



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

Criminal Appeal 100 of 2006

1. HASSAN ABDALLA
2. NTHENGE KIKWALO MUMO
3. ALI KIJIMBI BAKARI
4. OSMAN ZUBERI.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants, **Hassan Abdalla, Chondo Kikwalo, Ali Kijimbi Bakari** and **Osman Zuberi**, (hereinafter “*the 1st, 2nd, 3rd and 4th appellants*” respectively) were charged before the Chief Magistrate’s Court at Mombasa in Criminal Case Number 2317 of 2003 with three (3) counts of robbery with violence contrary to section 296 (2) of the Penal Code, convicted and sentenced to death on the first count particulars whereof were as follows:- **That the appellants and one John Mukungu, on the 19th day of April, 2003, at Jomvu Chamuny village Changamwe in Mombasa District within Coast Province, jointly with others not before the court, while armed with offensive weapons namely pangas, rungas and knives, robbed Gilbert Khamisi Mogusu (hereinafter “*the complainant*”) of one mobile phone make Siemens C4445, one wrist watch make Indigo, five pairs of bed-sheets, a traveling bag, five pairs of leather shoes, one stein fan make Khindone, a radio cassette make Nico, one television set make Samsung, two bicycles and foodstuffs all valued at Kshs. 83,000/= and at or immediately before or immediately after the time of such robbery wounded the said complainant.**

The appellants were first tried by **C. A. Opulu**, SRM who heard the testimony of three prosecution witnesses. The trial was then taken over by **H. N. Ndungu** who completed the trial and convicted the appellants as already stated and sentenced them to death.

The appellants were not satisfied and have appealed to this court against both conviction and sentence on some 14 grounds. The gist of the grounds is however that the prosecution case was not proved beyond reasonable doubt; that the witnesses did not positively identify the appellants and that they gave contradictory testimony. The appellants also complain about procedural defects at the trial and inadequate consideration of their defences.

During the hearing of the appeal **Mr. Magolo**, Learned counsel represented the 1st and 4th appellants, the 2nd and 3rd appellants appeared in person and **Mr. Onserio**, Learned State Counsel, appeared for the Republic. The 2nd and 3rd appellants relied upon written submissions which had been previously filed with the leave of the courts. In those submissions they raised among other things issues of their identification, contradictory and insufficient evidence, defective charge and poor investigations. **Mr. Magolo** confined himself to two primary issues namely that the trial was a nullity because section 200 of the Criminal Procedure Code was not fully complied with when **H. N. Ndungu** (PM) took over the trial from **C. A. Opulu** who had been transferred elsewhere and that the identification of the appellants was not positive. **Mr. Onserio** conceded the appeal on the main ground that the testimony of PW 2 was not fully tested by cross-examination by some of the appellants. He however sought a retrial, contending that there was overwhelming evidence to secure a conviction and further that witnesses would readily be availed.

The brief facts of the case before the Lower Court were as follows: - **Gilbert Hamisi Mogusu**, the complainant in count one on the material night at about 3.30 a.m., woke up to help himself. He thereafter went back to the bedroom to sleep but it was not to be: a gang of five (5) entered the bedroom and demanded his mobile phone, watch and money. They assaulted him using the flat side of a panga and carried away various items. He saw that the gang comprised people he knew save for one who was charged as the 2nd accused. He gave the names of the appellants and described how he had come to know them and how they had been arrested. The police were informed and he later went to hospital for treatment for his injuries.

PW 3, **Mwana Tunu Ali**’s evidence was similar to that of the complainant. She recalled that on the material night at 3.00 a.m., after fetching water, she fell asleep in her sitting room and made up to find a person holding a knife. She screamed and jumped from her seat and realized that there were many thugs in the house. One of them hit her using the flat side of a panga and ordered her not to make noise. The others ransacked the house and took away her jewellery, wedding ring, T.V. set, watch, mobile phone, clock, radio and children’s bag. She identified two of the attackers: the 2nd and 4th appellants. Police were called and she too received treatment for her injuries.

The appellants gave unsworn statements on how they were arrested for an offence they did not commit.

The Learned Principal Magistrate, **H. N. Ndungu**, on the above evidence found that the complainant had identified the appellants by recognition and that his testimony had been corroborated by his wife's (PW 3's) testimony.

We have re-considered and re-evaluated the evidence upon which the trial magistrate relied to convict the appellants as we were bound to do (see **Okeno – v – Republic [1972] EA 32**). Having done so, the following facts have emerged. The complainant commenced his testimony on 23rd March, 2004. He was then stood down before cross-examination when witness statements were applied for. The trial resumed on 20th April, 2004 and the 4th appellant commenced his cross-examination of the complainant but before concluding the cross-examination, he applied for the O.B. of the material date. The cross-examination was again adjourned to the afternoon of the same date. In the interim PW 3, the complainant's wife, took the witness stand and gave evidence in chief.

Come the afternoon, the record is not clear as to who between the complainant and PW 3, was cross-examined. If it is assumed that the cross-examination of the complainant continued in the afternoon it would then follow that PW 3 was not cross-examined. On the other hand if it is assumed that PW 3 was the one who was cross-examined, then the cross-examination of the complainant (PW 2) was not complete. Either scenario would suggest their testimonies were not properly taken. Cross-examination is a right given to an accused by section 208 (2) and (3) of the Criminal Procedure Code. The evidence of PW 2 and PW 3 was therefore not taken in accordance with the said provisions.

The record further indicates that when **H. N. Ndungu** (PM), took over the trial on 4th July, 2005, all he said was as follows:-

“Accused informed the court will take over this case under provisions of section 200 of Criminal Procedure Code as it had been handled by others.”

We do not think that there was sufficient compliance with the said section. Sub-section 3 of the said section reads as follows:-

“3. Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. (underlining ours).

The record does not indicate that **H. N. Ndungu** informed the appellants of their right to demand that any witness or witnesses heard by **Opulu SRM** be re-summoned and be re-heard. The language of the said section as underlined is mandatory and the failure to so inform the appellants of their right rendered the entire proceedings before **H. N. Ndungu** (PM) a nullity. **Mr. Onserio** was therefore, in our view, right in conceding the appeal. The Learned State Counsel however urged a retrial whilst **Mr. Magolo**, Learned counsel for the appellants, resisted the same on the main grounds that a retrial would provide the prosecution with an opportunity to fine-tune its case. Counsel further argued that a retrial would be prejudicial to the appellants, given the period the appellants have been in custody. Before determining that issue however, we shall briefly consider the evidence upon which the appellants were convicted. We have set, in outline above, the testimonies of the complainant (PW 2) and his wife (PW 3). The case of the prosecution depended entirely upon the evidence of the two. The Learned Principal Magistrate concluded that the appellants had been positively identified. We however do not share that conclusion because of the following. The O.B. entry of the incident, which was referred to at the trial, did not contain the appellants' names. The police statements did not also have the names of the appellants. At page 18 of the record the following sentences are found:

“I have not mentioned your name in the statement.”

.....

“I did not write your name.”

In view of that record, we find it rather difficult to believe that the complainant and his wife indeed identified the appellants by recognition. If indeed the appellants were known to the complainant, as he alleged, why did he not mention them in his police statement and at the time of making the first report? It is further significant that the investigating officer and the officer who received the first report were not called as witnesses.

The state of the evidence on the identification of the appellants therefore impels us to decline to order a retrial. The record also makes very depressing reading. For one reason or another, the trial could not proceed. The prosecution made excuses such as inability to avail witnesses and failure to avail the police file. The following statement by the Learned Principal Magistrate in her judgment is also pertinent.

“It is important to note at this juncture that the prosecution case was closed prematurely and the investigating officers were never called.”

That was because the Learned Magistrate could allow no further adjournments.

In the premises and in view of the record we do not think that the prosecution is in a position to mount an expeditious and successful prosecution. They could not do so seven (7) years ago. The position must be worse now.

In view of the above we decline to order a retrial as it would be prejudicial to the appellants, given the period the earlier trial took and the period that has elapsed since the commission of the offence. In the end we allow this consolidated appeal. The conviction of the appellants is quashed and the sentence set aside. The appellants are set at liberty forthwith unless they are otherwise lawfully held.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF SEPTEMBER 2010.

F. AZANGALALA
JUDGE

M. ODERO
JUDGE

Read in the presence of:-

Mr. Magolo for the 1st and 4th Appellants and the 2nd and 3rd Appellants in person and Mr. Ondari for the Republic.

F. AZANGALALA
JUDGE
7TH SEPTEMBER 2010