1ST APPELLANT

SAID SWALEH AHMED 2ND APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGEMENT

The two appellants namely **SALIM SHABAN WANJA** (hereinafter referred to as ‘the 1st Appellant’) and **SAID SWALEH AHMED** (hereinafter referred to as ‘the 2nd Appellant’) both filed an appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at the Mombasa Law Courts. The two Appellants were both arraigned in court on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were given as follows:

“On the 20th day of May 2009 at ISSAKIM Store, Mwembe Tayari area in Mombasa District within the Coast Province, jointly with others not before court being armed with offensive weapons namely knives, rungun, pangas and a hammer robbed BONIFACE KIRINYA of cash Kshs.35,000/=, airtime scratch cards valued at Kshs.30,000/=, cigarettes valued at Kshs.10,000/=, ten mobile phones all valued at Kshs.140,000/= and at or immediately before or immediately after the time of robbery used actual violence to the said BONIFACE KIRINYA”.

Both Appellants entered a plea of ‘Not Guilty’ to the charge and their trial commenced on 1st February 2010. The prosecution led by **INSPECTOR SUMBA** called a total of nine (9) witnesses in support of their case. **PW2 BONIFACE KIMUNYA MAKOMA** told the court at he has a retail shop in Mwembe Tayari. On 20th March 2009 at about 8.30 p.m. he was inside his shop with other attendants. A gang of men armed with knives, pangas and rungun attacked the shop. They beat up **PW1 JAMES KABERAH ITABURI** who was standing at the door of the shop. The two Appellants then entered the shop and attacked **PW2**. They then stole cash and other items. **PW4 GABRIEL OUMA KOBIA** who runs a miraa business nearby witnessed the attack. He rushed to Central Police Station to report the incident. He returned to the scene with police officers only to find that the assailants had already escaped. Several months thereafter the two appellants were arrested. The complainant and his witness identified them at

the police station. They were then brought to court and charged.

At the close of the prosecution case both appellants were found to have a case to answer. They were placed on their defence and each made an unsworn defence denying the charges. On 28th February 2011 the learned trial magistrate delivered his judgement in which he convicted both appellants and thereafter sentenced each one to death. Being aggrieved the appellants filed this present appeal.

MR. TANUI, learned State Counsel made oral submissions by which he conceded this appeal. We have carefully examined the record of appeal and are persuaded that the State was right to concede the appeal for the following reasons. Firstly the incident is said to have occurred at 8.00 p.m. – it was night time and therefore dark. Yet although the other witnesses talk of the presence of electric lights at the scene **PW1** who was standing at the door did not make any mention of electric lights in his evidence. None of the witnesses has however described exactly where these electric lights were placed. Were the lights inside the shop? Were there lights outside the shop? This is not made clear. Further the quality and range of the lights is not described. If the lights were on inside the shop but no lights were outside then how would **PW1** and **PW4** who were both outside the shop been able to see and identify the robbers? All these questions remain unanswered.

Secondly the witnesses all state that they were able to recognise the two appellants whom they all knew before as amongst the robbers. The incident occurred on 20th May 2009 and the report to the police was made on that very same day. The two appellants were not arrested until 20th September 2009 about four (4) months later. They were not arrested in connection with this incident but were arrested for other unrelated offences. The delay in arrest could be explained by the fact that the Appellants may well have gone underground for some time. What is curious is that the witnesses only wrote their statements **after** the appellants had been arrested and **after** they had an opportunity to see them at the police station. Why would police wait until **after** a suspect has been arrested before recording statements of witnesses? In the circumstances we cannot rule out the very real possibility that the witnesses only identified the Appellants because they had seen them at the police station. Such identification cannot be said to be untainted and in our view cannot be relied upon.

Finally the evidence is that **PW1**, **PW2** and **PW3** were attacked and injured with knives and rungs. **PW1** said that he was stabbed in the head with a knife. **PW3** on his part stated that he was cut with a panga on his forehead. Strangely enough **PW8 DR. LAWRENCE NGONE** who filled the P3 forms **Pexb3** and **Pexb4** insisted that the injuries noted on **PW1** and **PW3** were caused by a blunt as opposed to a sharp object. Under cross-examination **PW8** states at page 23 line 15:

“probable objects were blunt objects. Knives and pangas are not blunt objects”

Even under re-examination **PW8** maintains that the injuries noted were caused by blunt objects. A cut with a knife or panga is not a blunt object injury. The evidence is therefore inconsistent in this regard.

On the whole we find that several unexplained anomalies exist in the prosecution case. It was unsafe to render a conviction on the basis of such evidence. We therefore grant to the two appellants the benefit of doubt and quash their conviction by the trial court. The subsequent death penalty imposed on each appellant is also set aside. This appeal succeeds. Each appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 18th day of February, 2014.

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M. ODERO

JUDGE

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M. MUYA

JUDGE

In the presence of:

Both Appellants in person

Mr. Tanui for State