REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL No. 11 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 3152 of 2006 of the Chief Magistrate's Court at Mombasa – T. Mwangi, SRM)

1. HAMISI SAID BAKARI.....1ST APPELLANT
2. SALIM OMAR BAKARI.....2ND APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

Hamisi Saidi *alias* ***Simba Bakari*** (the 1st appellant) and ***Salim Omar Bakari*** (the 2nd appellant) are both aggrieved by the decision of the Senior Resident Magistrate sitting at Mombasa convicting them of the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. It was alleged, in the charge sheet, that –

"On the 25th day of July at Devcon Gate along Mwinyi Babu road in Likoni Location of Mombasa District of the Coast Province, jointly while armed with dangerous weapon namely a kitchen knife robbed JOYCE MWIKALI KIIO a handbag containing a mobile phone make motorrola C117, a bottle of perfume, a bottle of powder, face cream tube, one hair flower and cash Kshs. 140/- all to the total value of Kshs. 4,000/- and at or immediately before or immediately after the time of such a robbery threatened to use actual violence on the said JOYCE MWIKALI KIIO."

Both were sentenced to death and have appealed against both conviction and sentence. Although they had filed separate appeals, namely **Mbsa Criminal Appeal No. 11 of 2008** and **Mbsa Criminal Appeal No. 12 of 2008**, on the agreement of the parties, the two were consolidated and heard as Criminal Appeal No. 11 of 2008, this appeal.

The duty of the first appellate court is to re-evaluate all evidence adduced before the trial court and to draw its own conclusion on that evidence. Unlike the trial court, it does not have the advantage of seeing

or hearing the witnesses testify and some allowance must be made for this.

The complainant Joyce Mwikali Kiio (PW1) is a business lady in Mombasa Town. From the town center she would have to by pass Devcon gate Likoni on her way home. On 25th July 2006 at about 7.00pm she was near the gate when she felt someone pull her bag from behind. One man held the bag and another held a knife over her and threatened to stab her if she did not remain silent. They snatched her bag and ran. She started to scream and in a short while she heard the loud sounds of a gun shot. She ran to the direction of the sound and after about 50 meters she found that PW2 P.C Collins Marenge and PW3 P.C Johnson Mwanyala Ngalo had arrested two people. One had been shot, he was the one who snatched her bag and the other sitted down was the person who had threatened her with a knife.

The first appellant gave a brief unsworn statement in defence. He says that he was on his way home on 25th July 2006 at around 7.30am when he had a loud sound. He fell down and was arrested. On the same day, the 2nd appellant recalls hearing shouts of "thief, thief". He thought those behind him had been attacked but he was wrong. He was shot and injured on his right leg. He lost consciousness and when he came to his senses he found himself at Coast General Hospital. He was later charged.

This is yet another matter involving the evidence of a single witness whose evidence must be tested with greatest care. PW1 stated how when she turned, she felt someone pull her bag from behind. She then saw two men. Two men she had never seen before. One was holding her bag and the other a knife. These are the two people she was able to identify a short while after. Her testimony was that there were street lights at the scene and was therefore able to see the appellants notwithstanding that darkness had set in. These are her words-

"The scene of crime had electricity supply. I was therefore able to see the two attackers."

Although no questions were put to the witness as to the length of time the robbery took, it seems to have been a fairly brief encounter. We say so because the robbers snatched the bag, ordered the victim not to scream then took to their heels. The complainant must have had a short glimpse of her attackers and she was at this time under siege. These are conditions that make correct identification difficult. These are the circumstances contemplated by the Court of Appeal in **Abdalla Bin Wendon –Vs- Republic [1953] 20 EACA** when it said-

"… what is needed is other evidence whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

That circumstantial evidence, in our view, was provided by the evidence of PW2 and PW3. They were patrolling about 100 meters away from the scene of the robbery when they had distress calls. They rushed towards the direction of the screams. They saw two young men come towards them, one was brandishing a knife and possessed a black ladies bag. The young men refused to stop when ordered to do so and so PW2 shot one on the foot. The confrontation between the two young men and PW2 and PW3 happened very shortly after the robbery and very close to the scene of robbery. One had a knife but more telling the hand bag that had just been snatched from the complainant. Taken together, there was overwhelming evidence that the two men were the ones who had robbed the complainant. That is the only inference that can be made.

The appellants pressed this court to find inconsistencies in the evidence of the witnesses. PW1's evidence was that at the time of the robbery it is the 1st Appellant who had the knife while the 2nd Appellant snatched the gun. At the scene of the arrest the 2nd Appellant had both the knife and the handbag. While we cannot speculate as to whether the 1st appellant gave the knife to the 2nd appellant immediately after the robbery, we would not find these differences to be material. The appellants were arrested immediately after the robbery. One was possessed with the complainant's hand bag and a knife. The complainant's

evidence was that she was threatened with the knife as she was robbed of the hand bag. She may have been mistaken as to whether the 1st Appellant was the one with the knife but the quick sequence of events ending with the arrest of the two points to them as the robbers.

Was there a contradiction as to the quality of light at the scene of robbery as suggested by counsel for the 1st appellant? We do not think so. The only person who testified on the quality of light at the scene of the robbery was PW1 who both in examination in chief and re-examination consistently maintained that it was lit by an electricity source. PW2 gave evidence of the poor quality of light at the scene of arrest. The scene of arrest was about 100 meters away from the scene of the robbery. These are two different places. There is no contradiction in the evidence of the two witnesses.

We then turn to consider, briefly, the ground taken up in the supplementary petition as to the constitutionality of the trial. The 2nd appellant was brought to court on 7th September, 2006 about 41 days after his arrest. At trial his counsel asserted that Section 72(3) (b) of The Repealed Constitution had been infringed and hence the 2nd appellant was entitled to an automatic acquittal. The learned Magistrate after considering this argument held as follows-

"I do not agree with the counsels assertation that there was no explanation on the delay. In his own words accused two was all through admitted in hospital. It was thus not possible for him to be availed in court to take plea earlier than the time he was escored. As the court record will bear witness on 7th September, 2006 when he was brought to court he declined to take plea saying he was unwell and required treatment. It was not until 13th September 2006 when he took plea and again further treatment was prayed for. There was therefore no infringement of any constitutional right in the circumstances."

We think that the learned Magistrates finding was right on the mark. The prosecution had given a plausible reason for the delay. In any event, and even more importantly, it is now settled, since the decision in **Criminal Appeal No. 50 of 2008 Julius Kamau Mbugua –Vs- Republic** that an unconstitutional extra judicial incarceration by the authorities will not entitle an accused to an automatic discharge or acquittal. We agree with this passage of that decision-

"In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72(6) expressly compensatable by damages."

It is not argued, and we do not find, that the detention of the 2nd appellant for 41 days affected the fairness of his trial.

In the end we do not find any merit in the appeal on conviction. The ingredients of capital robbery were proved. The offenders were two, they robbed the complainant and at or immediately after the time of the robbery threatened to use actual violence.

As to the sentence, we think that there is need to relook it. The appellants were each sentenced to death. That sentence is, without doubt, lawful. Yet it is not lost on us that no actual violence was used on the victim and that the appellants were first offenders. We are also persuaded that the decision in **Godfrey Ngotho Mutiso –VS- Republic Criminal Appeal No. 17 of 2008** would apply to punishment for offenders under Section 296(2) of The Penal Code. For these reasons we hereby set aside the death sentence and impose a jail term of 20 years for each appellant to run from the date of conviction, that is 31st February, 2008.

Dated and delivered at Mombasa this 7th day of February, 2012.

M. ODERO **F. TUIYOTT**
JUDGE **JUDGE**

Dated and delivered in open court in the presence of:-
Ms Macharia for state
Appellant in person
Court clerk - Mutisya