



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 78 OF 2013**

*(From the original Conviction and Sentence in the Criminal Case No. 617/2011 of the Principal Magistrate’s Court at Kwale: E.K. Usui Macharia – PM)*

**IDDI JUMA MWADZOGO**

**SALIM OMAR MANDULI.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants namely **IDDI JUMA MWADZOGO** (hereinafter referred to as the 1<sup>st</sup> appellant) and **SALIM OMAR MANDULI** (hereinafter referred to as the 2<sup>nd</sup> appellant) have both filed this appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at the Kwale Law Courts. The two appellants had both been arraigned before the trial court on 13<sup>th</sup> June, 2011 facing 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 19<sup>th</sup> day of May, 2011 at Tiwi Location in Kwale County within Coast Region jointly while armed with dangerous weapons namely kitchen knife robbed off PURITY CATHERINE MWIKALI KISAVI a purse containing Kshs. 480/=, one mobile phone make Nokia 1680 and its charger valued at Kshs. 3,000/= and personal documents and at or immediately before or immediately after the time of such robber threatened to stab the said PURITY CATHERINE MWIKALI KISAVI with a kitchen knife.”**

Both appellants entered a plea of ‘*Not Guilty*’ to the charge and their trial commenced on 11<sup>th</sup> November, 2011. The prosecution led by **CHIEF INSPECTOR MUIRURI** called a total of three (3) witnesses in support of their case.

The complainant **PURITY CATHERINE MWIKALI KISAVI** told the court that on 19<sup>th</sup> March, 2011 at about 1.30 p.m. she alighted from a vehicle at the Kenol/Tiwi stage. As she walked home she passed a group of about six (6) men sitting by the side of the road. One man whom she identifies as the 1<sup>st</sup> appellant followed her. He ordered her to stop and surrender all she had to him. The man grabbed her and held a knife to her. Then the 2<sup>nd</sup> appellant came and cut her handbag. He took it. The 1<sup>st</sup> appellant hit her on the forehead. The complainant began to scream for help and the two men ran away. A man

called **HAMISI JUMA MWAGAMUNO PW2** who was passing by came to the rescue of the complainant. She then reported the matter to Diani police station. Later on the two appellants were arrested by administration police and taken to the police station. Following police investigations the two were charged in court.

At the close of the prosecution case both appellants were found to have a case to answer. They both denied the charge. On 26<sup>th</sup> March, 2013 the learned trial magistrate delivered her judgment in which she convicted both appellants of the offence of Robbery with Violence and thereafter sentenced each to death. Being aggrieved the appellants filed this appeal.

Being a court of first appeal we are mindful of our obligation to re-evaluate the prosecution case and to draw our own conclusions thereof. The incident occurred at about 1.30 p.m. It was day light and therefore visibility must have been good. It would be assumed that the complainant was able to see her attackers well. However in her evidence the complainant testified that the two attackers came from *'behind her'*. Obviously she did not have eyes in the back of her head. It would have been quite difficult for the appellant to see and identify persons who had attacked her from behind. It must be remembered that she claimed one of the men held her from behind and threatened her with a knife. In that situation of panic a positive identification would hardly have been likely.

The trial magistrate in her judgment relied on the evidence of **PW2** as corroborating the evidence of the complainant on identification. Here again we find that certain flaws exist. **PW2** told the court that he responded to the complainant's cry for help. At page 17 line 20 **PW2** says:

**".....I rushed to the place. Just about 30 meters away I saw 2 people running fast. They did not see me....."**

If the two men were running fast we wonder how **PW2** would have been able to see and identify them. Under cross-examination at page 18 line 21 **PW2** goes on to state as follows:

**"You was [sic] ahead of me so I only saw your back. During the day you can identify one from the back side. I know you well ....."**

He goes on to state at page 19 line 17:

**"I am testifying because I saw you very well..... I saw your back as you ran away....."**

We ourselves harbor serious doubts as to whether **PW2** could have been able to positively identify two fleeing men whom he only saw by their backs. Identification is normally by facial features. A person's back has no identifying feature. **PW2** saw the two men running away. By his own admission he only saw their backs. We find that it would not have been possible for **PW2** to identify the two men he saw in those circumstances.

**PW2** further claims in his evidence that he told the parents of the appellants to ensure that the items stolen from the complainant were returned to her. At page 18 line 10 **PW2** says:

**"I told them [the parents] we expected him [the 1<sup>st</sup> appellant] to refund the items especially the personal documents. After about three days the complainant's personal documents were dropped at the place of theft near the homestead at the spot. The lady of the home called me and said the documents were dropped at the homestead."**

Firstly it is not clear by what authority **PW2** was issuing these ultimatums. He was just a fellow villager. He was not a chief or village elder. Secondly the fact that the stolen documents were dropped at the scene is not evidence that the 1<sup>st</sup> or 2<sup>nd</sup> appellants returned them there. Any other person could have dropped the documents there. There is no witness who saw either accused leave the complainant's stolen documents at the scene. The lady who **PW2** refers to in his evidence was never called to testify. The complainant herself states that she did recover her stolen documents dropped at the stage. She goes

on to state at page 8 line 24:

**“I heard accused tell the police they sold my phone to Wangui. They were beaten and even admitted to other robberies.”**

If the accused made an admission to the police this would amount to a confession of their involvement in the crime. No police officer who received this confession was called to testify. Section 25A of the Evidence Act clearly sets out the circumstances under which a confession made may be admissible as evidence in court. Section 25A was not complied with at all. This therefore remains hearsay which the court cannot rely upon. Further it appears that this so-called confession was not voluntarily made. The complainant clearly states that the accuseds had to be ‘beaten’ in order to confess. Thus such confession if any was obtained by use of force. **PW3 INSPECTOR RAPHAEL MULWA** told the court that the knife used in the robbery was recovered. The witness however admits that the recovery of the said knife was never recorded in the OB. Surely an item as crucial as a knife if recovered ought to have been recorded in the OB. We note that the investigating officer did not testify in this case. No reason is given for this omission. **PW3** told the court that he was not the investigating officer. He names a **“Corporal Musera”** as the officer who investigated this case. The mere fact that an officer has been transferred does not mean that they cannot be called upon to testify. In view of the anomalies we have noted in this case our opinion is that evidence from the investigating officer was necessary in order to tie up the loose ends in the prosecution case.

All in all we find that the prosecution case was contradictory and lacked cogency. We find that the charge was not proved beyond a reasonable doubt. We fault the conviction of the two appellants and we hereby quash that conviction. The death sentence imposed on the two is also set aside. This appeal succeeds. The two appellants are to be set at liberty forthwith unless they are otherwise lawfully held.

**Dated and Delivered in Mombasa this 28<sup>th</sup> day of November, 2014.**

**M. ODERO**

**M. MUYA**

**JUDGE**

**JUDGE**