



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 334 & 340 of 2006

*(From Original Conviction and Sentence in Criminal Case No. 3576 OF 2004 of the Chief Magistrate’s Court at Mombasa: T. Mwangi – S.R.M.)*

JOHN OMONDI ODUOL alias KIKONO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 340 OF 2006

STEPHEN MZEE Alias ADEDA ..... APPELLANT

=VERSUS=

REPUBLIC ..... RESPONDENT

JUDGMENT

The two Appellants JOHN OMONDI ODUOL alias KIKONO (hereinafter referred to as the 1<sup>st</sup> Appellant) and STEPHEN MZEE alias ADEDA (hereinafter referred to as the 2<sup>nd</sup> Appellant) have both filed this appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at the Mombasa Law Courts. The two Appellants jointly faced a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were given as follows.

*“On the 16<sup>th</sup> day of November 2004 at about 9.00 p.m. at Kengeleni labour area in Kisauni Location of Mombasa District within Coast Province, jointly while armed with a dangerous weapon namely a panga robbed LEAH SAISI UNDIGU of a mobile phone make Nokia 1200, two cloth materials, silver necklace, one pair of open shoes, a spray, two full dress, national identity card and cash Kshs.3,050/- all valued at Kshs.16,700/- and at or immediately before or immediately after the time of such robbery used actual violence to the said LEAH SAISI UNDIGU”*

Both Appellants pleaded ‘**Not Guilty**’ to the charge and their trial commenced on 8<sup>th</sup> June 2005. The prosecution led by **INSPECTOR KITUKU** called a total of five (5) witnesses in support of the charge.

The complainant **LEAH SAISI** told the court that on 16<sup>th</sup> November 2004 at around 9.00 A.M. she

was walking from Kengeleni to her home in Kisauni. Some two (2) men were also walking a few steps in front of her. As she made to bypass the two men they both caught hold of her. One held her right side and the other her left side. One of the men was armed with a panga. They grabbed the complainant's handbag containing her mobile phone, personal documents and cash Kshs.3,050/-. They also stole her blue paper-bag containing two (2) brand new Kitenge materials, a pair of open ladies shoes and two (2) full dresses. One of the men struggled to search the complainant's breasts to see if she had kept any money inside her bra. In the process her bra got torn. After robbing her the two men ran into the nearby Matopeni slums. The complainant gave chase shouting **'thief' 'thief'**. A woman emerged from the slum and advised the complainant not to chase the robbers as they were armed. As the men ran away one left his yellow shoe. The complainant picked the sole shoe and took it to the police station where she reported the incident. She later went to Coast General Hospital where she was treated for her injuries and issued with a P3 form. The two Appellants were apprehended shortly thereafter and charged.

At the close of the prosecution case both Appellants were ruled to have a case to answer and were placed on their defence. They both gave unsworn defence in which they denied having robbed the complainant at all. On 29<sup>th</sup> November 2006 the learned trial magistrate delivered her judgment in which she convicted both Appellants and thereafter sentenced each to death. Being aggrieved by both the conviction and sentence the Appellants filed this present appeal. The Appellants both of whom acted in person relied upon their written submissions which with the leave of court had been duly filed. **MR. GIOCHE** learned State Counsel made oral submissions opposing the appeal.

- We have carefully perused the written submissions filed by the Appellants and we do note that they raise similar grounds of appeal which are broadly the following
- Identification
- Inconsistent evidence
- Failure to consider their defence

On the question of identification the complainant told the court that the incident occurred at 9.00 p.m. It was night time and no doubt it was dark. However the complainant told the court that she was able to see her attackers with the aid of the security lights on the side of the road. Added to this was the fact that the complainant spent a fair amount of time struggling with the two men. Both men caught hold of her. She was therefore close to them and had ample opportunity to see them well. The fact that the complainant was able to get a good view of the Appellants is confirmed by the fact that she was able to give a very good description of both men after the incident. With regard to the 1<sup>st</sup> Appellant the complainant states at page 9 line 15

***"I told the police that one of the other thugs hand was abnormally big"***

The complainant goes on to reiterate this observation under cross-examination by the 1<sup>st</sup> Appellant when she states at page 9 line 28:

***"After the attack I reported to the police. I told the police that one of your hands is big"***

It is clear that this was a unique physical attribute by which the complainant was able to positively identify the 1<sup>st</sup> accused. Her evidence in this regard is corroborated by **PW3 PC JOEL LOMAYA** the arresting officer who stated at page 23 line 29:

***"At the time of reporting complainant gave description of her attackers. She said one had a swollen hand. It appears in the complainants statement"***

**PW3** went on to state that as the investigations proceeded the police came to learn that the 1<sup>st</sup> Appellant was known by the nickname **'Kikono'** undoubtedly a reference to his large hand. **PW3** is the officer who

arrested the 1<sup>st</sup> Appellant and therefore saw him well. He confirms that the 1<sup>st</sup> Appellant did in fact have a larger than usual hand when he states at page 24 line 2:

***“I confirmed one of your hands was swollen/bigger upon arrest”***

With respect to the 2<sup>nd</sup> Appellant **PW4 CHIEF INSPECTOR GABRIEL MBURU** told the court that following the arrest of the 2<sup>nd</sup> Appellant he conducted an identification parade at Nyali Police Station. The 2<sup>nd</sup> Appellant voluntarily participated in that parade at which the complainant positively identified him as one of the men who had robbed her. **PW4** further confirms that the 2<sup>nd</sup> Appellant made no complaint about the manner in which the parade was conducted. By way of this parade the complainant effectively confirmed the identification of the 2<sup>nd</sup> Appellant.

Aside from the complainant’s own testimony, further corroboration on the question of identification provided by the evidence of **PW2 MISI MUSA SALIM**. This witness told the court that she was inside her house at Matopeni slum at the material time. She heard cries of ‘**Thief**’ ‘**Thief**’. **PW2** rushed out of her house and came across the complainant running after two men one of whom was armed with a panga. **PW2** saw the two men and was able to recognize them both as residents of the same Matopeni slum. **PW2** told the court that she was able to see and identify both men by the aid of the moonlight and security lights on the road. **PW2** advised the complainant to abandon the chase as the men were armed. **PW2** identifies the 1<sup>st</sup> Appellant as the one who had the panga and the 2<sup>nd</sup> Appellant as the one who was carrying a paper-bag. This evidence correctly corroborates what the complainant stated in her evidence. **PW2** came across the two men hardly minutes after the complainant had been robbed. Her evidence is evidence of recognition which has been held to be more reliable, more satisfactory and more assuring than visual identification alone [**ANJONONI & OTHERS –VS- REPUBLIC**]. From the weight of this evidence we are satisfied that there has been proper reliable and irrefutable evidence identifying the two Appellants as the men who attacked the complainant on the material day.

The complainant told the court that the two Appellants accosted her as she was walking home. One held her left hand and the other grabbed her right side. This was clearly a

co-ordinated attack. The Appellants stole her hand-bag containing cash and her mobile phone. They also stole a paper-bag containing some clothes from the complainant. In the course of the robbery the Appellants man-handled the complainant and tore her bra. The torn bra was produced in court as an exhibit **Pexb2**. They also twisted the complainant’s hand no doubt to force her to let go of her belongings. **PW5 DR. SWALLEH** of Coast general Hospital testified that the complainant was examined at the hospital. The P3 form duly filled out and signed was produced as an exhibit before the court **Pexb3**. It was noted that the complainant’s right wrist was swollen. The evidence therefore shows that the robbery was perpetrated by two men, armed with a dangerous weapon i.e. a panga, and that actual physical harm was visited upon the complainant. We find that the incident does meet the threshold of Robbery with Violence as defined by Section 296(2) of the Penal Code.

The Appellants in their submissions raise the grounds of inconsistency in the prosecution evidence. Having ourselves carefully and anxiously examined the record of the trial before the lower court, we are unable to find any examples of the inconsistencies alleged. On the contrary our finding is that the prosecution witnesses all gave clear and concise evidence and corroborated each other in all material respects. We therefore dismiss this ground of the appeal.

The final ground of appeal raised is that the trial magistrate failed to consider the defence raised by the Appellants. This we find to be an incorrect assertion. As stated earlier both appellants opted to make unsworn statements denying the charge. In her judgement at page 31 line 15 the learned trial magistrate writes:

***“Both accused persons elected to give unsworn statements and called no witness. They both denied having committed the offence herein. I have carefully evaluated the evidence on record”*** [our own emphasis]

The trial magistrate makes it clear that she did **evaluate** and give consideration **all** the evidence on record, which evidence included the Appellants' defences before coming to a determination on the case. We therefore similarly find no merit in this ground of the appeal. In our view the conviction of both Appellants was sound and we do uphold the same.

Each Appellant was allowed an opportunity to mitigate, after which each was sentenced to death. The sentence was lawful and we have no inclination to interfere with the same. The upshot therefore is that this appeal fails in its entirety. The convictions and sentences of the trial court are hereby upheld and confirmed.

**Dated and Delivered in Mombasa this 23<sup>rd</sup> day of October, 2012.**

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

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**G. NZIOKA**  
**JUDGE**

In the presence of:

Mr. Tanui for State

Appellant in person