REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 44 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 3557 of 2005 of the Chief Magistrate's Court at Mombasa: T. Mwangi – S.R.M.)

HAMAD ATHMAN ....APPELLANT

-VERSUS-

REPUBLIC ....RESPONDENT

JUDGEMENT

The Appellant **HAMAD ATHMAN** has filedthis appeal to challenge his conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant had been arraigned before the subordinate court on 5th October 2005 charged on three counts as follows:
COUNT NO. 1

"ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

On the 24th day of September 2005 at around 9.30 p.m. in Mombasa District within Coast Province being armed with an offensive weapon namely knife robbed E.J Kshs.200/- and sandals all valued at Kshs.300/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said E.J"

COUNT NO. 2

"RAPE CONTRARY TO SECTION 140 OF THE PENAL CODE

On the 24th day of September 2005 at about 9.30 p.m. in Mombasa District within the Coast Province, had carnal knowledge of E. J without her consent"

COUNT NO. 3

"UNNATURAL OFFENCE CONTRARY TO SECTION 162(e) OF THE PENAL CODE

On the 24th day of September 2005 at about 9.30 p.m. in Mombasa District within the Coast Province, had carnal knowledge of E. J against the order of nature"

The Appellant entered a plea of not guilty to all three charges and his trial commenced on 27th July 2006,

at which trial the prosecution led by **INSPECTOR KITUKU** called a total of four (4) witnesses in support of their case.

The brief facts of the prosecution case as narrated by the complainant **E.J**, is that on 24th September 2005 at about 9.30 p.m. she went out to the shops and purchased bread and soda. She then returned home and upon knocking on the door a man (whom she later identified as the Appellant) emerged from behind her. The man was wielding a knife with which he threatened the complainant and ordered her to surrender the money she had to him. No doubt fearing for her life and safety the complainant gave him the Kshs.200/- she had on her. In addition the Appellant also took her soda and bread as well as the slippers which the complainant was wearing. He then grabbed the complainant by the hand and pulled her away from the houses all the time threatening that if she screamed for help he would stab her. He dragged her to the back of the house, removed all her clothes including her underwear and proceeded to rape her. The complainant told the court that she had no choice but to comply with the Appellant's orders because he threatened to kill her if she resisted. After raping her the Appellant also sodomized the complainant. He then ordered her to dress up and leave the vicinity. The complainant left and proceeded home. On the way she met a neighbour called Amos to whom she narrated what had befallen her. Amos offered to help her search for the culprit. As the two searched the area they came across one **RASHID PW3** who told them that he had also been accosted by a man who tried to sodomise him. They later found the Appellant hiding in a valley. He still had on him the knife which he had used to threaten the complainant. He also was wearing a pair of slippers which the complainant identified as the ones stolen from her. Some vigilante youth came to their aid. They apprehended the Appellant and took him to the police station. The complainant meanwhile went to Jocham Hospital where she was treated and discharged. Her P3 form which was duly filled and signed was produced as an exhibit by **PW4 DR. LAWRENCE NGONE**. Upon completion of police investigations the Appellant was arraigned in court and charged with the present offences.

At the close of the prosecution case the Appellant was ruled by the trial court to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied any and all involvement in the robbery incident. On 20th February 2008 the learned trial magistrate delivered her judgement in which she convicted the Appellant on all three counts and sentenced him to death on the first count of Robbery with Violence. Sentences for Count Nos. 2 and 3 were held in abeyance. Being aggrieved by his conviction and sentence the Appellant filed this appeal.

MR. MUTETI, learned State Counsel who appeared for the Respondent State opposed the appeal and urged the court to uphold the convictions and sentence as rendered by the trial court.

Being a court of first appeal we are mindful of our obligation to re-examine and re-evaluate the evidence adduced by the prosecution in the trial court, and to draw our own conclusions on the same [see **AJODE –VS- REPUBLIC [2004]2 KLR 81**]. We have carefully perused the written submissions filed by the Appellant in which he raised two (2) main grounds of appeal namely –

(1) Identification

(2) Insufficiency of Evidence

At the outset we deem it is important to establish whether the incident described by the complainant did in actual fact amount to a robbery with violence as envisaged by S. 296(2) of the Penal Code. They key ingredients of this offence were very well elucidated by the Court of Appeal in the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549**, where it was held:

"Robbery with Violence is committed in any of the following circumstances-

a) The offender is armed with any dangerous and offensive weapon or instrument; or

b) The offender is in company with one or more other person or persons; or

c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person"

The use of the word ***"OR"*** in this definition means that proof of **any one** of these three ingredients will suffice to prove the offence under S. 296(2) of the Penal Code. In this case the complainant states that she was attacked by one person. However her attacker was armed with a knife which he used to threaten and intimidate her into compliance. The said knife was later recovered and was produced in court as an exhibit **Pexb2**. The complainant identified this knife as the weapon which was used by her attacker to threaten her. Secondly the complainant told the court that immediately after the robbery she was raped and sodomized. Rape constitutes the ultimate act of violence upon the person of any woman and we can think of no other act so degrading and violent as that of forcible sodomization. The fact that the complainant did actually endure these dehumanizing acts is proved by the evidence of the doctor **PW4 DR. NGONE** and by the P3 form produced in court as an exhibit **Pexb3**. His findings were as stated on page 36 line 17:

"Hymen had been broken, reddening of outer part of genitalia. Had a foul smelling discharge from her vagina. On her anal part she had lacerations on the opening and was tender to touch … Doctor concluded there was evidence of rape and sodomy"

There is therefore ample corroborative evidence by the bruising of the vagina and lacerations on the anus all of which point to forcible entry.

From the evidence above we are satisfied that the 1st and 3rd ingredients of robbery listed in the **OLUOCH** case are shown to have existed. This incident did therefore amount to an offence as created by S. 296(2) of the Penal Code.

The key question to be considered is whether the Appellant was properly identified as the perpetrator of this offence. **PW1** told the court that the incident occurred at 9.30 p.m. It was night and therefore it must have been dark. The complainant herself does not address the issue of what light was available to her at the scene. She only mentions that her attacker was wearing a ***'red shirt'***. The assumption can be made that having identified the colour of his shirt the complainant must have been able to see this colour and therefore some form light must have been available at the scene. The learned trial magistrate in her judgement at page 44 line 16 states:

"The issue of lighting was not raised by both the prosecution and the accused. Although this is a very important issue to consider, I have evaluated the evidence on totality and formed [the] opinion that the reason why it was never contested is because it was never in issue."

With this respect the trial magistrate misdirected herself in making the above observation. The fact that a fact in issue is not addressed by the prosecution does not render that fact no longer a fact in issue. In other words the failure by the prosecution to address a fact in issue does not negate its being an important fact for determination. The question of lighting was crucial indeed it was of utmost importance since the incident occurred at night. A court cannot make any assumptions on such a crucial issue. The prosecution ought to have adduced direct evidence from the complainant herself indicating how she was able to see and identify her attacker including the colour of his shirt. No such question was put to **PW1** and she did not explain by what means she was able to see the Appellant at night. **PW3 RASHID NDELE SALIM** states under cross-examination by accused at page 27 line 6:

"In the fields there were no lights but in between the houses there was electric light"

This evidence is not adequate firstly because **PW3** came into the picture much later after the robbery had occurred and is not able to shed any light on the visibility at the scene where the offence occurred. Secondly **PW3** talks of electric lights between the houses, yet she was does not elaborate as to the quality of this light. Was it very bright? How much of a radius did this light illuminate? Did this light illuminate the area where the offence occurred? All these key questions remain unanswered. It is our finding that the question of identification was not properly disposed of in this case. A doubt remains

whether the complainant was actually able to see and positively identify the Appellant. This doubt must be applied to the benefit of the Appellant.

In her judgement at page 45 line 19 the trial magistrate states:

"Nowhere in the entire case did accused deny having met and robbed the complainant shortly before his arrest. I have therefore concluded that his defence was a mere afterthought"

Again with respect we find that the trial magistrate misdirected herself. Firstly the Appellant did deny the charges that is why the trial proceeded to a full hearing. Secondly this statement implies that the onus lies on the Appellant to prove that he did **not** commit the robbery. This amounts to shifting the burden of proof to the Appellant, a grave error, in view of the cardinal principle that the onus lies **at all times** on the prosecution to prove their case beyond a reasonable doubt. At no time can this burden be shifted to the accused.

In the absence of clear, reliable and positive identification of the Appellant on the charge of robbery, it is difficult to prove Count No. 2 and 3. Although we are satisfied that indeed the complainant was raped and sodomized there is no concrete evidence to pinpoint the Appellant as her assailant. The medical evidence available proves the facts of rape and sodomy but unfortunately no blood or secretor typing was done to link the Appellant to the semen noted in the complainant's vagina. This is a serious omission especially given the dirth of evidence on identification. Once again we must apply the benefit of doubts raised in favour of the Appellant.

For these above reasons we find that the prosecution did not discharge its burden of proof in the lower court. The conviction of the Appellant was in the circumstances unsafe and we cannot uphold the same. This appeal succeeds. The Appellants conviction is hereby quashed and the attendant death sentence is also set aside. Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 31st day of March 2011.

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MOHAMED IBRAHIM	**MAUREEN ODERO**
JUDGE	**JUDGE**