



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL No. 209 OF 2009**

*(From Original Conviction and Sentence in Criminal Case No. 3764 of 2007 of the Chief Magistrate's Court at Mombasa – R. Kirui, PM)*

**1. HUSSEIN HAMISI MOHAMED..... 1<sup>ST</sup> APPELLANT**  
**2. MOHAMED BAKARI SULEIMAN ..... 2<sup>ND</sup> APPELLANT**  
**- Versus -**  
**REPUBLIC..... RESPONDENT**

**J U D G M E N T**

It is alleged that on 17<sup>th</sup> November 2007 at about 5.00am **Hussein Hamisi Mohamed** (the 1<sup>st</sup> appellant) and **Mohamed Bakari Suleiman** (the 2<sup>nd</sup> appellant) jointly, while armed with an offensive weapon namely a panga, robbed **William Chagusia Luvunga** of Kshs. 300/- and at or immediately before or immediately after the time of such robbery used actual violence on the complainant. After receiving evidence, the trial Magistrate convicted both appellants on the offence of robbery with violence contrary to Section 296(2) of The Penal Code and imposed a death penalty.

Aggrieved with the results, the appellants each filed appeals against both conviction and sentence. On the application of the State, and on agreement by both appellants, the two appeals namely **Mombasa Criminal Appeal No. 209 of 2009** and **Mombasa Criminal Appeal No. 212 of 2009** were consolidated and heard as **Criminal Appeal No. 209 of 2009**.

The brief facts are as follows. In the early morning of 17<sup>th</sup> November 2007 at about 5.00am William Chagusia Luvanga (PW1) was walking towards his home along Kingorani Road having attended an overnight funeral arrangement meeting. He heard two people talk behind him. When he looked back he noticed that they were trailing him. They then started running after him. One of the men jumped on PW1 and held him by the neck, the second man frisked him and robbed him of Kshs. 300/- which was in his shirt pocket. PW1 resisted and a struggle ensued. PW1 raised an alarm and the man who had robbed him removed a panga and cut his head. He held on to the other person. Neighbours came to his rescue and found him holding on to one assailant. They helped him arrest that man. In the meantime the other had fled. The members of the public took the prisoner to Makupa Police Station where he was re-arrested by the police. He is the 1<sup>st</sup> appellant. About three (3) months after, PW1 was able to identify the 2<sup>nd</sup> appellant in an identification parade conducted at Makupa Police Station as the second assailant.

When invited to their defence the 1<sup>st</sup> appellant made a sworn statement, while the 2<sup>nd</sup> appellant an unsworn statement. They did not call witnesses. The 1<sup>st</sup> appellant says that in the early hours of 17<sup>th</sup>

November 2007 he got involved in a fight with PW1 who had without provocation, insulted him. They struggled and both fell. At this point, PW1 started shouting "thief, thief". Members of the public responded to the call, believed PW1 and beat up and arrested the 1<sup>st</sup> appellant. He denies the charge. On his part the 2<sup>nd</sup> appellant does not know why he was arrested on 5<sup>th</sup> February 2008 and two days later charged as he had nothing to do with the offence.

The 1<sup>st</sup> appellant attacked the judgment of the court on six (6) grounds. These can be condensed to four (4) grounds. That the conviction was against the weight of evidence. Secondly that the prosecution failed to call key witnesses. Three, that the evidence proved that there was a fight and not a robbery. Lastly that the learned trial Magistrate failed to give the appellants defence due consideration.

On his part the 2<sup>nd</sup> appellant raised seven (7) grounds. Again they can be conveniently considered under fewer heads. That the 2<sup>nd</sup> appellant was not properly identified. That the prosecution case was weak and with discrepancies. That the prosecution failed to explain why it took such an inordinate length of time to have him arrested. Lastly that learned Magistrate erred in rejecting his defence. The State opposed both appeals.

We now turn to re-evaluate the evidence. The evidence against the 1<sup>st</sup> appellant is strong. The 1<sup>st</sup> appellant admits being present at the locus at the time of the incident. That PW1 abused him and engaged him in a fight. That PW1 then incited members of the public to beat him up on allegation that he was a thief. The 1<sup>st</sup> appellant does not mention the presence of the 2<sup>nd</sup> appellant nor does he mention the head injury sustained by PW1.

PW1's testimony was cogent and compelling. He described the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> appellant trailed him before attacking him. He gave a detailed account of his struggle with both of them and how he held on to the 1<sup>st</sup> appellant until members of the public assisted in arresting him. The account of PW1 is corroborated by PW2 and PW3. These two were woken up by noises on the morning of 17<sup>th</sup> November 2007 they went outside and found PW1 bleeding and the 1<sup>st</sup> appellant under the arrest of members of the public. The injury of PW1 was confirmed by the P3 form produced by PW7.

The evidence places the 1<sup>st</sup> appellant at the scene of crime. PW1 and the 1<sup>st</sup> appellant had physical contact from the time the 1<sup>st</sup> appellant attacked him upto the point members of the public intervened. The account given by appellant lacks credibility and the learned Magistrate, in our view, correctly rejected it. At the time of the incident, he was acting in concert with another person. They took Kshs. 300/- from PW1 and in the process inflicted injury to his head using an offensive weapon, a panga. All the ingredients of the offence of Robbery with Violence were proved. It is true that the prosecution could have called each and every person who arrested and or witnessed the arrested of PW1. We, however, do not see how the plurality of witnesses would assist the prosecution case further. The prosecution has discretion as to who to call as a witness. To our minds the witnesses called by the prosecution ably proved the offence against the 1<sup>st</sup> appellant. We do not find anything to suggest that the prosecutor was motivated by some oblique motive in not calling any particular person to testify.

We now turn our focus to the 2<sup>nd</sup> appellant. In respect to him is evidence of a single eye witness. PW1 says that he did not know the 2<sup>nd</sup> appellant prior to the incident. PW1 says that both appellants trailed him for sometime and he was able to see them from the street lights and security lights from the surrounding building. He also says that he was able to see them as they tussled. This is his evidence-

***"I struggled with them upto outside a video show room where there was powerful electricity lights and I also identified the one who escaped from his appearance."***

After the arrest of the 2<sup>nd</sup> Appellant PW6 arranged and conducted an identification parade on 6<sup>th</sup> February 2008. PW1 picked out the 2<sup>nd</sup> appellant in the parade. PW6 explained how he arranged and

conducted the parade. The 2<sup>nd</sup> appellant signed the identification parade form signifying his satisfaction with the manner the parade was conducted. PW6 was consistent and firm on the conduct of the parade. This court is satisfied that the 2<sup>nd</sup> appellant was positively identified. The light was from an electricity source and was in the words of the witness powerful. That is a description of the intensity. The learned magistrate found that-

***“the complainant ... saw the 2<sup>nd</sup> accused clearly at the time of the incident as there was enough electricity light. He subsequently identified him in the identification parade properly conducted by PW6.”***

This court agrees with counsel for the 2<sup>nd</sup> appellant that ***“a fact may be proved by a single witness but when such evidence is in respect of identification it must be tested with greatest care”*** (Oluoch – Vs- Republic [1985] KLR at page 554. The learned Magistrate found that the electricity light was sufficiently intense to aid in the identification of the 2<sup>nd</sup> appellant. He further found that there were lights on the way as the appellants trailed PW1 and at the scene where they attacked him. There was good opportunity for the witness to make an impression of his attackers.

Mr. Magolo, acting for 2<sup>nd</sup> appellant also took issue with the delay in his arrest. The robbery took place on 17<sup>th</sup> November 2007 but it was not until about 2<sup>1/2</sup> months later that the 2<sup>nd</sup> appellant was arrested. PW5 the investigating officer explained this delay. That after incident, the 2<sup>nd</sup> appellant moved out of Kingorani Estate and it took the police that time to trace him to a house in Bamburi. The 2<sup>nd</sup> appellant in his sworn testimony confirmed that he was arrested at Bamburi. This court does not find the explanation by the police as incredible. The delay in effecting the arrest does not weaken the prosecution evidence against the 2<sup>nd</sup> appellant.

Lastly, the learned Magistrate considered the defence of the 2<sup>nd</sup> accused. The 2<sup>nd</sup> accused gave an account of his arrest but he never gave any evidence of his whereabouts on the material day. His defence was a mere denial and the learned Magistrate did not fall into any error in rejecting the defence as the evidence put the 2<sup>nd</sup> appellant at the scene of the crime.

We have said enough to show that the appeals by both appellants are for rejection. We find that their convictions were well founded and see no reason to upset them. In respect to sentence, there is evidence that the robbers used actual violence on PW1. He suffered a deep cut and a P3 form was produced as an exhibit in this respect. We think that the death penalty that was imposed was deserved. These were two people attacking one person, the appellants never acted with restraint and decency, there was no reason to inflict injury on PW1.

The result is that the appeal against conviction and sentence fail.

***Dated and delivered at Mombasa this 7<sup>th</sup> day of February, 2012.***

**M. ODERO**  
**JUDGE**

**F. TUIYOTT**  
**JUDGE**

**Dated and delivered in open court in the presence of:-**

**Mr. Magolo for 2<sup>nd</sup> Appellant**  
**Ms Macharia for state**  
**Appellant in person**  
**Court clerk - Mutisya**

