



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 172, 175, 176, 177 & 178 of 2004**

**JUMANNE MOHAMED .....1<sup>ST</sup> APPELLANT**

**SALIM MWALIMU HAMISI.....2<sup>ND</sup> APPELLANT**

**OMAR HUSSEIN MASEMA .....3<sup>RD</sup> APPELLANT**

**HAMISI MWALIMU HAMISI.....4<sup>TH</sup> APPELLANT**

**LUMA ABDALLA SALIM .....5<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 747 of 2003 of the  
Resident Magistrate's Court at Kwale)*

**J U D G M E N T**

Jumanne Mohamed Hassan, Salim Mwalimu Hamisi, Omar Hussein Masema, Hamisi Mwalimu Hamisi and Juma Abdalla Salim hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants respectively with two others namely: Juma Mwalimu Mwamgute and Lucas Matheka Nzomo were tried for two counts of robbery with violence contrary to Section 296(2) of the Penal Code. They were also faced alternative counts of handling stolen property contrary to Section 322(2) of the Penal Code. The appellants herein were convicted and sentence to suffer death for the offence of robbery with violence. The remaining two i.e. Juma Mwalimu Mwamgute and Lucas Matheka Nzomo were acquitted. Being aggrieved, each of the appellants filed an appeal which appeals were consolidated by an order of this court issued on 17<sup>th</sup> October 2006. The particulars of the offence in count one (1) to the effect that on the 16<sup>th</sup> day of April 2003 at about 2.00 a.m. at Denyenye village Ngombeni location in Kwale District within Coast Province jointly with others not before court, being armed with offensive weapons to wit pangas, jembes, iron bars, bows and arrows robbed Juma Nuru Tella of two television sets (Sanyo coloured and great wall black and white), video machine (L.G.), sewing machine make butterfly, radio cassettes, solar battery, small radio (Philips) 3 wall clocks, bags, 3 pairs of men shoes, a calculator (cebar), seven window curtains, ten video cassettes, a golden chain, personal documents, assorted clothes and cash Kshs.10,000/- all valued at Ksh.250,000/- and at or immediately before or immediately after the time of the said robbery threatened to use actual violence to the said Juma Nuru Tella. The appellants are also alleged in count 2 while armed with the same weapons as in count 1 to have robbed Mwanamweha Ali Sami of a black handbag, a pair of ladies open shoes, one buibui, two pairs of lessons and four dresses all valued at Kshs.6,500/- and at or immediately before or immediately after the time of the said robbery

threatened to use actual violence to the said Mwanamweha Ali Sami.

On appeal, the appellant put forward a total of 8 grounds in their petition. Each of the appellant was granted leave to rely on written submissions. We think it is appropriate at this stage to set out in brief the case before the trial court before dealing with the merits of the appeal.

The prosecution was to the effect that Juma Nuri Tella (P.W.1), the complainant herein, was asleep when at 2.00 a.m. his sleep was interrupted by screams from the neighbourhood. He heard people say that there were thieves within the area and that he also heard the robbers demand to be given TVs and videos. P.W.1 and his wife (P.W.2) peeped through the window upon which he claimed he saw people outside his house armed with assorted weapons. He screamed for help. P.W.1 said he overheard them say that they had gone to the wrong house and that they were his visitors. P.W.1 placed a sofa on the door but the door was hit with a huge stone which broke it into pieces. He rushed to hide in his bedroom from where he saw the robbers carry his T.V. after warning him not to resist. P.W.1 said he recognized the voice of Salim Mwalimu Hamisi, the 2<sup>nd</sup> appellant herein. P.W.1 claimed that the 2<sup>nd</sup> appellant was his cousin. He said he overheard the 2<sup>nd</sup> appellant tell the other robbers to take the two TVs. At 2.30 a.m. the robbers left upon which the complainant discovered that the items enumerated in count 1 were missing. P.W. 1 said that the robbers left leaving behind a jembe and a T-shirt which he claimed belonged to the 2<sup>nd</sup> appellant.

On her part, Mwanamweha Salim (P.W.3) said that she was asleep when she was woken up at 2.00 p.m. by screams. She said she found four people standing in front of her. They demanded to be given money. When she told them she did not have money P.W.3 claimed the robbers took away her clothes which she had placed on her sofa set. They also stole the items listed in count II. P.W.3 said she engaged the robbers but was warned of dire consequences. She then retreated to her bedroom where she screamed. P.W.3 said she and another girl peeped through the window whereupon they saw the robbers heading to P.W.1's house. They saw them break P.W.1's door and take away goods. P.W.3 said she did not recognize the robbers. The incident was reported to the police who then commenced investigations. The police using sniffer dogs managed to reach the home of Hamisi Mwalimu Hamisi (4<sup>th</sup> appellant) and Salim Mwalimu (2<sup>nd</sup> Appellant). It is also said the sniffer dogs also led the police to the house of Juma Mwalimu (5<sup>th</sup> Appellant) where he was arrested. At about 6.30 a.m., the 1<sup>st</sup> complainant (P.W.1) led the police to the house of Omar Mwinyi Masesa (3<sup>rd</sup> Appellant) where they recovered P.W.1's red bag, calculator and P.W.3's sandals and handbag. The police and P.W.1 visited the houses of Juma Abdalla (5<sup>th</sup> Appellant) where they recovered lessos and a co-operative Card belonging to the wife of P.W.1. The 5<sup>th</sup> appellant was then arrested. The police later recovered from Jumanne Mohamed Hassan (1<sup>st</sup> appellant) 2 pairs of lessos and a dress, the property of P.W.1.

The 1<sup>st</sup> appellant, Jumanne Mohamed Hassan, denied committing the offence in his defence. He accused the police of having gone to his place to collect his children and wife's clothes. When they failed to trace a gun they were looking for.

On his part the 2<sup>nd</sup> appellant, Salim Mwalimu Hamisi, gave an unsworn statement denying having committed the offence.

The 3<sup>rd</sup> Appellant Omar Hussein Masema said he had been away from home for sometime and when he arrived home he found his wife had left his house leaving the keys to a neighbour. While he was waiting for those keys the police came arrested him before breaking into that house. He said the police took his wife's property from that house. He too denied committing the offence.

Hamisi Mwalimu Hamisi the 4<sup>th</sup> appellant herein, said the police arrested him for no apparent reasons at all.

Juma Abdalla Salim, the 5<sup>th</sup> Appellant, also denied having committed the offence. He admitted that the police visited his house where they recovered some lessos from some boxes from another woman's

house and not his. He claimed he was not living in that house where the lessons were recovered.

After receiving the evidence, the learned trial magistrate found that the appellants were placed at the scene of crime and that they were the robbers and no one else.

On appeal, all the appellants dwelt on the issue of identification in their written submissions. It is their submission that the conditions prevailing at the time of crime did not augur well for a favourable identification. Mr. Onserio learned State Counsel was of the view that the 1<sup>st</sup> complainant identified the 4<sup>th</sup> appellant through his voice. The learned state counsel also urged this court to apply the doctrine of recent possession.

We have re-evaluated the evidence tendered before the trial court. We note that the incident took place at night. The complainants were asleep when they were rudely interrupted by people who went to break into their homes. The 2<sup>nd</sup> complainant Mwanamweha Sami (P.W.3) admits she did not recognize the people who broke into her home. The 1<sup>st</sup> complainant claims he recognized the voice of one of them (4<sup>th</sup> appellant). It is also claimed that there was bright moonlight which enable P.W.5 to see the robbers. The second appellant, Salim Mwalimu Hamisi is said to have been recognized by his voice by P.W.1, P.W.3, P.W.4 and P.W.5. He was a close relative to them. His T-shirt was recovered from the scene. We are satisfied that Salim Mwalimu Hamisi is placed at the scene of crime. The evidence which made the trial magistrate place Hamisi Mwalimu Hamisi (4<sup>th</sup> appellant) at the scene is the Jembe which was found at the scene of crime. We are unable to agree with that line of thinking. It is possible the jembe was taken by somebody else to the scene of crime. We shall give the benefit of doubt in favour of the 4<sup>th</sup> appellant. The 3<sup>rd</sup> appellant is placed at the scene of crime because some assorted items belonging to P.W.1 & P.W.2 were recovered from his house. It is the submission of the 3<sup>rd</sup> appellant that these items belonged to his wife. The 3<sup>rd</sup> appellant's defence was rejected. We have re-assessed that defence and we think the learned principal magistrate unjustly rejected the 3<sup>rd</sup> appellant's defence. In fact we are satisfied that the 3<sup>rd</sup> appellant's defence cast some doubt on the prosecution's case. The prosecution should have tendered evidence to disprove the fact that it is possible that the clothes belonged to the 3<sup>rd</sup> appellant's wife. We also give the benefit of doubt to the 3<sup>rd</sup> appellant.

We are satisfied that the evidence on record places Juma Abdalla (5<sup>th</sup> appellant) at the scene of crime. He was found with the lessos and co-operative card belonging to P.W.1 and his wife P.W.2. hence the doctrine of recent possession applies here. This doctrine also applies to the 1<sup>st</sup> appellant. He was found with assorted clothes stolen from P.W.1's house.

In the end we are satisfied that the appeals of Omar Hussein Masema (3<sup>rd</sup> Appellant) and Hamisi Mwalimu Hamisi (4<sup>th</sup> Appellant) should be allowed. The evidence tendered place Jumanne Mohamed Hassan (1<sup>st</sup> Appellant), Salim Mwalim Hamisi (2<sup>nd</sup> Appellant) and Juma Abdalla Salim (5<sup>th</sup> Appellant) at the scene of crime. However the evidence on record did not establish the offence of robbery with violence. We think the offence of burglary and theft under S.304(2) of the penal code has been proved instead.

In the final analysis we allow the appeals of Omar Hussein Masema and Hamisi Mwalimu Hamisi. Their convictions are quashed and sentences set aside. They should be set free forthwith unless lawfully held.

We however quash the conviction and set aside the sentences against Jumanne Mohamed Hassan, Salimu Mwalimu Hamisi and Juma Abdalla Salim and substitute the same with a conviction for the offence of burglary and theft contrary to Section 304(2) of the Penal Code. Each of the appellants is hereby sentenced to serve 12 months imprisonment each for burglary and theft. The sentences to run concurrently.

**Dated and delivered at Mombasa this ...7th.... Day of ...March.....2008.**

**J.K. SERGON**

**J U D G E**

**D.K. MARAGA**

**J U D G E**