**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 2 OF 2010**

***(From the original Conviction and Sentence in the Criminal Case No. 3139 of 2008 of the Chief Magistrate's Court at Mombasa: R. Kirui – PM)***

**MOHAMED ALI……APPELLANT**

**VERSUS**

**REPUBLIC……..……..RESPONDENT**

**JUDGMENT**

The appellant herein **MOHAMED ALI** has filed this appeal against his conviction and sentence by the learned Principal Magistrate sitting at the Mombasa Law Courts. The appellant was arraigned in court on 21st October, 2008 facing two counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The appellant entered a plea of *'Not Guilty'* to the charge and his trial commenced on 21st July, 2009. The prosecution led by **CHIEF INSPECTOR KATUKU** called two witnesses. The complainant in his evidence told the court that on 15th October 2008 at about 8.30 a.m. he left his house together with his wife to go and check on a house the couple wished to move to. At Majimboni area he met a group of six men whom he knew by appearance. The men stopped him and demanded identification. The complainant and his wife readily identified themselves. The men who were armed with knives then threatened the couple and stole from the complainant his wallet containing Kshs. 3,400/= and 50 sterling pounds as well as his mobile phone make Nokia. They also robbed the complainant's wife of cash and her mobile phone. After they had been robbed the couple went and reported the incident to the local community vigilante and later at Likoni police station. The same day at 4.00 p.m. while accompanied by the community policing the complainant saw the appellant but he feared to point him out as the appellant was one of the members of the community policing. Two days later the complainant accompanied by police officers returned to the scene of the robbery. He spotted the appellant and pointed him out to the police who arrested him. The appellant was later charged.

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 an unsworn defence in which he denied any and all involvement in the robbery. On 5th January, 2010 the learned trial magistrate delivered his judgment in which he convicted the accused on only one count of Robbery with Violence and thereafter sentenced him to death. The appellant was however acquitted of the second charge of Robbery with Violence since no complainant testified in support of this count. Being aggrieved by both his conviction and sentence the accused filed this present appeal.

During the hearing of the appeal, the appellant who was not represented chose to rely entirely upon his

written submissions. **MR. AYODO** learned state counsel opposed the appeal. The appellant relied mainly on the ground of identification as a basis for his appeal. He also argued that given the circumstances he ought to have been convicted of the lesser offence of simple robbery under section 296(1) of the Penal Code.

As a court of first appeal we are obliged to re-evaluate the prosecution case and to draw our own conclusions on the same. In this case the incident occurred at 8.30 a.m. It was already day light and visibility was good. The complainant spent a fair amount of time in the company of the six men who accosted him. They engaged him in conversation demanding that he identify himself. The complainant identified the appellant as one of the men who robbed him. The fact that he had a clear view of the appellant is buttressed by the fact that the complainant was able to narrate the precise role which the appellant played in this incident. At page 16 line 2 the complainant says:

> **"The accused had a knife and is the one who secured me as the other one directed his knife at me."**

Further on at page 16 line 6 the complainant sates:

> **"He handed over the money and the phone to the accused who was their leader."**

Immediately after the incident the complainant saw some of the vigilante youth passing by and he was able to identify the appellant who was amongst them as one of those who had robbed him.

We are mindful of the fact that the evidence on identification is given by a single witness. This fact does not on its own render this evidence unreliable. In the case of **MAITIANYI –VS- REPUBLIC [1986] KLR** the Court of Appeal held that:

> **"Subject to well known exceptions it is trite law that a fact maybe proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification ……. "**

The complainant has given a very cogent and concise account of the events of that day. He remained unshaken under cross-examination by the accused. The circumstances were optimal for a positive identification. More importantly the appellant was a person who was not a stranger to the complainant. The complainant testified that he knew the appellant by appearance having seen him before in Majimboni estate. Therefore there is evidence of recognition which was held in the case of **ANJONONI & OTHERS –VS – REPUBLIC [1980] KLR** to be **"more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."** In this case the complainant was identifying a person whom he was able to recognize thus reducing further the risk of a mistaken identity. We are satisfied that notwithstanding the fact that identification was by a single witness our view is that the identification was water tight.

We have interrogated the circumstances under which such identification as made. It was in broad day light. The complainant spent some time in conversation with his attackers. The attackers were unmasked. All these are circumstances which in our view favour a positive identification. The complainant spotted the accused a couple of days later and pointed him out to the police who then arrested him.

The appellant has argued that he ought not to have been convicted of the offence of capital robbery but rather that upon the facts of the case he ought to have been convicted on the lesser offence of a simple robbery under section 296(1) of the Penal Code. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of **OLUOCH –VS – REPUBLIC [1985] KLR** where it was held:

> **"Robbery with violence is committed in any of the following circumstances:**

a. **The offender is armed with any dangerous and offensive weapon or instrument; <u>or</u>**
b. **The offender is in company with one or more person or persons; <u>or</u>**
c. **At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ……"** *[our own emphasis].*

The use of the word **OR** in this definition means that proof of **any one** of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. In this case the complainant said that he was accosted by a group of six men – this fulfils ingredient (b). The complainant testified that the accused and his companions were armed with knives which were used to threaten the complainant – this fulfils ingredient (a). The fact that the complainant did not sustain any injury in the course of the robbery does not reduce the offence to simple robbery. Two ingredients of Robbery with Violence under section 296(2) have been shown to have existed and that is sufficient to prove the offence. We therefore find that the trial magistrate was correct in imposing a conviction under section 296(2). The trial magistrate did give due consideration to the appellant's defence which he found to be unworthy and subsequently dismissed. We are satisfied that the appellant was properly convicted and we do hereby dismiss his appeal against conviction.

The appellant was accorded an opportunity to mitigate after which the learned trial magistrate imposed the death sentence. This was the lawful sentence in accordance with section 296(2) of the Penal Code. We therefore uphold the sentence. The upshot is that this appeal fails in its entirety and is hereby dismissed.

**Dated and delivered in Mombasa this 30th day of October, 2013.**

**M. ODERO** **M. MUYA**

**JUDGE** **JUDGE**