REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 331 & 332 of 2008

1. BENJAMIN MBITHI KAVEVA

2. NICHOLAS MUMO MUTALA.....….APPELLANTS

VERSUS

REPUBLIC……..……..……RESPONDENT

JUDGMENT

Benjamin Mbithi Kaveva and **Nicholas Mumo Mutala** (hereinafter *"the 1st and 2nd appellants"* respectively), were charged in Kwale Senior Resident Magistrate's Court Criminal Case Number 1056 of 2006 with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were that the appellants **on the 4th day of May, 2005, at about 7.00 p.m. at Gazi Village, Kinondo Location, in Kwale District of the Coast Province, jointly robbed Twaha Mohamed (hereinafter *"the complainant"*), of one mobile phone E600, one golden necklace, one Seiko wrist watch and a pair of shoes all valued at Kshs. 187,700/= and at or immediately before or immediately after the time of such robbery used actual violence to the said complainant.**

The appellants pleaded not guilty and after a full trial the Learned Senior Resident Magistrate, **Ogembo D. O.**, convicted them of the said offence and sentenced them to death. The appellants were not satisfied with their conviction and sentence and have appealed to this court against both conviction and sentence. They have raised the following issues in their amended grounds of appeal: defective charge; poor evidence of identification; inconsistent and contradictory evidence and violation of their constitutional fair-trial rights.

During the hearing of the appeal, the appellants appeared in person and **Mr. Muteti**, Learned Senior State counsel, appeared for the Republic. Having previously filed written submissions, the appellants opted to rely upon the same entirely. **Mr. Muteti** opposed the appeal contending that the charge is not defective as it discloses the offence charged and contains adequate particulars thereof. Counsel further submitted that the charge was proved to the required standard in Law.

With regard to identification, **Mr. Muteti** argued that the same was positive and that the appellants were identified at the scene of crime and also at a subsequent identification parade which was properly conducted. With regard to alleged violation of the appellants' fair-trial rights under the Constitution,

counsel submitted that the same was raised too late after the prosecution had closed its case and was therefore an afterthought.

The brief facts of the case before the Learned Senior Resident Magistrate were as follows:- the complainant, who testified as PW 1, on the material date at 7.00 p.m., was in his sitting room watching T.V., when his wife summoned him to the door. He responded and when he reached the door, he saw the 1st appellant standing near the door in a group of four including the 2nd appellant. The appellants were armed with guns and demanded money threatening that unless the same was given, the complainant and his family would be killed. He instructed his wife to comply and she gave the appellants and their accomplices Kshs. 60,000/=. The 1st appellant then led the complainant back to the sitting room and ordered him to lie down. He complied as the appellants ransacked the house. They took away mobile phones, watches, gold and other assorted goods. In the same building, the complainant operated a shop in which his daughter at the material time was selling. The robbers stole Kshs. 9,000/= from the shop and left. As they left, they fired in the air. The complainant stated that he identified the appellants through electric light. The police were informed the same night and **PC Silas Kiptoo**, (PW 4), visited the scene the same night and took statements from the victims. An immediate search yielded nothing.

An Identification Parade was subsequently mounted by **C.I. Daniel Chacha** who testified as PW 2. He testified that at the parade, the 2nd appellant was identified by the complainant. **Rajab Rashid Kusala**, (PW 3), testified that on the material date at 7.00 p.m., he was at the complainant's shop when thugs struck. Four of them entered the shop and ordered him to lie down. He complied and when he raised his head he was stepped upon and ordered to remain lying down. He witnessed the thugs put money from the cash box into a bag and further heard them order the complainant to give money. Two of them, according to PW 3, were armed with pistols. The thugs then left. He testified that he identified the appellants through electric light but did not participate in the Identification Parade.

The appellants gave sworn statements. The 1st appellant testified that he traveled to his rural home on 3rd May, 2005, to make arrangements for his mother's funeral. He traveled back after the funeral on 15th May, 2005. On his return on 18th May, 2005, **Cpl. Wafula** disagreed with him over a plot, arrested him and released him after two days. He reported to the Chief at Diani and the District Officer Msambweni and even complained in writing to the District Commissioner. **Cpl. Wafula** then arrested him and shot him. He then took him to the police station and had him charged with an offence he did not commit. The 1st appellant produced PW 1's statement to the place in which he mentioned different people.

The 2nd appellant testified that on 19th August, 2005, he was carrying on his water hawking business in Ukunda when, at a certain hotel, he was arrested for operating a hotel without a licence. He remained in police cells until 4th September, 2005 when he was charged with an offence he knew nothing about. The 2nd appellant referred to two other criminal cases against him which had been withdrawn. He discredited his identification at the parade because the complainant had seen him in court before the parade.

The Learned Senior Resident Magistrate on the above evidence found that the appellants had been positively identified as the attack occurred at a bright and well lit place. He rejected the appellants' defences as being without merit.

We have re-considered and re-evaluated the evidence upon which the Learned Senior Resident Magistrate relied to convict the appellant as we were duty bound to do (see **Okeno – v – Republic [1972] EA 32**). Having done so, we have made the following observations: The charge as framed omitted to state certain items which the complainant in evidence gave testimony of. We agree with the Learned Senior State Counsel that the failure to capture the complete list of the items mentioned by the complainant in his testimony did not vitiate the charge. In our view, the particulars given therein are sufficient and the charge meets the requirement of section 134 of the Criminal Procedure Code. In the premises the complaint regarding the charge is without merit and is rejected.

With regard to the ground that the evidence of identification was not positive, our perusal of the record reveals the following: The complainant's statement with the police was produced at the trial. We have

read that statement and note that in it, the complainant stated as follows:-

"One robber known as Salim Raster was carrying a big bag and he was the person who entered into my shop when my daughter Leilah was robbed Kshs. 9,000/= and outside my shop there were two robbers one was armed with a pistol and he was the one who fired one round in the air…… All in all there were seven robbers and they robbed me cash Kshs. 69,000/=, one mobile phone make Samsung E 600 valued Kshs. 33,000/=, gold earrings and necklace all valued at Kshs. 70,000/=, one wrist watch Seiko gold valued at 7,000/=, one pair of shoes valued at 3,700/=, one lady bag and passport valued Kshs. 5,000/=. Total value Kshs. 187,700/=.

The robbers stayed at my place for a period of 15 minutes and left on foot.
After those robbers had gone about 10 minutes police officers arrived.

On the same night I received information that those robbers were seen with Hemed Hamisi who is a resident of Gazi trading centre is the person who brought this people who had power saw to come and cut trees and split timber, he is a broker whereby one of them and he was the one who was seen with those people as they were meeting in one of the small hotels in Gazi trading centre. Among those people who entered into my house was one Administration Police Officer and was the one who escorted me to my seating room and the other person whom I can identify was an ex-police officer who was there before stationed at Msambweni Police Station.

I can be able to identify two people, Administration Police Officer and the ex-police officer. Salim Raster may be identified by the people of the hotel where they were meeting.
That is all to state."

We have quoted the entire statement made by the complainant to the police for a proper appreciation of his testimony before the Lower Court. It is plain that the complainant's statement to the police was remarkably different from his testimony in court. Whereas he informed the police that he was robbed by among others, **Salim Raster**, an Administration Police Officer and one ex-police officer, he never disclosed those he identified when he testified in court. The discrepancy in our view greatly discredited the complainant's testimony. It became clear at the trial that none of the appellants could fit the description given by the complainant in his statement. None of the appellants was an Administration Police Officer. None of them had ever served in the police force. Yet the complainant was categorical in his said statement with the police that he recognized an Administration Police Officer and an ex-police officer. In our view the complainant could not get away with a casual explanation that he used to see the 1st appellant at the police station and therefore thought he had been a police officer. None of the appellants is also known by the name **Salim Raster**.

We are puzzled that the Learned Senior Resident Magistrate could not detect the glaring difference between the complainant's said statement and his testimony before him.

There is then the testimony of PW 3, who testified that he identified the appellants at the time of the robbery and the 2nd appellant at an Identification Parade mounted by PW 2. The evidence of PW 3 was however not positive in our view. We say so, because the witness told the court that while he was at the complainant's shop, robbers struck. He was ordered to lie down and when he raised his head, he was stepped upon by the 1st appellant who ordered him to remain lying down as he pointed a pistol at him. In our view, while in that position he could not positively identify his attackers who were armed and pointed a pistol at him as he lay on the ground. He also testified that the incident took about 5 minutes. In view of the prevailing circumstances, PW 3 in our view did not have adequate opportunity to make a positive identification.

PW 3 also informed the court that he was able to identify the 2nd appellant at the Identification Parade mounted by PW 4. That identification in our view was worthless for three reasons. One, in cross-examination by the 2nd appellant, the complainant testified that the Identification Parade had members who were different in height and age. Secondly, PW 3, **Rajab Rashid Kusala,** admitted in cross-

examination by the 2nd appellant, that a description of the appellant was not in his statement to the police prior to mounting the Identification Parade. His statement, which was produced, indeed confirmed that position. Thirdly, PW 2, **CI Chacha** who conducted the parade admitted that he did not determine if witnesses had seen the suspects before the parade. In **Fredrick Ajode – v – Republic [Criminal Appel No. 87 of 2004] (UR),** the Court of Appeal held that dock identification is worthless *"unless it has been preceded by a properly conducted identification parade. It is also trite that before such a parade is conducted and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."* We are not satisfied that the identification parade mounted by PW 2 in this case reached the threshold set by the Ajode case.

Turning now to the appellants complaints that their fair trial rights as enshrined in the Constitution under section 72 (3) were breached, we note that that complaint was raised before the Learned Senior Resident Magistrate who resolved the same as follows:-

"Again this is not convincing in view of the fact that accused had been arrested in relation to other offences and charges on which he was tried and convicted. In fact he still remains a convict. He was obviously charged with this present charge as the trials in the other cases were in progress."

In our view, the 1st appellant's complaint was adequately dealt with by the Learned Senior Resident Magistrate. On the material on record, we are unable to agree with the appellants that their fair trial rights under section 72 (3) of the Constitution were violated. This appeal does not therefore turn on that complaint.

We have however found that the identification of the appellants was not positive. Our conclusion is therefore that their conviction was unsafe and we are unable to uphold the same. We allow this appeal, quash the conviction and set aside the sentence of death which was imposed on the appellants. We order that the appellants be released forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2010.

M. IBRAHIM
JUDGE

F. AZANGALALA
JUDGE

Read in the presence of:-
The Appellants and Mr. Onserio for the Republic.

F. AZANGALALA
JUDGE
22ND SEPTEMBER 2010