



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 246 & 254 of 2006**

**(1) DOMINIC ALI RAJAB..... APPELLANT**

**(2) ALI MAHMOUD CHAMBO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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**JUDGEMENT**

The two Appellants namely Dominic Ali Rajab (hereinafter referred to as Appellant No. 1 and Ali Mahmoud Chambo (hereinafter referred to as Appellant No. 2) both filed their appeals against their conviction and subsequent sentence before the learned Senior Resident Magistrate Kwale. The two Appellants were charged before Kwale court on 5<sup>th</sup> September 2005 with the offence of Robbery contrary to Section 296(2) Penal Code. The particulars of their charge were as follows:-

“ 1. DOMINIC ALI RAJAB

2. ALI MAHMOOD CHAMBO. On the 30<sup>th</sup> day of August 2005 at about 7.00 p.m. at Dorald Village Diani location in Kwale District within the Coast Province jointly with another before court robbed Floice Namwaba of Kshs.5,070/- Post bank card, 2 mobile phones make Nokia 3310, all valued at Kshs.118,300/- and at or immediately before or immediately after the robbery wounded the said Floice Namwaba”.

Being the court of first appeal we are minded of our duty to re-evaluate the evidence adduced in the lower court but we are mindful also of our duty to make allowance for the fact that we neither saw nor heard the witnesses. In the case of Ajode –vs- R. Criminal Appeal 87 of 2004 it was held that –

*“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that”.*

The evidence before the subordinate court was that on 30<sup>th</sup> August 2005 the complainant was walking home from work at about 7.00 p.m. two men accosted her and demanded money. She gave the men all she had in her possession. The men took her hand-bag containing Kshs.5,070/-, her jewellery, two mobile phones and bank card. The complainant reported the matter to police. She told the court that she knew one of the men who robbed her as the 1<sup>st</sup> accused. On 31<sup>st</sup> August 2005 she saw the 1<sup>st</sup> accused. She called police who arrested him. The 2<sup>nd</sup> accused was also later arrested by police. Both men were

arraigned in court and charged. The prosecution called a total of five witnesses in support of their case. The two Appellants who were both placed on their defence also gave their statements in defence. Thereafter the learned trial magistrate wrote his judgement in which he convicted both Appellants of Robbery contrary to Section 296(2) Penal Code and imposed the mandatory sentence of death.

The 1<sup>st</sup> Appellant who appeared in person relied wholly on his written submissions filed in court. Mr. Khatib learned counsel appeared for the 2<sup>nd</sup> Appellant. Mr. Ondari who appeared for the State conceded this appeal and gave reasons in his oral submissions before us.

We have perused the record from the lower court and we note that there are certain glaring contradictions and inconsistencies in the prosecution case. A charge of Robbery with Violence contrary to Section 296(2) has attached to it a condition of actual violence or a threat of violence against the victim. The complainant in her evidence did mention that the robbers had a knife which they used to threaten her. However the complainant made no mention of having been injured in the attack nor did she mention ever having sought medical attention. It is therefore surprising to hear PW4 Chrispus Munyapara a Clinical Officer state that the complainant was examined and found to have injuries on her eye and neck. How and when did the complainant sustain these injuries of which she herself was seemingly unaware. PW4 the Clinical Officer produced a P3 form in respect of the complainant indicating that she suffered harm inflicted by both blunt and sharp objects. If the complainant had truly been injured then this evidence would and ought to have come from her and not from PW4 who did not witness the incident. At page 3 line 4 of his judgement the trial magistrate states that –

*“The complainants injuries were confirmed by the P3 form that was produced in court as an exhibit by PW4”.*

With respect we find that the learned trial magistrate was mistaken in making this assertion. How could PW4 confirm that which the complainant had not even alleged. The inconsistency between the complainant and PW4 in regard to any injuries she may have sustains cannot just be glossed over in this manner.

Of equal significance is the question of the recovery of certain of the complainants stolen items on the two Appellants. In her evidence at page 7 line 1 the complainant asserts that:-

*“The 1<sup>st</sup> accused was arrested with my two silver rings. ... the 2<sup>nd</sup> accused was found wearing my wristwatch. I was able to identify the same as mine MFI2. The accused also took us to a certain house where we recovered my chain from a certain lady”.*

In his judgement the learned trial magistrate laid great emphasis on the recovery of these items as a basis upon which he was able to connect the two Appellants to the crime. However we find the complainants identification of all these items wanting to say the least. It is not enough for the complainant to merely assert that the chain, watch and rings belonged to her. She failed to properly identify those items as belonging to her and nobody else. The complainant has not even told the court what make her watch was – there are several different types of watches in the market. She has likewise failed to adequately describe her rings and chains. What type were they? What colour? Did any have a specific identifying mark on it. With regard to the chain it was actually recovered on a lady who told the police that one Bozani had sold it to her. That lady was PW2 Miriam Ali. She did not implicate either Appellant at all. She talked of a certain Bozani who was not called as a witness. This leaves a missing link in the prosecution evidence. As it is there is nothing to link this chain to either of the Appellants. Furthermore as Mr. Khatib counsel pointed out on behalf of 2<sup>nd</sup> Appellant whilst the complainant claims the wristwatch as her property the 2<sup>nd</sup> Appellant lays claim to the said watch saying that he purchased it from one Hamisi for Kshs.600/-. To this the learned magistrates conclusion is as stated on page 4 line 27 of the record –

*“The 2<sup>nd</sup> accused stated that he bought the wristwatch from a certain boy. He ought to have questioned the boy the source of the watch and where he got it. I find the 2<sup>nd</sup> accused explanation unreasonable”.*

Again with respect we must disagree. By making such a finding the learned trial magistrate has erred in law. The 2<sup>nd</sup> accused had no obligation to enquire from the seller if the watch was stolen. More importantly the law places the onus at all times on the prosecution to prove its case beyond reasonable doubt. At no time does this onus shift to the accused to prove his innocence. The defence raised by the 2<sup>nd</sup> accused placed a valid doubt on whether or not the watch (which the complainant failed to properly identify) belonged to her or to himself. Instead of addressing and probably eliminating this doubt the trial magistrate merely dismisses the defence as out of hand. This in our view amounts to a serious error on the part of the trial court. At no time did the court bother to determine whose watch it actually was.

Thirdly we find that the question of the arrest of the two Appellants is also riddled with contradictions. Whereas the complainant stated that she spotted the 1<sup>st</sup> accused seated near a shop and called police to arrest him, this evidence is contradicted by PW3 PC. Mark Otieno the arresting officer at page 11 line 28 of the record when he states that:-

*“On arrival at the scene we failed to spot the robbers. We later went to their house but they could not be found. We duly laid an ambush near the accused house. After some minutes the accused appeared. We accosted and arrested the two accused”.*

Thus whilst the 1<sup>st</sup> complainant talks of the arrest of 1<sup>st</sup> accused outside a shop. PW3 the arresting officer says both accused were arrested after an ambush was laid at their house. Which is the correct version. Once again the trial magistrate completely failed to address this major contradiction in his judgement.

Having re-evaluated the evidence we find that the prosecution case was riddled with inconsistencies and anomalies. These must resolved in favour of the Appellants. Their conviction cannot stand. As such we allow this present appeal and hereby quash the convictions against both Appellants. We further set aside the sentences imposed on the Appellants. Both Appellants to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and delivered at Mombasa this 29<sup>th</sup> day of July 2009.

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**F. AZANGALALA**

**JUDGE**

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**M. ODERO**

**JUDGE**

Read in open court in the presence of:-

Mr. Monda for State

Both Appellants in person

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**M. ODERO**

**JUDGE**

**29.7.2009**