REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL ON 224 AND 225 OF 2008
(From the original conviction and sentence in Criminal Case No, 1571 of 2007 of the Chief Magistrate's court at Mombasa)

MUTHAMI JOSEPH SWALEH SALIM JUMA
…….....…….APPELLANTS
VERSUS

REPUBLIC …….....
…….……..RESPONDENT

J U D G M E N T

The two Appellants herein were on the 8th August 2008 convicted of two counts of the offence of robbery with violence contrary to Section 296(2) of the Penal code by the Principal Magistrate at Mombasa in the Chief Magistrates' Criminal Case No. 1571 of 2007. They were then sentenced to death being the only applicable sentence in law at the time.

The particulars of the 1st count were that:-

- **MUTHEMI JOSEPH KILYUNGI ALIAS KAMALE AND SWLAEH SALIM JUMA** on the 24th day of April 2007 at about 3.15 a.m. at Toa Tugawe area of Kisauni location in Mombasa District within Coast Province, jointly with others not before court, while armed with dangerous weapons, namely, pangas and rungus, robbed MOHAMMED AHMED MWATSAHU of one T.V. make Nec, 14", two Buibui clothes and two Islamic Caps all valued at Kshs.22,600/- and at or immediately before or immediately after the time of such robbery used actual violence to the said MOHEMMED AHMED MWATSAHU.

The particulars of Count II were that:-

On 24th day of April, 2007 at about 3.15 a.m. at Toa Tugawe area in Kisauni location of Mombasa District within Coast Provinces, jointly
with others not before court, while armed with dangerous weapons namely pangas and rungus robbed **HARE JOHNSON RANDU** of one
Radio, Make Sharp, two mobile phones make Nokia 3310 and slim Bird, (sic) trousers, 10 shirts, 5 T-shirts and cash Kshs.8,386/- all
valued at Kshs.25,180/- and at or immediately before or immediately after the time of such robbery used actual violence to the said **HARE**

JOHNSON RANDU.

We do not think that it is not necessary to set out herein the particulars of Count III as the Appellant were not convicted of the said count and were acquitted of it. The appeal is only in respect of count 1 and II.

The prosecution called 5 (five) witnesses in connection with the said two counts.
The Appellants submitted written submissions at the hearing while the Respondent made oral submissions through, Mr. Onserio the State Counsel.
The first ground of appeal in both appeals is that of identification. With regard to Appellant MUTHAMI HOSEPH KILYUNGI ALIAS KAMALE, he was identified by P.W.1 the first complainant.
PW1 testified that on the night of 24th April 2007 at 3 a.m. he was at home sleeping. That about 3.15 a.m. he heard a big bang on the front door. He went to check on his bedroom door, and found it closed from outside. He then heard some footsteps and saw torch lights. He looked through the window and saw outside. He saw about 8 people standing and armed with pangas, rungus, metal bars, He said he saw them because these were security lights from outside his house and those of the adjacent house. He however did state the distance between his house and the security lights. About 50 minutes later he heard the door being smashed and three men came into his house. One stood in one of the rooms while three men entered his room. He said that they took his T.V. Set, make 'NEC', and "Islamic women veil". One of the robbers ordered him to give a mobile phone and cash. That one of them took two Islamic caps, his clothes and shoes. That the one at the door asked the other not to take shoes and clothes as they would be identified.
P.W. 1 said that he identified the robber who stood at the door. He said that he recognized him as he comes to his estate. That he was known as 'Kamale' in the Estate and he is also called 'Mathew'. That he used to see him for over one year. He reiterates that there was security light from the electricity just outside his house from the door to his house and he could see them before they entered.
P.W.1 did not state the lighting in his bedroom where he was and the other rooms in his house. He said that he had looked through the window and saw 8 men standing around with pangas, rungus and metal bars. But he had stated that thereafter there was an interval of 50 minutes before the door was smashed. He did not tell the court what was happening during the 50 minutes and whether he stood at the window looking outside throughout the period.
From the evidence, it is clear that:-
In P.W.1's evidence's he did not state that he recognized the 1st Appellant while he was outside among the 8 men. But then 50 minutes passed and finally only 3 men entered his bedroom. P.W.1 did testify that 1st appellant was among the three who were in his room. That he stood at the door. He relied on the light from the security lights outside his house. He did not refer to any lights in his bedroom where the men were.
The evidence of recognition at the scene in the said circumstances required corroboration. This is because the distance of the security lights was not given to the court. Secondly, in the absence of lighting in the bedroom, the P.w.1's evidence was not categorical. He had seen 1st Appellant as one among the 8 men he saw through the window. After a lapse of 50 minutes, it cannot be said with certainty that the 3 men who entered the bedroom were part of the 8 men he saw outside the window. Many things can happen in a period of 50 minutes – 1 hour.
P.W. 1 said that nobody came to his rescue and who could have seen the 1st Appellant. P.W. 1 did not identify 1st Appellant at any Identification parade as none was carried out on 1st Appellant.

The 1st Appellant was not found with any of the stolen goods and there is no evidence of how he was arrested.

In the judgment, the Honourable trial magistrate found that on 14.4.2007 P.W. 1 and another person recovered his neighbour's phone MFI -1 which was being charged by P.W. 2 at P.W. 4's premises. On 27.04.07 P.W 1 led the Community Police to where they made an arrest of 1st Appellant. There is a clear error on the part of the Trial Magistrate to state in his judgment that 1st Accused (who is 1st Appellant) was arrested in connection with his neighbours (P.W.2's) mobile phone.
The person who was arrested in connection with the mobile phone was the 2nd accused, now the 2nd Appellant, Swaleh Salim Juma. In fact the record shows that the 1st Appellant was arrested when P.W.1 led the Community Police to the 1st Appellant's and he purported that he had seen 1st Appellant in his house. As stated earlier the evidence is required to be corroborated. It was never corroborated. We find this evidence alone is unsafe to convict the 1st Appellant. He was not arrested at the scene and no stolen goods found on him. On 27.04.97, it is that P.W. 1 who led the Community Police to 1st Appellant based on what he says he saw. Question is why did the Formal Police not go to arrest the 1st Appellant immediately on the report being made. Why did P.W. 1 await until 27.04.2007 and only to use the members of the local Community Policing which is not part of the regular police and are constituted of

ordinary citizens who are not authorized to carry out Criminal investigations? Community Policing does not involve investigations or arrests after the incident in the circumstances of this case.

In fact it appears that P.W. 1 was obsessed with the 1st Appellant as he referred to him as 'Kamale"; 'Mathew' and "Karate". He did not explain how 1st Appellant had so many aliases and the relationships between the two of them. He said that he knew him for a period of about one year.

In view of the foregoing, we find that the 1st Appellant had not been properly identified in accordance with the law. In this case, no police officer testified. The police investigating officer was not called and neither any arresting Police officer. No police officer was called regarding any identification parade. In fact, even none of the members of the Community Policing group was called to testify.

We find that this was unusual and while it is not always necessary that the Investigating officer or the arresting officer testify to prove the matter in question, yet the role of these officers are crucial and their absence must be explained when they do not attend court to testify.

We find that the only reason why the 1st Appellant was charged was due to the statement of the P.W. 1 which is unreliable and unsafe without corroboration or other evidence to connect 1st Appellant with the two counts.

In respect of Count II, P.W.2 the second complainant did not know 1st Appellant and there is no evidence that he identified him at the scene, at the Police Station or even in the dock. There is no identification even in court while he was testifying. His evidence mainly dealt with the items be that were stolen from him as he did not recall or know the Accused. He testified that one of his stolen mobile phones were recovered. He identified the telephone when it was shown to him. He said that he learnt that his mobile was found with one Ndegwa, (P.W.3) and that it was traced to P.W.2. P.W.2 made no reference to the 1st Appellant.

On the basis of the foregoing, we find and hold that the evidence against 1st Appellant in connection with the two counts were not proven beyond any reasonable doubts. The alleged recognition was not based on irrefutable evidence and even credible. It was not substantiated and corroborated

The conviction of the 1st Appellant was therefore irregular and improper and cannot be sustained in law.

We, therefore, do hereby quash aside the conviction and set aside the sentence.

With regard to the2nd Appellant, P.W.1 did not recognize him at the scene as he claimed in respect of 1st Appellant. His statement in respect of identification of the 2nd Appellant was that on 13.05.2007, he was called to Nyali Police Station for an identification.

He said that he identified the 2nd Accused during the said parade.

We noted that P.W.1 did not state that he had recognized the 2nd Appellant at the scene. No police officer was called to testify about the identification parade at Nyali Police Station. No Identification Parade Report or form was produced. In fact, no Police officer whether arresting, investigating or carrying out the identification procedures at the parade testified.

We therefore find that there was no basis to find that P.w.1 had identified 2nd Appellant. How could the trial court make a finding on the identification-parade when the identification forms and the report were not produced in court? We hold that this violated the Judge's Rules and in fact there was no evidence that an identification parade was ever carried out in respect of the 2nd Appellant.

P.W. 2 who was the second complainant testified that he did not know the Accused persons. On this basis they did not even cross-examine him. There was no need to.

The 2nd Appellant was convicted on the basis of the evidence of P.W. 3 who said that on 26.04.2007, he met one Abdalla who told him that there was a phone on sale. That Abdulla led him to the 2nd Accused who had the phone. That the 2nd Accused sold him the phone at Kshs.400/-. Since the phone had low power he took it to be charged and when he returned at 8.15p.m. he found some people at the place where he left the phone to be charged who claimed that it had been stolen. He then took them to Abdalla who led them to the 2nd Accused.

We have already found that neither P.W.1 nor P.W. 2 from whom the phone was stolen had identified the 2nd Appellant. In the premises, we find that the trial's court's finding that the evidence of P.W.1 was corroborated by P.W. 3 was misguided and not based on the evidence. P.W.1 never saw or identified the 2nd Appellant and his evidence was wrongfully accepted by the trial court as explained above.

As a result, the evidence of P.W. 3 stands alone. The prosecution should therefore have called, the arresting officer or the Community Policing Unit to testify and explain their findings. The telephone was found on p.W.3 and not the 2nd Appellant. The statement of P.W. 3 was not enough as it required corroboration. The arresting officer and the investigating officer were not called. The arrest had been done by members of the Community Policing Group. None of them was called. No police officer was called to explain the basis for the 2nd Appellant being charged.

We find that the evidence of P.W.3 was insufficient. The "doctrine of recent possession" could not be applied here, since, the phone was not found in the possession of the 2nd Appellant.

Again the mobile phone "MFI – 1" was not proved to be the one which stated that belonged to P.W. 2 and which was stolen. In the charge sheet, the P.W.2 had 2 mobile phones stolen from him. One was said to be a Nokia 3310 and the other to be a "slim Bird". P.W. 2 however, testified that two Nokia phones were stolen from him. He identified one phone but did not give its serial number or any other marks.

P.W. 1 said that he was involved in the tracing of the phone and arrest of P.W. 3. He knew the phone and he referred to it as a "Bird Shun". In view of the said inconsistencies, it is not clear which telephone was indeed found on P.W.3. The alleged owner, P.W.3 did not even refer to it as a "Bird" Model. He said he lost 2 Nokia phones. There is no evidence who took away the phone from P.W.3 to the Police station, the chain of custody until it was identified in court and marked "MFI – 1".

After the 6th prosecution witness had testified, the prosecutor applied for adjournment on 30.7.2007 in order to call three remaining witnesses. He said that he had the investigating officer but he wanted to call him last.

The matter was adjourned from time to time until 12.05.2008 when another application was disallowed by the trial court on the same ground. The court refused to allow adjournment and the prosecution closed its case without calling the investigating officer and the other 2 witnesses.

This meant that MFI – 1" the alleged mobile phone belonging to the P.W. 2 was never formally produced and admitted in evidence as an Exhibit. It remained on an item marked for identification MFI.

In view of this it is clear that the none of the Appellants could be convicted on the basis of recovery and possession of the said MFI – 1". It was not admitted in evidence and not an exhibit.

On this ground apart from the others, we also find and hold that the conviction of the 2nd Appellant was unlawful, irregular and improper. There was no evidence the basis on which he could be convicted.

We therefore do hereby also quash his conviction and set aside the sentence.

As a result, both the Appeals now consolidated are successful and the Appellants are hereby acquitted. They shall be released forthwith and set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF DECEMBER 2010.

MOHAMMED IBRAHIM
J U D G E

MAUREEN ODERO
J U D G E