



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 1 OF 2006

(From Original Conviction and Sentence in Criminal Case No. 1194 of 2005 of the Senior Resident Magistrate’s Court

at Kwale: D.M. Ochenja – S.R.M.)

HAMADI MOHAMED

BAKU.....APPELLANT

=VERSUS=

REPUBLICRESPONDENT

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JUDGEMENT

The Appellant **HAMADI MOHAMED BAKU**, has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) of the PENAL CODE**. The particulars of the charge were that:

“On the 7th day of February 2005 at about 6.45 p.m. at Mwanyakulu trading centre Waa location in Kwale District within Coast Province jointly with others not before court, robbed MAGDALINA OPIYO OKELLO of 1. 20 litres mineral water, 2. shepherd dog food 3. Baby’s cerelac 4. Hair food 5. peanut butter 6. mobile telephone make Sagem 7. Three pairs of baby pants 8. A bag 9. A wallet 10. I/D card 11. Nakumatt smart card 12. Make-up kit 13. Baby’s car seat 14. Wheel brace and carjack 15. cash Kshs.10,500/- all these valued at Kshs.57,720/- and at or immediately before or immediately after the time of such robbery threatened to use actually [six] violence to the said Magdalina Opiyo Okello”

The Appellant who was arraigned before the trial court on 23rd March 2005 entered a plea of ‘not guilty’ to the charge. His trial commenced on 11th August 2005 at which trial the prosecution led by **INSPECTOR CHARO**, called a total of five (5) witnesses in support of their case. The brief facts of the prosecution case were that on 7th February 2005 at about 6.00 p.m. the complainant was driving along the

Mombasa-Ukunda road in her motor vehicle Registration No. KAK 240M Pajero. The complainant's vehicle was involved in a collision with an on-coming matatu. In the commotion and confusion after the accident the Appellant and a group of young men pulled the complainant out of her vehicle and robbed her of her hand-bag containing Kshs.10,500/-, her ID card, watch, make-up kit and medical treatment notes. The complainant who had already sustained injuries as a result of the accident called out for help. **PW2 CHARI HOKA**, who was in her house nearby rushed out to assist the complainant. The Appellant and his companions then turned on **PW2** and assaulted her causing **PW2** to retreat back to her house. The complainant was rescued by another passing matatu and was taken to hospital where she was treated. The matter was reported to police who later arrested and charged the Appellant.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. The Appellant gave an unsworn defence in which he denied any involvement in the robbery. On 22nd December 2005 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the charge of Robbery with Violence and sentenced him to death. Being aggrieved with both his conviction and sentence the Appellant filed this present appeal. **MR. ONSERIO**, who appeared for the State opposed this appeal and urged this court to uphold both the conviction and sentence of the lower court.

We have carefully perused the grounds of appeal raised by the Appellant in his written submissions. The Appellant argues that the charge sheet as framed was defective. We have carefully perused said charge sheet but find that the same is properly framed. As such this ground of appeal must fail.

However upon a close scrutiny of the proceedings we have noted a serious omission on the part of the trial magistrate which to our surprise the learned State Counsel failed to bring to the courts attention. The Appellant herein was originally charged with the offence of '**Robbery with Violence contrary to Section 296(1) of the Penal Code**'. On 16th September 2005 after the complainant had testified the court prosecutor made an application to substitute the charge with the more serious offence of '**Robbery with Violence contrary to Section 296(2) of the Penal Code**'. The Appellant made no objection to this amendment of the charge and the trial magistrate proceeded to allow the same. So far so good. However the trial magistrate omitted to enquire from the Appellant whether he wished the complainant be recalled to testify afresh. The amendment of the charge is provided for by Section 214(1) of the Criminal Procedure Code. However S. 214(1)(i) provides that:

“Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or give his advocate, and, in he last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination”

This provision of law specifically provides that where a charge is altered and/or amended as happened in this case, the court must enquire from the accused whether he seeks to have any witness who had previously testified, recalled. The failure of the court to adhere to S. 214(1)(i) is in our view fatal to the prosecution case. This is more so because the charges were amended to incorporate the more serious capital offence of Robbery provided for by Section 296(2) of the Penal Code. In view of the death penalty provided for upon conviction, it was even more essential that the accused be accorded the option of recalling the complainant to testify if he so wished. By virtue of this omission by the trial court it is our view that, evidence notwithstanding, the present proceedings were fatally flawed. Any conviction based upon such flawed proceedings has no merit and cannot stand. As such we do quash the conviction of the Appellant for the offence of Robbery with Violence. The subsequent death sentence is also set aside. The present appeal succeeds. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 20th day of May 2011.

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J.B. OJWANG
JUDGE

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M. ODERO
JUDGE