



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 318 of 2008**

**CHARLES MWANZI MAIDU.....1ST APPELLANT**

**EVANS AKWEYU INZIANI.....2ND APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 2853 of 2007 of the Chief Magistrate's Court at Kibera by Mr. Maundu – Senior Resident Magistrate)*

**JUDGMENT**

**CHARLES MWANZI MAIDU** and **EVANS AKWEYU ENZIANI** were convicted for the offence of Robbery with violence **contrary to section 296 (2) of the Penal Code**. Both of them were then sentenced to suffer death as by law prescribed.

Both appellants have challenged their alleged identification at the scene of crime. They asserted that the evidence of identification was not free from the possibility of error.

Secondly, the persons who effected their arrest did not testify at the trial.

On her part, the complainant is said to have had only a fleeting glance at her two (2) assailants. The said assailants appear to have launched a sudden attack on the complainant, on a lonely road, thus causing her to be frightened. In those circumstances, the complainant is said to have been unable to closely observe the assailants.

The appellants submitted that if the complainant had identified them, she would have described the assailants to the first person in authority whom she met after the attack. As the complainant did not offer any such description to the security officer, the appellants argued that that confirmed that the complainant did not identify her attackers.

The complainant was also said to have played no role in the arrest of the appellants. Therefore, it would have been useful to have the evidence of those who effected the arrest of the appellants to explain to the court about the circumstances and their reasons for arresting them.

As the arrest of the appellants was done by members of the public, in the absence of the complainant, the appellants submitted that there ought to have been an Identification parade:

The appellants also submitted that neither of them was in possession of any of the stolen items, at

the time they were arrested.

The first appellant said that he was not in possession of any stolen item, whilst the second appellant says that the Investigating Officer actually found the items in the hands of the complainant.

The appellants also faulted the trial court for rejecting their defences, which were considered, by them, to have been formidable.

Mr. Mulati, learned state counsel, submitted that the identification was positive, as the incident took place in broad daylight, at 11.00a.m.

The respondent also explained that the reason why none of the members of the public testified about the manner in which the appellants were arrested, was because Mr. William Outa, who is the person who contacted the police officers over the mobile phone, had passed-away before he gave evidence.

Being the first appellate court, we have re-evaluated all the evidence on record, and drawn our own conclusions. In drawing our said conclusions, we have borne in mind the fact that we did not see the witnesses when they were testifying.

The complainant said that she was robbed at about 11.00a.m, when she had come from Nakumatt Karen.

She was robbed by 2 men. One of the said 2 men was armed with a knife.

About 3 hours later, **PW 1** was at her home when a security van arrived. Inside the van, was the first appellant. His hands were tied using PW 1's sweater, which had been inside the paper bag that the 2 robbers had run away with.

**PW 1** also recovered her blouse, together with the vegetables she had purchased earlier, and 2 packets of "mala" milk. The said packets of milk were, however, empty.

**PW 1** joined the 1st appellant inside the vehicle, so that she could go to the Karen Police Station to report the incident.

As the vehicle was moving along, **PW 1** and the police found that members of the public had arrested the second appellant.

The said members of the public were carrying the knife which the second appellant had used to threaten **PW 1**.

During cross-examination, **PW 1** said that she was robbed at about 12.0noon. But when she was referred to her written statement, **PW 1** confirmed that she had told the police that the robbery was at 11.00a.m.

**PW 1** also confirmed that she had not yet reported the robbery to the police by the time the security officers took the first appellant to her hose.

Secondly, **PW 1** had not described the assailants to the villagers who had responded to her screams. Therefore, **PW 1** candidly conceded that she had no idea how the members of the public knew the appellants.

When answering questions from the second appellate, **PW 1** said that the knife which that appellant had allegedly used to threaten her was not unique.

The Investigating Officer (**PW 3**) said that the complainant (**PW 1**) had described the first appellant as black, whilst the 2nd appellant was described as brown.

**PW3** also said that the second appellant was found in possession of the knife; and that the person who recovered the knife was the security guard who passed away before he testified. The name of the said security guard was given by **PW3** as Wycliffe Outa.

Meanwhile, **PW 2** is the police officer who re-arrested the appellants from the members of the public who had arrested them.

By the time **PW 2** was re-arresting the first accused;

***“The victim was in a group. We took her. She had a paper bag which had green vegetables, milk and potatoes. The milk was K.C.C. Mala. The complainant had this bag (MFI 9) which contained vegetables, milk a sweater and blouse.”***

That means that the complainant was present when the 1st appellant was being re-arrested by the police.

That evidence tallies with what the complainant had told the court. It therefore follows that after members of the public had arrested the first appellant, they handed them over to security guards from Ultimate Security. The security guards then drove 1st appellant to **PW 1**'s house, where **PW 1** identified her property which had been stolen from her earlier that day.

Considering that **PW 1** was robbed at about 11.00a.m, whilst the first appellant was arrested at about 2.00p.m, that means that a period of about three (3) hours had lapsed between the time of robbery and the time of arrest.

As none of the members of the public testified, we are unable to establish from the evidence tendered, what led the members of the public to arrest the appellants.

Of course, it was said that the first appellant was in possession of **PW 1**'s property, whilst the second appellant was in possession of the knife which was used to threaten **PW 1**. However, none of the persons who recovered the said items testified. There was therefore no evidence on record to verify that the appellants were in possession of the items which implicated them.

The police officer who re-arrested the accused persons confirmed to the trial court that the person who gave him the knife was an **“important witness.”**

That witness was important because **PW 2** did not recover anything from the appellants.

Meanwhile, the Investigating Officer also confirmed that;

***“Members of public who arrested you are crucial witnesses in this case They were not traced to record their statements. You were found with the vegetables, this sweater, blouse and these 2 empty packets. Accused 1 was not found with anything. I am telling the court the truth.”***

Two issues arise from that testimony. First, the two police officers confirmed that the members of the public who arrested the appellants were important witnesses. That implies that if they did not testify, an important aspect of the prosecution case would remain with a gaping hole.

Secondly, the Investigating Officer established that the first appellant was not in possession of anything when he was arrested.

In the circumstances, we hold the considered view that the evidence on record was much less than is required to sustain conviction. We therefore allow the appeal; quash the convictions for both the appellants, and set aside the death sentence for the said appellants. We order that the appellants be set at liberty forthwith unless they are or either of them is otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi, this 18th day of December,2012.**

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**FRED A. OCHIENG**

**JUDGE**

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**LYDIA A. ACHODE**

**JUDGE**