



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 139 & 140 OF 2009

1. SIMON WAITHAKA KINYUA
 2. BRUNO MKASAAPPELLANTS

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 1873 of 2008 of the Chief Magistrate's Court at Mombasa – R. Kirui - PM)

JUDGMENT

SIMON WAITHAKA and **BRUNO MKASA** hereinafter referred to as the 1st and 2nd Appellants were charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code. They were subsequently acquitted on counts one and two but found guilty in respect of count three and sentenced to suffer death.

We have analyzed the evidence adduced before the trial Court and are satisfied that the complainants in respect of counts No. 1 and 2 did not identify their attackers.

It is **DAVID KARISA MORRIS (PW 1)** who had told the court that he had identified the Accused persons.

At page 2 line 12 of the proceedings this is what he testified,

“On 15th July, 2008 at 8:30 pm I was standing at the door when I saw one person wearing a Reddish T-Shirt and black trousers standing outside my neighbours house..... There was electricity light there and I saw the person clearly.

After about two minutes two other people came to my house fast. One had a panga and an iron bar while the other had a panga. The one in front told me, I was under arrest and ordered me to give him my mobile phone and money. I tried to lock myself in my house but they overpowered me and entered. I then raised my arm high and surrendered. When I saw they were relaxed, I dashed out shouting “thieves thieves”. Then the one I had seen standing outside my neighbours house cut me on the face near the right eye. The last one sensing danger ran away. They robbed me of my mobile phone and Tv remote before they ran away. Later I was called by police on 23rd July, 2008. I checked and identified the first and second Accused”.

The investigating officer (PW 4) had visited the scene upon a report of robbery. In the course of investigations he received information that one of the robbers was called Hamisi. He testified that its the complainants who led him to his house at Bagladesh where he arrested a person called **HAMISI** and other suspects. They took him to the station and continued with investigation.

At page 10line 10 this is what he told the Court,

“In my investigations I discovered the one I had arrested is not the Hamisi who committed the robbery. I therefore released him together with those I arrested him with”.

From his evidence we note that the 2nd Accused was arrested on 20th June, 2008 by police officers who handed him over to IP Makori whereas the 1st Accused was arrested on 22nd June, 2008 and taken to Coast General Hospital by Corporal Kingoso.

Upon evaluating the evidence which was adduced before the trial Court we are not satisfied that the circumstances obtaining at the time offered ideal conditions for identification.

The reasons being that, immediately after the incident the complainants themselves led police to the house of one Hamisi who was arrested together with others but upon further investigations it was found that he together with his colleagues were not involved in the robbery. If the complainant in Count three was so certain that he had clearly seen and identified the Accused persons as the robbers how come that he led police on a wild goose chase and arrested the wrong persons.

We have also observed that the complainant in the third count had no input on the arrest of the Accused persons. He did not give their descriptions to police.

No arresting officer was called to testify as to how and why the Accused persons were arrested.

Nothing was recovered from the Accused persons to link them with this offence.

We are therefore of the considered view that the identification of the two appellants by the complainant (PW 1) was not free from error.

The Conviction of the appellants on the 3rd Count was therefore unsafe and there are good reasons to interfere which we hereby do and quash the Conviction accordingly, the Sentence is set aside.

The Appellants are set at liberty unless otherwise lawfully held.

Judgment dated and delivered this **9th** day of **September, 2013**.

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M. ODERO

JUDGE

In the presence of:-

Learned State Counsel

Appellants

Court clerk

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M. MUYA

JUDGE