REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 215 & 216 OF 2008

(From the original Conviction and Sentence in the Criminal Case No. 3329/2005 of the Senior Resident Magistrate's Court at Kwale: D.O Ogembo – SRM)

ATHMAN HAMISI MWAVIADZO

ABDALLAH HASSANI MUSANITE..……APPELLANTS

VERSUS

REPUBLIC……..…..RESPONDENT

JUDGMENT

The two appellants **ABDALLA HASSANI MUSANITE** (hereinafter referred to as the 1st Appellant) and **ATHUMAN MWAVIADZO** (hereinafter referred to as the 2nd Appellant) have jointly filed this appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at the Kwale Law Courts. The two appellants, together with a third accused who was eventually acquitted by the trial court were jointly arraigned in the lower court on 17th November, 2005 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that

> **"On the 10th day of August, 2005 at Maganyakulo Filling Station in Kwale Distrcit within Coast Province, jointly with others not before court while armed with dangerous weapons namely AK 47 rifle and pistols robbed SAIDI MWATSULUKA MWAKULO Kshs. 100,000/= and one Nokia mobile phone all valued at Kshs. 117,000/= and at or immediately before or immediately after the time of such robbery threatened to shoot the said SAIDI MWATSULUKA MWALUKO.**

The appellants both entered a plea of *'Not Guilty'* to the charge and their trial commenced on 3rd July, 2007. The prosecution led by **INSPECTOR GITONGA** called a total of five (5) witnesses in support of their case. The brief facts of the prosecution case were as follows:

PW1 SAIDI MWATSULUKA MWAKULO told the court that he is the proprietor of a petrol station at Maganyakulo shopping centre in Waa Location. On 10th August, 2005 at about 8.00 p.m. he was standing by the petrol pumps reconciling the records of the day's collections. Suddenly a group of five men armed with an AK 47 rifle and pistols attacked **PW1** and his two (2) employees. They were all ordered to lie down. The robbers took Kshs. 100,000/= from the pocket of **PW1** and also took his mobile phone make Nokia 66301. After the robbery the assailants vanished into the darkness. Police were called

in. **PW1** told police that he knew two of the robbers and a manhunt began for them. The 1st appellant was arrested in Likoni while the 2nd appellant was apprehended by **PW1** when he returned to his house. They were then arraigned in court and charged.

At the close of the prosecution case both appellants were found to have a case to answer and were placed on their defence. They each denied any involvement in the robbery from the complainant's petrol station. On 27th July, 2008 the learned trial magistrate delivered his judgment. He convicted the two appellants of the offence of Robbery with Violence (but as earlier mentioned the third co-accused was acquitted). Both appellants were thereafter sentenced to death. Being aggrieved by both their conviction and sentence the appellants filed their appeals.

Being a court of first appeal we are obliged to re-examine and re-evaluate the evidence on record and to draw our own conclusions on the same. Both appellants chose to rely upon their written submissions which had been duly filed in court. **MR. TANUI** learned state counsel made oral submissions opposing the appeal.

We have carefully perused the written submissions filed by the two appellant. They raise similar grounds of appeal as follows:

- Defective charge sheet
- Lack of proper identification
- Failure to name the two in the OB report
- Failure to consider their defence.

On the first ground the appellants argue that section 296(2) of the Penal Code under which they were charged provides for the penalty for the offence of Robbery with Violence. As such they submit that having been charged under the wrong provision of law, the charge is fatally defective rendering their trial a nullity. It is true that section 296(2) does provide for the penalty of the offence charged. It is section 295 which **creates** the offence of robbery with violence. However, failure to cite section 295 does not render the charge sheet fatally defective. The law requires that an accused person be informed in a clear manner and with sufficient clarity of the charge against them. The particulars of the charge clearly indicated that the offence was one of robbery with violence. We have no doubt that the two appellants were fully aware of the charges they face. There was no misapprehension on their part which is evidenced by the fact of their pleading to the charge and the fact of their robust participation in the trial. The question of the validity of charges brought under section 296(2) of the Penal Code was determined conclusively by the Court of Appeal in the case of **JOSEPH NJURUNA MWAURA & 2 OTHERS VS. REPUBLIC Criminal Appeal No. 5 of 2008** where the Judges categorically held as follows:

> **"the offence of robbery with violence ought to be charged under section 296(2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person……."**

He second ground of appeal relied upon was that of identification. **PW1** told the court that the incident occurred at 8.00 p.m. It was night and therefore dark. However **PW1** states that he was at his petrol station near the petrol pumps an area which is very well lit by fluorescent lights. In his evidence at page 30 line 14 **PW1** says:

> **"The robbery was at 8.00 p.m. I identified accused because there was bright electricity lights from fluorescent tubes."**

This evidence regarding source of light is corroborated by **PW3 MWINYI HAMISI NERI** an employee of **PW1** who was also an eyewitness to the robbery who stated at page 20 line 18:

> **"It was very bright from electricity light."**

As a court we do take judicial notice of the fact that most if not all petrol stations in Kenya have bright lighting in the forecourt area to enable the attendants to pump fuel and to enable both the attendant and customer to see the fuel gauge in order to determine the value of fuel to be purchased. The fact that the witnesses were able to state with clarity the role which each appellant played in the robbery only serves to reinforce the fact that lighting was sufficient. In his evidence at page 20 line 18 **PW3** states as follows:

> **"I identified accused. He is Abdalla ……..He is the one who was behind the thief who was firing gun shots. There was enough light and he was not far from me."**

Similarly **PW1** in his testimony states:

> **"It is accused 1 who placed the pistol on my head."**

Further on the same page at line 15 **PW1** says:

> **"It is accused 3 [the 2nd appellant herein] who put his hands in my pockets and took the money."**

PW1 also told the court that although they were all ordered to lie on the ground he lay on his back facing upwards thus he had a clear view of events. None of the robbers was masked thus their faces were clearly visible.

We are therefore satisfied that lighting at the scene was adequate.

Aside from visual identification both **PW1** and **PW3** state that they were able to identify the two appellants whom they knew well as neighbours. In his evidence at page 15 line 8 **PW1** states:

> **"I identified Abdalla Hassan Musanite (points to the accused – 1) and Athuman (points to accused 3)….."**

Thus **PW1** was able to identify the two by name. Under cross-examination by the 1st appellant **PW1** says:

> **"I have said the truth. We know each other well. You are Abdalla Hassan Musanite and I have known you for long."**

Similarly **PW3** under cross-examination by the 1st appellant states at page 21 line 9:

> **"I know you well as Abdalla Hassan Musanite. We were with you in class 6 and we come from the same village ……."**

It is therefore clear that the assailants were both persons who were well known to **PW1** and **PW2**. In the case of **ANJONONI VS. REPUBLIC [1980] KLR2** evidence of recognition was held to be *"more satisfactory, more assuring and more reliable than identification of a stranger because it depends on personal knowledge of the assailant in some form or other."*

We note that despite the fact that the suspects were well known to the witnesses the police proceeded to conduct an identification parade. A parade in such circumstances was superfluous and added no value.

At this stage we will deal with one of the grounds of appeal raised being that the witnesses in the first report did not give the police the **names** of the appellants. The OB report for 10th August, 2005 was sought for as additional evidence in this appeal and a copy of the same was availed to court. We have perused the relevant OB entry No. 53 of 10th August, 2005 and note that indeed the names of the attackers was not recorded in the OB. However this does not prove that the attackers were not known to the witnesses. A case is determined on the evidence adduced in court and not on the basis of the OB

report. The failure to provide the names of the robbers is not fatal to the prosecution case. The OB report is merely a synopsis of a report made to the police and does not necessarily include all pertinent facts of the case. We therefore find no merit in this ground of the appeal and the same is hereby dismissed.

Finally the appellants submit that the trial magistrate failed to consider their defence. In his judgment page 39 from lines 15 – page 40 line 4 are spent analyzing the defences raised by the appellants. It is therefore misleading to state that their defences were not considered. We do not fault the decision of the trial magistrate to dismiss these defences as lacking in merit. It is clear that all the ingredients for the offence of Robbery with Violence existed. The assailants were five (5) i.e. more than one person. They were armed with a rifle and pistols which they used to threaten the victims into compliance in pursuance of the theft. On the whole we are satisfied that the prosecution did prove the case against both appellants to the legally required standard. Their conviction was merited and we uphold the same.

Both appellants were accorded an opportunity to mitigate after which they were each sentenced to death. The sentence was lawful and we do uphold it. This appeal therefore fails and is hereby dismissed.

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

M. ODERO **S. MUKUNYA**

JUDGE **JUDGE**

In the presence of:

Ms. Mwaura for State

Both Appellants in person

Court Clerk Mutisya