REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NOS. 132, 133 & 134 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 3260 of 2006 of the Chief Magistrate's Court at Mombasa: T. Mwangi – S.R.M.)

BENARD ONYANGO AKOKO …….... 1ST APPELLANT
JAMES OMONDI OPIYO …… ……. 2ND APPELLANT
DAVID SIMON MULINGE ……. 3RD APPELLANT
=VERSUS=
REPUBLIC ……..…….. RESPONDENT

JUDGEMENT

The three (3) Appellants, namely **BERNARD ONYANGO AKOKO alias OTOYO** (hereinafter referred to as the 1st Appellant), **JAMES OMONDI OPIYO** (hereinafter referred to as the 2nd Appellant) and **DAVID SIMON MULINGE alias CHULA** (hereinafter referred to as the 3rd Appellant) have each appealed against their conviction and sentence by the Senior Resident Magistrate sitting at Mombasa Law Courts. The three Appellants were arraigned in court on 15th September 2006 and faced two counts as follows:

"COUNT NO. ONE ROBBERY WITH VIOLENCE CONTRARY TO S. 296(2) OF THE PENAL CODE

"On the 10th day of September 2006, at Mzizima in Coast Province General Hospital area within Mombasa District of the Coast Province jointly with another not before court while armed with offensive weapons namely pangas and sticks robbed MICHAEL MUGAMBI of his mobile phone make Nokia 2310 and cash Kshs.3,600/- all valued at Kshs.9,660/- and at or immediately before or immediately after the time of such robbery used actual violence to the said MICHAEL MUGAMBI.

COUNT NO. TWO CREATING DISTURBANCE IN A MANNER LIKELY TO CAUSE A BREACH OF THE PEACE CONTRARY TO SECTION 95(1)(b) OF THE PENAL CODE

"On the 10th day of September 2006 at Mzizima area in Mombasa District within Coast Province, jointly created a disturbance in a manner likely to cause a breach of the peace by chasing MICHAEL MUGAMBI while threatening to cut him with a panga"

All three Appellants entered a plea of ***'not guilty'*** to both counts and their trial commenced before **HON. T. MWANGI – S.R.M**. on 31st May 2007. The prosecution led by **INSPECTOR KITUKU** called a total of seven (7) witnesses in support of their case. The brief facts of the case were that on 10th September

2006 at about 10.00 A.M. the complainant and his wife **PW2 JOSEPHINE WAMAITHA**, were on their way to buy fruits for the complainant's business. **PW2** diverted to go to nearby toilets. The complainant proceeding on his own met the three Appellants all of whom he knew before, together with a fourth man seated by the road. The men accused the complainant of reporting them as trouble makers to the assistant chief. Then they pounced on the complainant and began to beat him up. Appellant No. 3 was armed with a rungu. The complainant's mobile phone and cash 9,660/- was stolen. Members of public responded to the Appellant's calls for help. He then rushed to report the matter to the village elder and later reported at Makupa Police Station. Later at 7.00 p.m. that same day the complainant was on his way home. He met 1st and 3rd Appellants hiding near his house. When they saw the complainant they again attacked him this time Appellant No. 1 was armed with a panga. The complainant screamed for help and once again members of public responded and came to his aid. Police from Makupa Police Station came and arrested the 1st and 3rd Appellants. The following day the complainant pointed out the 2nd Appellant to the police and he was also arrested. The complainant's mobile phone was recovered and kept by police as an exhibit. Upon conclusion of police investigations the three Appellants were charged in court.

At the close of the prosecution case all the three Appellants were found to have a case to answer and were placed on their defence. They each made statements in which they each denied having robbed the complainant. On 30th April 2008 the learned trial magistrate delivered her judgement in which she exercised the powers conferred on a trial court by S. 179 of the Criminal Procedure Code and reduced the charge from Robbery with Violence to Simple Robbery and convicted all three Appellants of Robbery contrary to S. 296(1) of the Penal Code. The trial magistrate did also convict the 1st and 3rd Appellants on the charge of Creating a Disturbance. Thereafter each was sentenced to serve seven (7) years imprisonment. In addition the 1st and 3rd Appellants were sentenced to serve four (4) months imprisonment each for Count No. 2 which sentence they have by now no doubt completed. It is against these convictions and sentence that the 3 Appellants have now appealed.

The Appellants who all appeared in person at the hearing of their appeal opted to rely entirely upon their written submissions which had been duly filed with leave of the court. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State made oral submissions in which he urged this court to uphold both the conviction and sentence rendered by the trial court. In addition the State did, through Mr. Onserio, give notice of its intention to seek an enhancement of the sentence from seven (7) years imprisonment to the death penalty as provided for by S. 296(2) of the Penal Code. This court did warn all three Appellants of the possible outcome of their appeal. However having properly understood such warning all three Appellants made the choice to nevertheless pursue their appeals.

Given that we are sitting as a court of first appeal we are mindful of our obligation to weigh the same conflicting evidence and make our own conclusions on the same. [See **AJODE VS. REPUBLIC [2004] KLR 81**]. The charge which the Appellants faced was that of Robbery with Violence. It was alleged that the three Appellants acting together and in concert with a fourth man attacked the complainant and robbed him of cash as well as his mobile phone. We believe that it is important to take into account the history of this case. The evidence reveals that there was bad relations between the parties. In his evidence **PW1** stated that before attacking him the Appellants accused him of reporting them to the assistant chief as trouble-makers. This clearly shows that the three Appellants had an ***'axe to grind'*** with the complainant. The complainant claims that the three Appellants who were armed with sticks (in this first attack there was no mention of a panga) then descended upon him with kicks and blows. The incident took place in broad daylight it was 10.15 A.M. and from all accounts the incident took place by the road-side in full view of the public. If the Appellants had formed an intention to rob the complainant, would they commit the crime in broad daylight and in total disregard of the presence of other persons in the vicinity? This seems hardly likely. The complainant says he was robbed of cash and his mobile phone. Once again given the history we would question whether these items were actually stolen from him or whether they merely got lost during the ***'melee'***. The complainant went to report the incident to the village elder. **PW7 PC. GABRIEL NYONGESA** told the court that the 1st Appellant also went to report the incident at Tononoka Police Post. This fact was conceded to by **PW1** and the OB report read out in court indicates that the 1st Appellant went to the police station to report that he had been attacked by ***"Michael Mugambi"*** (who is the complainant) who was armed with a slasher. It strikes us as extremely

odd and very atypical that a robber would rush to the police station to report having been attacked by the so-called victim. We are also left to wonder why police acted on the report by **PW1** and issued him with a P3 form yet they declined to follow up the report made by the 1st Appellant and failed to issue him with a P3 form. **PW7** the investigating officer does not give court any convincing reason why this happened. Further under cross-examination by the 1st Appellant **PW7** states at page 30 line 31 –

"I was not told of any grudge by either party. You are talking of it now"

Yet **PW1** in his evidence in chief told the court that the Appellant started of by accusing him of reporting them to the chief – clearly they were aggrieved about this and in our view it is entirely probable that they attacked the complainant not out of any intention to rob him of his property but out of a desire to hit back at him for this report he made to the chief.

Further doubt is thrown on this robbery theory by the circumstances under which the complainant's mobile phone was recovered. This was the mobile phone which the complainant alleged was stolen from him during this so-called robbery incident. **PW5 JULIUS MUTHIKA,** said that on 10th September 2009 at about 2.00 p.m. (barely hours after the incident) the 3rd Appellant came to their home and said that he wished to see the father of **PW5** who was a village elder. Once again it is highly unlikely that having been involved in the commission of a robbery the 3rd Appellant would calmly walk to the home of the village elder seeking audience with him. As it was the village elder was not home, only his son **PW5** was home. 3rd Appellant handed the mobile phone to **PW5** and told him to return it to the complainant. **PW5** obliged and took the phone to the complainant. It is unlikely that 3rd Appellant having stolen the phone would on the very same day return said phone to the authorities and request that it be returned to the owner. These actions by the 3rd Appellant indicate that he did not have the intent or mens rea to permanently deprive the complainant of that phone.

In addition to the matters discussed above we find it odd that having made his report to police about 11.00 A.M. and having named and identified the alleged perpetrators who **PW1** said he knew very well, the police took absolutely no steps to arrest the three Appellants. There is no evidence that the three, left the scene or tried to hide or evade arrest in any way. Indeed **PW1** told the court that on that same evening at 7.00 p.m. he came across the 1st and 3rd Appellants near his house and they attacked him yet again. It is only after this second attack that police bothered to arrest the 1st and 3rd Appellants.

Our own reading of the evidence is that this incident was actually a fight or an affray between the complainant and the Appellants due to a pre existing grudge and not a robbery as was alleged. Both complainant and the 1st Appellant immediately reported the incident to police. The police for reasons best known to themselves decide to act only against the three Appellants and took no action on the report made by the 1st Appellant.

It is clear from her judgement that even the learned trial magistrate harboured doubts as to whether this incident actually amounted to a robbery. At page 39 line 26 of the judgement she states:

"I cannot close my eyes on the fact that accused persons must have been angered by the complainant who cited them before the chief as wrong doers. That nevertheless was no reason for them to attack PW1. The three had well planned the attack as a revenge for what PW1 had done. It was however unlawful"

We are in total agreement that no matter how aggrieved they felt by the complainant's actions the Appellants had no right to take revenge by attacking him as he walked by. However we must also reiterate that such a revenge attack can only amount to an assault but cannot be deemed to amount to a robbery. From the evidence it is clear that the intention of the Appellants was to teach the complainant a lesson not to rob him. The phone which may have gotten lost in the melee was retrieved by the 3rd Appellant who handed it back to the complainant through the village elder's son **PW5**. The complainant's claim that he lost cash Kshs.9,660/- cannot be verified as there was no proof that he had this amount on him in the first place.

We feel that in the circumstances the proper course that the trial magistrate ought to have taken was to acquit the Appellants. She however did not do this. Instead despite her finding that all the essential ingredients of a charge of robbery were shown to exist, the trial magistrate then proceeds for some inexplicable reason to convict the Appellants of the offence of the lesser offence of simple robbery. If the trial court was satisfied that the offence of Robbery with Violence was proved why not convict on that charge. It is quite clear that even the trial court was not convinced that this incident amounted to a robbery with violence and thus chose to convict on the lesser charge. In so doing the learned trial magistrate erred. In cases where doubts exist then the court must acquit not reduce the charges. Our finding is that this evidence did not sufficiently prove a charge of Robbery. The conviction of the 3 Appellants were in our view unsound. We do hereby quash the same. The subsequent seven (7) year sentence is also set aside. All the three Appellants are to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and Delivered at Mombasa this 6th day of April 2011.

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