REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HCCR APP NO 88 OF 2006

(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 995 OF 2005 SENTENCE OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILIFI BEFORE C. OBULUTSA –SRM)

1. JUMA MORRIS NGOLU

2. RAJAB alias KAMAU KATANA HINZANO ….APPELLANTS

VERSUS

REPUBLIC ……..……RESPONDENT

J U D G E M E N T

Juma Morris Ngolo (1st appellant) and Rajab alias Kamau Katana Hinzano (2nd appellant) were both convicted on a charge of robbery contrary to section 296 (2) Penal Code and sentenced to death.

The particulars of the charge are that on 16th day of October 2005 at 9.00pm at Mwapa in Kilifi District of the Coast Province, jointly while armed with dangerous weapons namely knives, robbed Norman Njeru Njire of his motor vehicle taxi registration no. KAS 961P Toyota Station Wagon, green in colour, valued at Ksh 550,000/-, a mobile phone make motorolla talkabout serial No. – 449269072991102 valued at Ksh. 2800/- cash ksh. 2800/- and personal documents, all totaling to the value of Ksh. 600,000/- and at or immediately before or immediately after the time of such robbery, wounded the said Norman Njeru Nyire.

The 2nd appellant had faced an alternative charge of handling stolen property contrary to section 322(2) Penal Code particulars being that on 20th day of October 2005 at Barani area of Mtwapa in Kilifi District of the Coast Province, otherwise than in the cause of stealing, dishonestly received or retained one motorolla Mobile phone, a car radio cassette make Toyota SN 17254 and two car speakers make Pioneer knowing or having reasons to believe them to be stolen goods.

The appellants denied both charges – the evidence of Norman Njure Njue (PW1)who resides in Mtwapa and operates a taxi is that on 16-10-05 he was at Mtwapa Kenol with his vehicle, when two boys approached him saying they wanted to go to Coral High School. Upon reaching Caltex Station, he asked them for money but they said they would pay later in the course of the journey. On reaching the destination, one begun to argue, and PW1 turned the vehicle around. One of then pointed something at him and pulled out the ignition keys. As PW1 got out to hold him, he was cut on the hand. The other held PW1 and PW1 was stabbed with the knife, his hands and legs were tied and he was blindfolded. They put him in the boot of the motor vehicle and drove to a place called Barani – this was at 9.00pm. They left PW1 there and he managed to untie himself then walked up to a mosque from where he got assistance to report to police about the incident.

He was treated for his injuries and the P3 form in respect of his injuries filled by Dr. Kimanga who testified as PW1 and who produced the P3 form.

On cross-examination explained that he had two passengers, one sat behind and the other sat infront – he did not get to see the one behind but identified the other from the light. He did not know them before and on cross-examination by the 2nd appellant he stated.

"***You alighted and pretended to be giving me the money and then pointed a knife at me while standing at the door. The same shirt you have now is the same one you had that night…you are the one who was talking with me. At the scene I could not be sure of who attacked me, I was only told at the station that it is the two of you who were with the vehicle."***

PW3, Morris Ngolo, a farmer in Jibana was at home on 16-9-05 at about 10.30pm when his son Juma Morris (1st apeplalnt) arrived saying he was in a hurry. He had come with a friend who had a vehicle and they had run out of fuel. He then left that very night with one Ali. PW1 saw the motor vehicle they had, at the police station.

Cpl. Mwakio (PW4) of Kaloleni police station testified that on 17-10-05, a report was made on phone by the chief of Jibana one Mwadewa, that a suspect Juma Morris was wanted for stealing a taxi. The said Juma had been detained at Tsagwa area. PW3 proceeded there with police officers and found 1st appellant under guard.

1st appellant led them to his house where the police found blood stained clothes. 1st appellant's father told police that he had gone there with the blood stained clothes, accompanied by another person and they had a motor vehicle. The clothes were produced in court. Meanwhile Mtwapa police station had received a report of carjacking.

Cpl. Sulubu Kalume (PW5) of Mtwapa testified that on 17-10-05, he found a report involving robbery of a taxi and the driver injured. He commenced investigations and got information that the motor vehicle was at Kaloleni Police Station. The number plates had been removed and the part on the side was visible. A day later they got report that a suspect was arrested at Kaloleni, so the first appellant was handed over to them and photographs of the motor vehicle were taken. They received a tip off that the second suspect was hiding at Barani and police officers went there and found him sleeping in bloods stained clothes. Upon searching him they recovered the car keys from him. From a cousin, PW5 got a bag which 2nd appellant had taken there to be kept – it contained a car radio, mobile phone which belonged to the complainant. Blood samples were taken from the two suspects and analysed and an exhibit memo and report were produced as exhibit.

The first appellant gave sworn testimony wherein he stated that on 16-1-05, he was at home watching TV when the door was forced open by police officers. He was arrested, the house was searched. They claimed he had stolen a vehicle which was at the police station and that some blood stained clothes were his.

The 2nd appellant gave unsworn evidence in which he stated that 1st appellant is not known to him and that police were led to his house by one Kazungu whom he had differed with – so he was arrested and charged.

The learned trial magistrate pointed out in his judgment that it was for the court to determine whether the appellants were the ones who took the motor vehicle from Norman. He observed that the appellants were arrested by police officers separately.

The learned trial magistrate stated thus:

"***According to Norman he remembers Accused 2 (now 2nd appellant0 as one of the two who robbed him as he is the one kept asking for money"***

The learned trial magistrate also pointed out:

"***It is not clear from the evidence how or where the vehicle was recovered. The other parts taken, speakers and radio were recovered from a cousin to accused 2 not accused 1."***

The learned trial magistrate also took into consideration the evidence of PW3 who said 1st appellant went to his home with the car and at the station he identified the same car and concluded that:

"***The 1st accused was seen with the car that night and 2nd accused was arrested the day subsequent. They have been positively linked to the theft of the car and in the process they used violence on Norman who was injured as confirmed by the P3 form..."***

It is against these findings that the appellants appeal against both conviction and sentence based on the amended grounds of appeal that:

- The learned trial magistrate erred by convicting appellants without properly finding that there is no identification evidence to convict appellant with the present case.

- That section 197(1) (a) Criminal Procedure Code was contravened.

- That the prosecution case was not proved and the trial magistrate relied on the evidence of PW3 which had doubts

- That the learned trial magistrate failed to consider that some of the essential prosecution witnesses were not summoned

- The learned trial magistrate failed to establish that the source of his arrest had not been established to have any connection with the instant case.

- The learned trial magistrate disregarded the defence raised.

The 2nd appellant's amended grounds of appeal included that the learned trial magistrate erred in failing to consider that the issue of visual identification was done under unfavourable circumstances.

- The learned trial magistrate erred by not considering that the recovery of the items which were alleged to be the complainant's property were not in his possession.

- The learned trial magistrate failed to consider that the alleged key was not in his possession and the key was never tested to confirm that it belonged to the said car.

The appeals were opposed both on conviction and sentence.

The major issue is on identification 1st appellant submitted in his written submission that complainant did not identify him as being among his attackers and that in fact PW2 was only told at the police station that the two appellant's had been found in the motor vehicle. 2nd appellant pointed out in his submission that it was pW1's evidence that at the scene he could not see who attacked him but was only told at the station about the people found inside the motor vehicle.

Mr. Ogoti's response is that there is evidence of people who saw 1st appellant with the motor vehicle (that is his own father PW3), the recovery of the car keys from 2nd appellant and the scientific of evidence of blood grouping linked the appellants to the offence and proved the case beyond reasonable doubt.

On positive identification, it was his submission that the evidence placed the appellants squarely at the scene of the incident and by that actions after the offence, they were involved in the movement of the motor vehicle and even went to the home of PW3 and that 2nd appellant was found with the car keys.

There is a lot of missing information in this case- it appears to be made up of filling in the blanks and making presumptions.

For instance who found 1st appellant with the motor vehicle? There is no evidence on that but somehow first appellant was placed under arrest by the area chief and handed over to police – the circumstances of his arrest and recovery of the motor vehicle are not disclosed. The only evidence that 1st appellant was seen with the motor vehicle is from PW3, his father who said that he saw the motor vehicle appellant had that night at the police station and he saw 2nd appellant in that motor vehicle. He was not asked to identify the motor vehicle in court nor did he never give the registration numbers, so what proof was there that he was talking about the same motor vehicle?

Then there are the keys which were recovered from 2nd appellant – they were not produced in court as exhibit, but even of greater significance is that they were never tested and demonstrated to the court to show that they could be used to operate the said motor vehicle – which somehow found its way to the police station. Even Pw 1 did not identify the recovered keys as the ones snatched from him.

Then there is the issue of identification – PW2's evidence is a mix-up – at one point on cross examination he says he could not be sure of those who attacked him, then again in his evidence in chief, he said he was SHOWN the suspects found with the vehicle (why didn't the police carry out an identification parade to allow PW2 the opportunity to identify he persons arrested and confirm that they were his attackers? Certainly this "showing" was prejudicial to the appellants. Then the evidence is that the incident occurred at night – as PW2 says it was 9.00pm by the time they got to his passengers' destination, so just how was he able to see and identify 2nd appellant whom he says on cross examination alighted and pretended to be giving him money, PW2 says:

"***I could see him from the car light" –*** were these the head lights, parking lights, were they dim, full? Or what was the position of 2nd appellant in relation to the said car light?

Certainly opportunity for identification was not sufficiently or adequately established.

There are the blood stained clothes which were taken to the government analyst and which showed that the 2nd appellant's clothes had human blood stains of type B which <u>could</u> have emanated from the complainant. Would that prove robbery? Probably or probably not. We are alive to the fact that criminal standard of proof is not based on possibilities or probabilities and guesses and filling in missing links through assumption – because unfortunately that is what happened in this case – either the investigations were poorly carried out <u>or</u> the police deliberately withheld certain vital evidence by not calling some witnesses to support the prosecution case.

The upshot is that the conviction was not safe and is quashed.

The sentence is set aside. Appellants shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 10th day of March 2009 at Malindi.

L Njagi

<u>JUDGE</u>

H A Omondi

<u>JUDGE</u>