



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NOS.511 & 517 OF 2007**

*(An Appeal arising out of the conviction and sentence of U.P. KIDULA - CM delivered on 26<sup>th</sup> October 2005 in Thika CMC. CR. Case No.4499 of 2004)*

SWAHIB MOHAMED SWAHIB.....1<sup>ST</sup> APPELLANT

WILLY JUMA OPONDO.....2<sup>ND</sup> APPELLANT

**-VERSUS-**

REPUBLIC.....RESPONDENT

**JUDGMENT**

The Appellants, Swahib Mohamed Swahib and Willy Juma Opondo, were charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 23<sup>rd</sup> May 2004 at Jamhuri Estate, Thika Township, the Appellants jointly with others not before the court, while armed with offensive weapons namely iron bars and bottles, robbed Virginia Nyambura of cash Kshs.100/-, and one cap all valued at Kshs.350/- and at or immediately before or immediately after the time of such robbery threatened to use violence to the said Virginia Nyambura. The Appellants were further charged with the offence of attempted Robbery with Violence contrary to Section 297(2) of the Penal Code. The particulars of the offence were that on the same day and in the same place, the Appellants, jointly with others not before court, while armed with offensive weapons namely iron bars and bottles attempted to rob Margaret Njambi of Kshs.6,000/- and a mobile phone and at or immediately before or immediately after the time of such attempted robbery, the Appellants used personal violence to the said Margaret Njambi. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. The prosecution called a total of seven (7) witnesses in their bid to prove the charges against the Appellants. The Appellants gave unsworn statements in their defence. After evaluating the evidence adduced, the trial magistrate found that the prosecution had established the two counts facing the Appellants to the required standard of proof beyond any reasonable doubt. The Appellants were sentenced to death on both counts as is mandatorily provided by the law. The Appellants were aggrieved by their conviction and sentence and have filed separate appeals to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the evidence of identification which made in circumstances that were not conducive for positive identification and therefore the possibility that there was an error or mistaken identity cannot be ruled out. They faulted the trial magistrate for relying on the evidence of the prosecution of their alleged recognition during the robbery incident when infact the recognizing witnesses did not explain how they were able to recognize the Appellants in situation of insufficient light. They were aggrieved that they had been convicted yet the prosecution was not able to establish the circumstances of their arrest. This was because the prosecution did not adduce evidence relating to the circumstances of their arrest. They faulted the trial magistrate for failing to take into account the totality of evidence adduced which constituted of glaring discrepancies which raised reasonable doubts as to the prosecution's case. They were aggrieved that the trial court had failed to take into consideration their defence before arriving at the decision to convict them. They faulted the trial magistrate for convicting them for the offence of robbery and attempted robbery yet nothing that was robbed from the victims of the robbery was found in their possession. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the death sentences that were imposed on them.

In the premises therefore, we find no merit with the respective appeals filed by the Appellants. The two appeals which were consolidated lack merit and are hereby dismissed. The conviction and the sentence of the trial magistrate's court are hereby upheld. It is so ordered.

**DATED AT NAIROBI THIS 12<sup>TH</sup> DAY OF NOVEMBER 2013.**

**L. KIMARU**

**JUDGE**

**P. NYAMWEYA**

**JUDGE**