REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 111 OF 2012

(From the original Conviction and Sentence in the Criminal Case No. 1687/2009 of the Principal Magistrate's Court at Kwale: E.K.Usui – PM)

ALI OMAR MWANASI..……..……APPELLANT

VERSUS

REPUBLIC……..……...……..RESPONDENT

JUDGMENT

The appellant **ALI OMAR MWANASI** has filed this appeal challenging his conviction on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.** The appellant was first arraigned in the trial court on 3rd December, 2009 when plea was entered. The charge was read out and the appellant entered a plea of *'Not Guilty'*. The facts of the charge were given as follows:

> **"On the 6th day of September, 2009 at Bongwe village, Diani Location of Msambweni District within Coast Province jointly with another not before court, being armed with dangerous weapon namely knives, robbed BEATRICE MUENI MUMO cash Kshs. 18,660/=, 3 long trousers, 4 blouses, one towel, one leso, one bag, two wallets, one digital camera, one mobile phone Nokia, medicines, chips all valued at Kshs. 68,200/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said BEATRICE MUENI MUMO."**

The trial commenced on 26th January, 2010 and three prosecution witnesses testified. However following the transfer of the first trial magistrate **HON. OGEMBO** from Kwale Law Courts the case began 'de novo' before a different magistrate **HON. USUI MACHARIA** on 15th February, 2011. The prosecution led by **CHIEF INSPECTOR WAITHAKA** called a total of three (3) witnesses in support of their case.

The complainant **MS. BEATRICE MUENI MUMO** told the court that she lives in changamwe and is a business lady who sells used '*mitumba*' clothes for a living. On 6th September, 2009 at 9.30 a.m. she had travelled to Ukunda to visit a cousin. She alighted at the stage and proceeded to walk to her cousin's house. On the way she met two men. The engaged her in a conversation. The complainant asked the men what they were doing and they replied that they were harvesting coconuts. The engaged in some more conversation, then one of the men (whom she identifies as the appellant) pulled out a sharp knife. He ordered her to walk to the bushes. **PW1** threw down the bag she was carrying containing clothes, money and other valuables like mobile phone and digital camera all valued at Kshs. 68,200/=. She began

to run away. Some children nearby called out the name **ALI BAMZER** Though **PW1** shouted for help nobody came to her aid. She went and reported to the village chairman who said that he knew the accused. She reported to police and recorded a statement. Later on **PW1** was informed that the appellant had been arrested and taken to court over another matter. She was later bonded to appear in court to testify.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied having robbed the complainant. On 10th April, 2012 the learned trial magistrate delivered her judgment in which she convicted the appellant on the charge of Robbery with Violence and thereafter sentenced him to death. Being dissatisfied with this decision the appellant filed this appeal.

During the hearing of this appeal the appellant was represented by **MR. GEKONGE** Advocate. **MS. MWARA** learned state counsel appeared for the respondent state. As a court of first appeal we are under a duty to re-examine and re-evaluate the evidence on record and to draw our own conclusions on the same.

In this case the only eyewitness so to speak was the complainant herself. She was on her own when the incident occurred. The complainant stated that she was a stranger to the area. As such she did not know the men who accosted her. The incident occurred at 9.30 a.m. – it was broad daylight and no doubt visibility was good. The complainant stated that she spent about half an hour chatting with the men before the appellant pulled out a knife. In these circumstances we have no doubt that she had ample time and opportunity to see them well. However given the fact that the appellant was identified by a single eye-witness, it is imperative that the evidence on identification be very closely examined to ensure that the same is water-tight.

In her evidence the complainant mentioned that certain children playing nearby told her that the name of the appellant was *'Ali Bamzere'*. The said children were not called as witnesses to confirm that the person to whom they referred was the appellant. Infact the complainant stated that when the children gave the name of the appellant their mother hurriedly pulled them away. The given name of the appellant herein is *'Ali Omar Mwanasi'* not *'Ali Bamzere'*. The complainant told court that she gave the chief the name of Ali Bamzere as her attacker. However in his evidence **PW2 OMAR ATHMAN MWAMAGADI** does **not** state that the complainant gave him any name. He instead states at page 23 line 6:

> **"She [the complainant] said she was attacked by a tall and short man armed with knife and panga. I suspected it was Bamzere Ali aka or Ali Omar Mwanasi. He had ben implicated in similar incidences previously. Some eye-witnesses said they were ready to disclose names so long as I never told anyone their names. They said its Ali Omar. I started looking for accused."**

From this evidence **PW2** was not given any name by complainant. He was given the name of the appellant by some un-named witnesses who did not want their identities disclosed. This amounts to hearsay evidence which cannot form the basis of a valid identification. The complainant only told **PW2** that she was attacked by a short and tall man. **PW2** concluded that one of the attackers was Ali Bamzere. It is not clear how he came to this conclusion. Surely there were several tall and short men in that area. The statement by **PW2** that the appellant had been implicated in other similar incidences is prejudicial. There exists the very real possibility that **PW2** only picked on appellant due to his previous activities. **PW2** did not himself witness the robbery and therefore could not tell if it was the appellant who robbed the complainant. He relied purely on hearsay evidence to come to this conclusion.

The appellant was apprehended about three (3) months **after** the robbery. Much time had elapsed. The complainant was called and she came to the police station. Given the lapse of time the police ought to have conducted an identification parade in order to confirm the complainant's identification of the appellant. No such parade was conducted. This was a serious lapse on the part of the investigators. No reason has been given why the police neglected to conduct an identification parade. As it is the

identification of the appellant by the complainant is mere *'dock identification'*. In the case **AJODE VS. REPUBLIC [2004] KLR 81** the court held:

> **"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade."**

Similarly in this case in the absence of an identification parade the dock identification is worthless. More so in view of the fact that the other witnesses who claimed to have positively identified the appellant either declined or were not called to testify. Our conclusion is that the identification of the appellant by the complainant cannot be said to be reliable and does not pass muster. In the absence of a proper identification the whole case collapses. For this reason this appeal succeeds. The conviction of the appellant is hereby quashed and the death sentence is also set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 14th day of April, 2014.

M. ODERO **M. MUYA**

JUDGE **JUDGE**