



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 247 & 248 OF 2006

SAIDI RAMA TENGA 1ST APPELLANT

HAMADI ALI MWAMREZI2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 388 of 2005 of the Senior Resident Magistrate's Court at **Kwale – Hon. Ochenga - SRM**)

JUDGMENT

The two Appellants **SAID RAMA TENGA** and **HAMADI ALI MWAMREZI** were Sentenced to suffer death as per law prescribed for the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars were that on the 31st day of December, 2004 at about 12:00 pm at Tiwi Location of Kwale County, being armed with dangerous weapons namely a knife jointly robbed **GEORGINA SIELE** of her handbag, cash Ksh. 3,300/=, Identity card, Post bank Book and Mobile phone make Motorola all valued at Ksh. 8,920/= and at or immediately before or immediately after the time of such robbery used personal violence to the said **GEORGINA SIELE**.

The two appellants have raised several grounds of appeal. Principally that the charge sheet was defective in that it did not comply with section 137 of the Criminal Procedure Code.

Secondly that the identification was not proper and sufficient as required in law and lastly that the trial magistrate did not consider the evidence for the defence.

The Complainant a sales representative with Bixa Company Kenya was at a bus stage at midday waiting for transport to Mombasa city. While at Tiwi Centre two men emerged from a nearby thicket. One of the men grabbed her by the shoulder and ordered her to surrender the handbag and its contents. This was the second Accused. She screamed for help but the two men grabbed her and a struggle ensued. One of the men produced a knife and threatened to stab her. She sustained injuries during the attack. After taking away her handbag the two bolted. Her screams attracted the attention of the security guard at her place of work which was nearby who upon a briefing of what had taken place gave chase while in the company of members of public and police on patrol. They managed to arrest the first Accused who was returned to her place of work and she identified him. The 2nd Accused was later arrested as he had gone into hiding. Nothing belonging to her was recovered.

The contention by the appellants is that the charge was defective in that it was in variance with or to the evidence in chief adduced by the complainant.

In the charge sheet it is noted that the items said to have been stolen were a handbag, cash Ksh.3,300/=, Identity card, Post Bank book and a mobile phone make Motorola. In her evidence in chief the Complainant testified that her handbag Ksh. 3,000/= and Identity card were the items that were stolen.

We were referred to section 137(c) (I) of the Criminal Procedure Code which relates to the description of property thus,

“the description of property in a charge or information shall be in ordinary language and shall indicate with reasonable clearness the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property”.

While acknowledging that in her evidence in chief the complainant did not mention a post bank book or that if mentioned the trial magistrate did not note it down, we are not persuaded that there was no compliance with section 137 (c) (I) of the criminal Procedure Code. The main items stolen from the Complainant was a handbag which contained the other items mentioned in the charge sheet. The property stolen was clearly described and the appellants cannot be heard to say that they were prejudiced for lack of knowing what was alleged to have been stolen.

The second ground is that of identification. We note from the outset that the incident took place at midday. The complainant evidence which is found at page 6 line 21 is as follows,

“I was at the bus stage waiting for a vehicle to board for Mombasa. I was alone, while I was waiting two people came from the bush one of them grabbed me by the shoulder and ordered me to surrender the handbag. I resisted and refused to surrender the bag. I also screamed for help. The other person also grabbed me. I struggled with the two and one of them produced a knife. I asked him why he wanted to kill me. He then ran away. I pushed them while crying, in the meantime our security guard heard me screaming”.

From the above, we note that the incident took place in broad daylight at a deserted area hence the complainant did not have distraction from any other third party as she struggled with the two attackers. The attackers did not wear any masks and she had ample opportunity to observe their features.

We also note that during the scuffle the complainant was screaming for help and this attracted the attention of their guard at her place of work.

This is what the guard (PW 2) told the Court at page 8 line 17,

“I can recall on 31st December, 2004 at noon I was on duty patrolling the factory when I heard screams. The screams were emanating from the road. I was a few meters from the main gate. I also heard some whistle. Later I switched on the alarm. I then left running towards the road. I saw PW 1. She was bleeding from the finger. She told me that she needed help. She had been robbed off her items. She showed me the direction the robbers had taken. I then saw the two Accused persons dashing into the bush. The 2nd Accused was carrying a hand bag. I pursued the two. Members of public also came for our rescue..... I saw a police car on patrol. They immediately joined us..... We later arrested the Accused. I am the one who arrested him”.

The evidence of arrest was also corroborated by Acting Inspector EMMANUEL OKONDA (PW 3) who also joined forces with members of public in combing the bushes and arresting the first Accused.

We are satisfied that complainant's evidence on identification was corroborated by that of the security guard at her place of work – **JUMA MWANGAMBO (PW 2)**.

This **JUMA MWANGAMBO** knew the two Accused persons before. During cross examination by the first Accused at page 9 line 11 he told the Appellant,

“ I saw you running towards the bush. I know you. You hail from Tiwi. You worked with Bixa for five years. What I have stated is the truth. You ran towards the forest I pursued you, you threatened to stab me with a knife. You threw away the knife. I am the one who arrested you”.

As for 2nd Accused/Appellant during cross examination this is what the witness said,

“I saw two people running away. I saw you carrying or running with the complainant's bag. Hitherto I had seen you. I have seen you more than three times. I positively identified you. I mentioned your names to police. The 1st Accused also implicated you. The 1st Accused took you to your home. You were never found at home. Your name was circulated to the Home guards”.

We are satisfied that the two appellants were clearly identified by the complainant during the robbery which was in broad daylight. They had a struggle at close quarters and she had ample opportunity to see their features.

Identification by PW 2 was that of recognition as the two appellants were known to him before and he had chased them and managed to arrest one of them after the incident whereas the second one was later arrested after his name and description was given to members of community policing.

We are also satisfied that the trial magistrate did consider the defence evidence in his Judgment. The appellants were found guilty and Convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code and Sentenced to suffer death as prescribed by law. This was a lawful Sentence.

The upshot is that we find no merit in the appeal on both Conviction and Sentence and hence find no reason to disturb it. The appeal is disallowed.

Judgment dated and delivered in open Court this **13th** day of **August, 2013**.

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M. ODERO

M. MUYA

JUDGE

JUDGE

In the presence of:-

Learned State Counsel Miss Ogweno

Appellants present

Court clerk Musundi