



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 223 OF 2009**

**Lesiit & Kasango J. J.**

**JAMAL ABDULLAHI OSMAN.....1<sup>ST</sup> APPELLANT**

**MOHAMED ABDIKADIR HASSAN.....2<sup>ND</sup> APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

***[Being an appeal against the conviction and sentence of the S.R.M 's Court at Wajir Hon Mr. A. Inguti***

***Esq. in Cr. Case No. 42 of 2009 dated and delivered on 14<sup>th</sup> August 2009]***

**JUDGEMENT**

The appellants Jamal Abdullahi Osman and Mohamed Abdikadir Hassan were the 1<sup>st</sup> and 2<sup>nd</sup> accused in the trial before the lower court. They had been charged with a third accused with one count of Robbery with violence c/s 296(2) of the Penal Code and one count of assault in resisting arrest contrary to section 253(a) of the P.C. The 1<sup>st</sup> appellant faced a third count of Handling Stolen Property contrary to section 322(2) of the Penal Code. The 1<sup>st</sup> appellant was found guilty of the main count of robbery with violence and sentenced to death. The 2<sup>nd</sup> appellant was convicted in the main count of violent robbery and in minor charge of assault. He was sentenced to death in the first count and to six months imprisonment in the second count.

The appellant then filed their respective appeals which we have consolidated as they arise out of the same trial. They each challenged their convictions on the grounds the evidence of identification was flawed and insufficient to sustain a conviction. The 1<sup>st</sup> appellant also raised issue with failure by the record name of interpreter used during the trial of their case if there was any.

Mr. Kimathi represented the State Counsel conceded to these appeals. The main ground of conceding to the appeals was that PW 1 and PW 2, the only eye witness in the prosecution case turned hostile and were so declared by the court. Mr. Kimathi submitted that their evidence required

corroboration in the circumstances and that none was available. Mr. Kimathi submitted further that the prosecution case was full of contradictions. He said that all prosecution witnesses and appellants were involved and that it was likely that there was a fight between them, and not a robbery, in which they all suffered injuries.

We have analyzed and evaluated afresh all the evidence adduced before the trial court See **OKENO V. REPUBLIC [1972] EA 32.**

The appellant while addressing us did not deny that they were present at the scene where the complainant alleged he was robbed. They however said a different thing at the trial before the lower court.

We wish to address one important issue which the learned State Counsel raised in his submissions before us. Mr. Kimathi submitted that P.W.1 and 2 were declared hostile witnesses at the trial and that in the circumstances the learned trial magistrate ought to have required corroboration of their evidence which was not available from the evidence before the trial magistrate.

We are concerned with the manner in which the learned trial magistrate conducted the trial in respect of the evidence of P.W.1 and 2. The question is who is a hostile witness and under which circumstances can a witness be declared hostile.

The court of Appeal in **Edusei Asili Malema Vs Republic Case No. 296/06** held:

**Regarding the correct procedures for declaring a witness to be hostile at the instance of the party who has called him, sections 161 and 163(1)(c) of the Evidence Act are relevant. Section 161 gives the court discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Section 163 (1) categorizes the evidence which may be called by and adverse party or, with the consent of the court, by the party who calls him for impeachment of his credit. Such evidence which may be called to impeach the credibility of the witness includes proof of former statements whether written or oral inconsistent with any part of the evidence which is liable to be contradicted. (see s.163(1)(c). In MAHATI BIN RUADIHA V. REX (1938) 5, EACA 52, the defunct Court of Appeal for Eastern Africa in dealing with Section 155 of the Indian Evidence Act,1872 which was *pari materia* with section 163(1) of the Evidence Act.**

We have perused proceedings of the lower court. It is shown that PW1 and PW2 gave their evidence and were cross examined and re-examined and released. The prosecutor proceeded to call PW3 in the case who also testified fully and was released. It is after the testimony of PW3 that the prosecution made the following application and the court ruled thus:

**“Prosecutor: I pray to have PW1 and PW2 declared hostile witnesses. They have denied their own statements which they signed. The statements were read over to them and they had an opportunity to correct any mistakes.**

**Court: Noted. PW1 and PW2 declared hostile. They are recalled for XX by prosecutor.**

The two witnesses were thereafter recalled and cross examined by the prosecution. The appellants were not given an opportunity to cross examine them.

With due respect to the learned trial Magistrate the procedure used to declare the two witnesses hostile was not the correct procedure. As section 161 of the Evidence Act provides, the prosecutor in the trial court could have applied to declare his/her witness hostile, if during the examination in chief, the witness denies statement he made earlier, whether oral or written. In the instant case, if the prosecutor in the process of examining PW1 and 2 felt they had contradicted their earlier statements to the police. It is at that stage that the application to declare them hostile could have been made.

Once the prosecutor applied to declare his witness hostile he will cross examine the witness and put to them the statements they are supposed to have contradicted. At the same time, the witness(es) ought to have been given an opportunity to explain the apparent inconsistency as it may be that there is a simple explanation for it. If the witness offers no acceptable explanation, then the contradicted statement should be produced in evidence, if it was in written form. The witness will then be availed for cross examination by the adverse party.

The record of the lower court clearly shows that the procedure explained hereinabove was not followed. We also noted that no contradiction was demonstrated between the evidence of the witnesses and their statements to the police. We do not find anything that can lead to the conclusion the PW1 and PW2 were deserving to be declared hostile witnesses. They varied their statement to police which in our view was a mere variation as to details not the substance of their statements. We find that the credit of these two witnesses was not impeached. We do not agree with Mr. Kimathi that there was need to have other evidence in the circumstances.

The evidence of the Prosecution was that the appellants went into the complainant's work place and asked for "their money". The complainant informed them that their names were not in the list. That is when the two set upon him with knives and robbed him of Ksh.100,000/- and Usd1500/- translating to a total of 35,000/- the complainant and the man who went to his rescue, PW2 were injured in the attack.

Dated and delivered at Meru this 29<sup>th</sup> day of October, 2010

**Lesiit, J**

**Judge.**

**Kasango, M**

**Judge.**