REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 373 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 222 of 2010 of the Chief Magistrate's Court at Mombasa:
T. Ole Tanchu – S.R.M.)

MOHAMED AHMED MOHAMED ……..… APPELLANT

-VERSUS-

REPUBLIC ……..…….. RESPONDENT

JUDGEMENT

Before us is the appeal of **MOHAMED AHMED MOHAMED** (hereinafter referred to as ***'the Appellant'***) against his conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant was arraigned before the trial court on 21st January 2010 and charged with two counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The Appellant entered a plea of ***'not guilty'*** to both counts and his trial commenced on 10th February 2010. At said trial the prosecution led by **INSPECTOR SUMBA** called a total of four (4) witnesses in support of their case. The brief facts of the case were that on the night of 27th December 2009 at about 11.30 p.m. **PW1 PC FREDERICK THURANIRA** and his brother **KENNEDY MITHIKA, PW2**were walking from Mwembe Tayari to Kibokoni. A group of about ten (10) men accosted them and accused them of being thieves. **PW1** who was a police officer based with the GSU Reche Company, pulled out his official police identity card to show the men. This did not seem to impress them much. They proceeded to attack the two complainants with sticks and robbed the 1st complainant of Kshs.5,000/- cash, mobile phone, open sandals and personal documents. **PW2** told the court that he was robbed of a mobile phone make Nokia 1100, cash Kshs.3,700/-, shoes, identity card and wallet. The two complainants managed to escape from their attackers and ran to the police station where they reported the incident. Later on 19th January 2010 they spotted the Appellant in the Kibokoni area of Mombasa and alerted police who came and arrested him.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave a sworn defence and in addition called two (2) defence witnesses. On 26th July 2010 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the charge of Robbery with Violence contrary to S. 296(2) of the Penal Code, and after listening to his mitigation sentenced the Appellant to death. It is against this conviction and sentence that the Appellant now appeals. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State opposed the appeal.

As a court of first appeal we are mindful of our obligation to reconsider and re-evaluate all the evidence adduced before the trial court **[AJODE –VS- REPUBLIC [2004]2 KLR 81**. We have carefully and closely examined this evidence and our conclusion is that it was wanting for the reasons stated below.

Both **PW1** and **PW2** told the trial court that the robbery incident occurred at night – at 11.30 p.m. to be precise. No doubt it was dark. However both witnesses claim to have been able to make a positive identification of the Appellant as one of their attackers by use of the ***'security lights'*** in the area. To merely describe lighting available as ***'security lights'*** is in our view too vague to be relied upon. Neither witness describes the quality or intensity of these lights. Neither is the court told where the lights were shining in relation to the Appellant. Did these ***'security lights'*** adequately illuminate the Appellant's face? All these crucial questions remain unanswered. To merely allege the presence of light at the scene of an incident is not enough. The witnesses must describe the source and quality of light and further explain how this light enabled them to see and make a positive identification of the culprit i.e. distance of the light from the incident. This was not done in this present case which in our opinion amounts to a fatal flaw in the prosecution case.

Aside from this question of lighting we have noted yet further discrepancies in the evidence of the prosecution witnesses. **PW1** stated in his evidence that he had never met the Appellant before, but that his brother **PW2** who lived in the Kibokoni area knew the Appellant well. Despite the fact that **PW1** admitted not having known the Appellant before the robbery the police did not bother to mount an identification parade, at which his identification of the Appellant could be tested. No reason is given why such a parade was not conducted yet the Appellant was in police custody. What therefore remains is mere ***'dock identification'*** by **PW1** which dock identification has been held by the Court of Appeal to be ***"worthless without a prior identification parade"*** [see **MURAGE & ANOTHER –VS- REPUBLIC [2006]2 EALR 218**. We do find likewise that the identification of the Appellant by **PW1** is mere ***'dock identification'*** which cannot form a sound basis for a conviction.

Even in the case of **PW2** where his identification of the Appellant is deemed to be based on recognition questions still abound as to its reliability. In his evidence at page 5 line 21 **PW2** states:

"I identified one of the attackers as I knew him even before that day. He stays in that area. He was said to be a security. He used to come I give him free miraa as he had said he was in charge of security in that area"

Despite this elaborate explanation of how he knew the Appellant it is surprising that under cross-examination says:

"I did not record in my statement that I knew one of the persons who attacked me"

If **PW2** knew the Appellant so well why did he not indicate this in his statement to the police? Even more surprising is the evidence of **PW4 CORPORAL MICHAEL MUSI**, the investigating officer in this case. He tells he court at page 9 line 15:

"PW2 did not tell me he knew the accused. Both witnesses did not know the accused person prior to the incident. It will not be true if any says that he knew the accused person"

This directly contradicts the evidence given by **PW2** that he knew the Appellant prior to this incident. **PW4** goes on to testify that it was security guards in the area who revealed the identity of the Appellant to him. Not a single one of these security guards were called as witnesses. This therefore remains uncorroborated hearsay evidence. From what we have stated above the identification of the Appellant was far from reliable and ought not have been relied upon by the learned trial magistrate.

Another discrepancy exists in the question of what weapon(s) (if any) the attackers were armed with. Whereas **PW1** and **PW2** declare that the men who robbed them were armed with wooden sticks, **PW4** admits that his investigation diary reveals that the men were armed with ***'metal bars'***. This again is

a major contradiction more so since no weapons were recovered either at the scene or on the Appellant.

Finally the Appellant in his defence raised an alibi stating that at the time the offence was being committed he was attending his sisters wedding. The investigating officer made no attempt to investigate this alibi defence. He merely dismisses the alibi by stating at page 9 line 4 –

"I did not interrogate anyone who is alleged to have been in the accused persons sister's wedding. I did not confirm anything about the wedding."

This amounts to a dereliction of duty on the part of the investigating officer. Once an alibi is raised (one which was corroborated by the Appellant's two witnesses) the police had a duty to investigate the same and establish the truth. Failure to do this means that this case was not conclusively investigated. In his judgement at page 26 line 21 the learned trial magistrate states:

"On being cross-examined, he [the Appellant] stated that he does not have any documentary evidence of his sister's wedding"

This in our view is a misdirection in law. By requiring the Appellant to produce proof of his alibi, the court was in effect shifting the burden of proof from the prosecution to the accused. It is a cardinal principle of our criminal law that the onus **at all times** lies on the prosecution to prove its case beyond a reasonable doubt.

In conclusion we find that the prosecution failed in its obligation, the required standard of proof was not discharged in this case, the conviction of the Appellant was manifestly unsound and we have no hesitation in quashing the same. Without a lawful conviction, the death sentence imposed upon the Appellant equally has no basis and is hereby set aside. This appeal succeeds. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 22nd day of March 2011.

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J.B. OJWANG	**M. ODERO**
JUDGE	**JUDGE**