



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI**

**Criminal Appeal 93 & 94 of 2009**

1. ABAR JUMA NZAI
2. OMAR ALI JUMA
3. ISMAEL MOHAMED.....APPELLANTS

=VERSUS=

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

Abar Juma Nzai, Omar Ali Juma, and Ismael Mohamed (hereinafter referred as 1<sup>st</sup> appellant, 2<sup>nd</sup> appellant and 3<sup>rd</sup> appellant respectively) were convicted on a charge of robbery with violence contrary to section 296 (2) Penal Code and sentenced to suffer death.

The particulars of the charge stated that on 28<sup>th</sup> May 2008 at Mtwapa Township in Kilifi District, with others not before court, being armed with dangerous weapons namely pangas, robbed Rehema Mwinyi Haji of one suitcase containing assorted clothes and documents, Mobile phone make Nokia 2610, one golden bracelet, one golden chain, two golden earrings, a digital calculator, and cash Kshs.30,000/- all valued at Kshs.108,000/- and at or immediately before or immediately after the time of such robbery, murdered one Jimmy Karisa.

The appellants each denied the charge – prosecution called a total of five witnesses in support of this case. Appellants were the only defence witnesses. Rehema (Pw 1) told the trial court that on 27/05/08 at 10.00Pm, she went to sleep inside her house in Mtwapa. At 2.00am, a group came into the compound – she heard them talk to the watchman Jimmy Karisa Sila, asking him why he had been chasing their wife. Through the window, Pw 1 could see them beating the watchman and she inquired why. She tried to call her brother Omar Mwinyi Haji on the mobile phone – she then opened the door, and immediately the young men forced their way in and slapped her while pointing a pistol at her. There were six of them – they took away her phone and demanded for money. All of them had pangas but one had a pistol. One of them identified her as Omar`s sister. She too was able to identify some of them. They carried away her suitcase which contained her documents, clothes, cash amounting to about Kshs.30,000/-, jewellery(silver and gold) a Kenyan passport, two handbags, a calculator, an identity card, ATM card, premium bond certificates.

One of them pleaded with the others to leave her alone saying he knew her as Omar`s sister. It was her evidence that whole incident took a very short time – about 2-3 minutes. The watchman was lying down. Neighbours went to her rescue – The watchman was taken to Coast General Hospital but died while undergoing treatment. She noted that the watchman had deep cuts although he was able to speak.

Pw 1 identified three of the attackers as they were her villages mates who she knew very well – these were Abar Juma Nzai (who was pleading with the others not to harm her) – he was armed with a panga, Omar Ali Juma and Ismael Mohamed – she saw them because there were two security lights on (that is electricity bulbs). Although Pw 1 was called to attend an identification parade, this did to materialize as the appellant declined to participate, saying Pw 1 knew them very well.

On cross-examination by 1<sup>st</sup> appellant Pw 1 stated;-

***“I know you by face and names, I even talked to you and pleaded with you not to harm the watchman”***

Appellants and Pw 1 grew up together in Mtwapa and she even knew their parents. Omar Mwinyi Haji (Pw 2) a brother to Pw 1 testified that on 27/05/08 at about 11.00Pm, he was at his home in Mtwapa – there was a funeral gathering within the neighbourhood. He saw 1<sup>st</sup> appellant pass accompanied by another, and Pw 2 warned his watchman that they were dangerous boys.

Pw 2 then went to sleep. At 2.00am, his sister (Pw 1) called him on his mobile phone – he could hear banging sounds in the background. He proceeded to Pw 1`s house and the watchman informed him that there were thieves at her house. He noticed that one of his watchmen had been cut with a panga on the head and neck, he was bleeding. Pw 2 gave his name as Jimmy Sila. When he got to Pw 1, she informed him that some young men had attacked the watchman – so he called the police station, and moved the injured man to a clinic in Mtwapa, but got no assistance so he took him to Coast General Hospital. On the way to hospital the watchman spoke saying;-

***“If I die, it is Pilla, Mole, Ng`ang`a who have killed me”***

Pw 2 knew Pilla to be Abar Juma Nzai – Pilla was his street name. On cross-examination Pw 2 explained that from pw 1`s house to his house is about 100 metres apart, when he got to Pw 1 place, he found that the attackers had already disappeared, and he denies mentioning any names to Pw 1.

Sergeant Musundi (Pw 5) was the duty officer who received a report from the OCS about the robbery at Mkanjuni area in Mtwapa. He visited the scene and found the complainant. He also observed a pool of blood at the door and learnt that the watchman had been taken to hospital. He was not able to trace the attackers that night.

At 6.00am, he received reports of mob justice at Mkanjuni area, the 3<sup>rd</sup> appellant was brought to the police station at about 10.00am, 1<sup>st</sup> appellant was also rescued from an angry mob, and taken to the police station, another suspect was beaten to death by members of the public, before police could act to save him. He confirmed that a parade was preferred but appellants declined to participate.

Pc Patrick Mataza who was then attached to Mtwapa Police Station confirmed receiving information from the OCS that some people had been surrounded by members of the public. He proceeded there and found two people being beaten by members of the public – they rescued them and took them to the police station – one of them was 1<sup>st</sup> appellant - the crowd said they had attacked Pw 1.

Pw 3 confirmed that Pw 1 had informed him that one of his attackers was nicknamed “Pilla” – who he identified as 1<sup>st</sup> appellant. On 30/05/08, he was again called to rescue a suspect who was under attack by a mob – his name was Omar Ali Juma and Pw 3 identified him as the 2<sup>nd</sup> appellant.

Pw 4 Pc Stephen Mbogo, also of Mtwapa Police Station told the trial court that on 28/05/08 at 8.30am, a lady came into the crime branch office where he was. She was crying, saying that her son was being beaten by members of the public. Pw 4 proceeded to Mtwapa Maeneo area where he found the suspect surrounded by members of the public who claimed that he was one of those who had attacked people at night – that person was the 3<sup>rd</sup> appellant, so PW4 arrested and took him to the police station.

All the appellants gave unsworn evidence.

1<sup>st</sup> appellant narrated events surrounding the day he was arrested – that while at his place of work, a crowd that was armed with rungas attacked him saying he was the one. He was beaten then taken to Mtwapa Police Station, later he was charged for an offence which he never committed.

The 2<sup>nd</sup> appellant likewise narrated how a police officer picked him from his place of business on 30<sup>th</sup> May 2008, saying he was needed at Mtwapa Police Station. He was locked up and taken to court with people he didn't even know. Likewise 3<sup>rd</sup> appellant said that on 28<sup>th</sup> May 22008 while at his place of business, some people attacked him then took him to Kijipwa Police Station. According to him he was taken to court but charged with an offence but he did not know anything about the charge.

In his judgment the trial magistrate found that from the evidence of PW1, the attackers who numbered six were armed with pangas and they meted out violence which led to the death of the watchman.

The Trial Magistrate was satisfied that the identification was by recognition as appellants were people whom the complainant had known for over ten years as fellow village boys. She knew their names (which she even gave to the police) and they even talked during the incident, referring to her as Omar's sister.

The Trial Magistrate also considered the watchman's dying declaration in which he mentioned 1<sup>st</sup> appellant as one of his attackers and he found that it corroborated the evidence of Pw 1. The Trial Magistrate described the prosecution case as water tight and found that the appellant's respective defences did not stand in the way of such strong and credible evidence. He also warned himself of the dangers of the possibility of mistaken identity, but he was persuaded that prosecution had proved its case against the appellants.

The appellants now challenge these findings on replicate grounds that are contained in the amended grounds of appeal to this effect.

The charge sheet was defective because the time of the incident was not indicated in the charge sheet and that some of the items Pw 1 mentioned as having been robbed off, were not listed in the charge sheet.

- 2) The Trial Magistrate relied on visual identification of a single witness without properly noting that the circumstances prevailing at the scene were not conducive to warrant positive identification given that;
  - (a) The attack occurred at night, and was sudden and terrifying
  - (b) Pw 1 did not disclose the distance and position of the security light in relation to the appellants
  - (c) Although Pw 1 claimed that the whole incident lasted about 2-3 minutes, time under observation was not disclosed
- 3) That the witness (Pw 1) did not give any description of the Physical features or names of the persons who attacked her, at the time of making her initial report.
- 4) That Pw 2 and Pw 3 were not sworn or affirmed, thus offending section 151 Criminal Procedure Code so the Trial Magistrate should not have relied on their evidence.
- 5) The Trial Magistrate failed to realize that the source of his arrest had not been established and erred in rejecting the appellant's defences.

Similarly, the appellants filed replicate submissions urging this court to find that because the time of the offence was not shown in the charge sheet, then this rendered the charge sheet defective and must be resolved in their favour. They sought to rely on the case of **Suleiman Juma V R Criminal Appeal No.18 of 2002(Mombasa)** to support their argument.

Further that because some of the items Pw 1 mentioned in the evidence were not listed in the charge sheet, then the entire evidence should be rejected pointing out that she had stated that the suitcase contained interalia her silver jewellery, passport, 2 handbags, an identification card and an ATM card, so the charge sheet ought to have been amended to include

these.

The State Counsel Mr Kemo did not respond to this. The appellant sought to rely on case law and the provisions of section 137(iv) f, which is to the effect that;-

***“Subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing 1 maker, act or omission to which it is necessary to refer in a charge or information, in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to”***

We think that provision must be read alongside the provisions of section 137 (i) (a) and (ii) regarding the rules for framing of charges and information especially with regard to the mode in which offences are to be charged. What is more, failure to list all the items the complainant referred to caused no prejudice to appellants. We hold that date is sufficient particulars – see **Moses Kimani V R Cr. Appeal NO. 212 of 2004 reported in 2005 KLR.**

Our finding on this limb is that the defect complained of is not fatal nor prejudicial to the appellants. The appellants also submit that that evidence on identification was not adequate saying that from the evidence of Pw 1, the moment she opened the door, the young men forced their way into the house and immediately slapped her and a pistol was pointed at her and that she fell down and admitted that she was shaken by the incident. It is the appellants contention that all these factors interfered with Pw1`s ability of proper observation and positive identification.

Appellants argue that she did not even get an opportunity to stand up and see her attackers, taking into account her evidence that the entire incident lasted 2-3 minutes. They cited the decision in **Charles O. Maitanyi V R Criminal Appeal No. 6 of (1986) C.A** which held that;-

***“It is at least essential to ascertain the nature of the light available, what sort of light, its size and position in relation to the suspect”***

Appellants submit that the first opportunity Pw 1 got seeking the attackers was when they were outside and she looked through her window – yet the size of the window and its distance in relation to the robbers, was not described. The appellants argue that due to foregoing, there was a possibility of mistaken identity and they should be given the benefit of doubt.

In opposing this ground of appeal, Mr Kemo (The Learned State Counsel) submits that the evidence was not only identification, but recognition which is more reliable. Mr Kemo urged us to consider that the deceased made a statement which amounted to a dying declaration, which corroborated what Pw 1 said regarding the identity of the assailants. He points out that Pw 1 was woken up by people who were attacking the watchman, she looked out of the window and recognized them with the aid of the two security lights which were outside, and which were bright enough to enable her see and identify them.

Further that the incident lasted 2-3 minutes and the prevailing conditions were favourable for Pw 1 to recognize the attacker and she gave out their names, which led to their arrest the next day. Further that the very nickname the deceased watchman knew 1<sup>st</sup> appellant by, was confirmed by Pw 1 and Pw 2, it is of course significance that 1<sup>st</sup> appellant never denied that he goes by the street name “PILA”.

It is not contested that appellants were persons well known to Pw 1 – indeed that is why when an identification parade was prepared, they declined to participate. We take cognizance of the fact that the incident took place at 2.00am – Pw 1 upon being woken up by the noises of the attack on the watchman looked through the window and saw the three appellants, among others. She saw and recognized them because of the electricity bulb lights – two in number which she described as bright – this illuminated the area outside and enabled her to recognize the appellants whom she had known for ten years. It was not just a fleeting glance, she even spoke to them asking them why they were beating the watchman. It was her evidence that appellants were people she used to interact with and even help and we are persuaded that it was because of this, that she felt safe enough to open the door without their so demanding.

That evidence clearly demonstrates that the prevailing conditions were favourable for identification by recognition – indeed even when they got into her house, 1<sup>st</sup> appellant kept urging his colleagues to leave her alone, saying she was Omari`s sister. The Trial Magistrate was keenly aware of the scenario and duly warned himself of the possibility of mistake but was satisfied that there was no mistake, because the dying watchman`s statement to Pw 2 corroborated the evidence of Pw 1 with regard to identification. The nature of light and what sort of light was ascertained by evidence before the Trial Magistrate. We cannot fault that finding. The appellants cling to the initial report, which they say made no mention of their names and 1<sup>st</sup> appellant called for the OB of 28<sup>th</sup> May 2008 entity No.37 to fortify their arguments. We concede that the appellants names were not recorded in that OB report, but it is instructive to note that the initial report came NOT from Pw 1, but was relayed to the officer who made the entry in the OB, from 999 control room – Infact the entry reads L/E 999 Message –

***“we have also received a message from 999 control room that some thugs have invaded the Mikanguni area, near Nuru Clinic. Already the duty officer informed and rushed to the scene”***

Our finding is that the limb being referred to by the appellants under the circumstances cannot be resolved in their favour, as the circumstances of that record are clear. The duty officer Sergeant Musundi did confirm that he had received the report about the incident from the OCS and it was his evidence at page 19 line 23 as follows:

***“It is the complainant who identified and named the 3 people as people she knew and saw on the day of the attack”***

We have considered the dying declaration by the watchman Jimmy Sila in which he mentioned 1<sup>st</sup> appellant by his nickname. It is argued by the appellants that it was unsafe for the Trial Magistrate to rely on that statement and they cited the case of **Kiarie V R (1984) KLR 739** which stated that;-

***“a trial court should have necessary circumspection as it is unsafe to base a conviction solely on this especially if made in the absence of the accused and if not subject to cross-examination of***

***satisfactory corroboration”***

In this instance, it is clear that the statement falls within provisions of section 33 Evidence Act. It is our finding that the conviction was not based on the sole declaration of the dying watchman – there was also the evidence of Pw 1 which was considered and indeed Pw 1`s evidence corroborated that of the dying man.

We therefore find no error on the part of the Trial Magistrate in relying on that statement.

We have perused the trial court`s original record, we confirm that Pw 3 was not sworn, which offended the provisions of section 15 of the Criminal Procedure Code. However contrary to what the appellants submit Pw 4 and Pw 5(as per the handwritten proceedings) were sworn. It seems this was not captured in the typed

copies of the same court`s records. Even if Pw 3 evidence was to be disregarded due to that omission, there is evidence of Pw 4 and Pw 5 regarding the circumstances under which the appellants were arrested – word had gone round that they had attacked and robbed Omar sister (it seems Omar must be some demi- god of sorts) and a mob was baying for their blood – police acted to save them from the mob and that is how they were arrested.

The upshot is that the Trial Magistrate findings were supported by evidence on record and the conviction was safe. We therefore uphold the conviction and confirm the sentence. The appeals are dismissed.

**Delivered and dated this 21<sup>st</sup> day of September 2010 at Malindi.**

**H A OMONDI  
JUDGE**

**M.ODERO  
JUDGE**