



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 115 & 119 of 2004**

**CHARLES OMONDI OTIENO .....1<sup>ST</sup> APPELLANT**

**ALI JUMA MOHAMED ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From Original conviction and sentence in Criminal Case No. 1220 of 2003 of the Chief Magistrate's Chambers Court at Mombasa).**

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

Charles Omondi Otieno alias Makakayu alias Mniga and Ali Juma Mohamed alias babulee alias Murage being the first and 2<sup>nd</sup> appellants herein, were convicted and sentenced to suffer death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. It is alleged that on the 27<sup>th</sup> day of April 2003 at about 12.22 p.m. along Bandari Road within Nyali Estate, Mombasa District within Coast Province, jointly armed with a dangerous weapon namely a knife robbed Caroline Angir of her mobile phone make Nokia 3310 Serial No. 3501048044132609 fixed with a Safaricom line No. 0722655398 all valued at Kshs.10,000/-. Each of the appellants being aggrieved preferred an appeal which appeals were consolidated by an order of this court.

We think it is appropriate at this stage to set out the case that was before the trial court before considering the merits of the appeal.

The complainant, Caroline Angir (P.W.1) on the 27<sup>th</sup> day of April 2003 at 12.22 p.m. was walking along Bandari Road when she was confronted by two people (Appellants). One stood in front of her brandishing a knife while the second stood behind her. The duo ordered her to surrender whatever she had. They robbed her of her Nokia mobile phone before walking away. P.W.1 screamed thus attracting the attention of K.K. Security guards who gave a chase. The 2<sup>nd</sup> appellant was arrested not far from the scene while the 1<sup>st</sup> appellant was arrested inside a private compound where he had jumped into while fleeing. The appellants were taken to Nyali Police Station where they were re-arrested. A knife was recovered from the scene where the 2<sup>nd</sup> appellant was arrested. The complainant's cell phone was recovered from the pockets of the 1<sup>st</sup> appellant. The guards i.e P.W.2, P.W.3 AND P.W.4 who arrested the appellants testified and corroborated the evidence of P.W.1.

The appellants denied the charge in their testimonies in support of their defence. The 1<sup>st</sup> appellant claimed that he was attacked by three people while he was on his way back home and that he later found himself aboard K.K. Guards' van. He said he later learnt that a lady had lodged a complaint against him to the effect that he was a suspect and that is why he landed in Nyali Police station.

The 2<sup>nd</sup> appellant on his part said that he was arrested by K.K. Guards at 9.00 a.m. while he was

walking along Bandari Road towards the beach.

The learned Senior Resident Magistrate considered the evidence from both the prosecution and the defence. He found that the evidence tendered placed the accused persons at the scene of crime. We have also re-evaluated the evidence and we have come to the same conclusion that the evidence tendered by the prosecution placed the appellants at the scene of crime. The appellants robbed the complainant and fled the scene. K.K. Guards i.e. P.W.2, P.W.3 and P.W. 4 managed to chase and arrest the appellants before disappearing from the complainant's sight. The 1<sup>st</sup> appellant was unable to explain how he came to be in possession of the mobile phone of the complainant. The learned Senior Resident Magistrate came to the correct conclusion that the doctrine of recent possession applied to the 1<sup>st</sup> appellant. There was no break from the point of chase to the point of arrest.

On appeal, the appellants argued one joint ground to the effect that the charge in which they were convicted for was fatally defective. It is the argument of the appellants that the charge as framed did not state the offence set out under Section 296(2) of the Penal Code. It is said that the charge did not contain the assertion that there was threatened or actual violence. Mr. Ondari, the learned Assistant Director of Public Prosecutions did not address us in response to this issue. We are convinced by the appellants submissions that charge as framed is defective. The same does not indicate that the appellant threatened to use violence. It does not also state whether the appellants used actual violence. This ingredient is material in respect of an offence under Section 296(2) of the Penal Code. The defect obviously prejudiced the appellants' case. On this ground alone we allow the appeal. Consequently the convictions quashed and the sentences set aside. The appellants are hereby set free unless lawfully held.

**Dated and delivered at Mombasa this ...6th.... Day of ...March..... 2008.**

**J.K. SERGON**

**J U D G E**

**D.K. MARAGA**

**J U D G E**