

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 152, 153 AND 154 OF 2005

(From original conviction and sentence of the SRMCC No. 2711 of 2004 of the Senior Resident Magistrate Hon. J. Kwena at the Mombasa Court)

1. RAPHAEL MWAZIGE NDAVIRO

2.OMAR RASHID MOHAMED

3. ALI ATHUMAN ALI.....APPELLANTS

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

Raphael Mwazige Ndaviro, Ali Athuman Ali and Omar Rashid Mohamed being the appellants herein were tried and convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Being dissatisfied, they each filed an appeal which appeals were later consolidated. The appellants each put forward eight grounds of appeal in their petitions of appeal. They are basically attacking the evidence of their identification and the quality of evidence which the learned trial magistrate based her conviction.

We wish to start by setting out in brief the case that was before the subordinate court. The complainant Simon Hunja Mwangi (P.W.1), had gone to Changamwe to participate in a workshop of training the employer's clients on Micro Enterprises Programme on 8th September 2004. At the end of the training the complainant boarded a matatu registration No. KAQ 612 T at Magongo headed for Mombasa Island. On the way three people stopped the motor vehicle posing as passengers. One sat behind the complainant while the others sat at the back of the matatu. At Kibarani, the matatu stopped to enable people to alight. As they alighted one grabbed the complainant's bag. The complainant held the man who snatched his bag. One of them removed a panga and threatened to cut the complainant. The other removed a wooden plank which he used to hit the complainant on the ribs. P.W.1 named Raphael Mwazige Ndaviro as the person who grabbed his bag and Ali Athman Ali as the one who removed a panga to cut him. P.W. 1 said the incident took place at 1.00 p.m. The complainant fell down as the trio fled across the road. P.W.1 tried to follow them but stopped when he was threatened with dire consequences if he continued to follow them. It is said the matatu was stationery as the passengers watched in disbelief. He went back to the matatu which took him to the nearby roadblock where he informed the police. They went back with the police to pursue the attackers. When they reached Kibarani they chased the robbers whom they could see running into Kibarani slums. It is said members of the public chased and arrested the first two suspects. The police rearrested them. The third suspect, Omar Rashid Mohamed is said to have been flashed out by use of tear gas later in the day. The bag was collected just a few metres from where the suspects were arrested. The complainant stated in his testimony that he managed to identify the appellants by their attire and physical appearances.

The appellants each testified by giving an unsworn statement in their defences. The 1st appellant, Raphael Mwazige Ndaviro said he was arrested by the police at Tudor area when he was unable to explain to the police where he came from. The second appellant, Ali Athuman said he was arrested by

the police while he was walking back home. He said at the time of his arrest the police were carrying with them a bag. The third appellant, Omar Rashid Mohamed claimed in his defence that he was arrested by the police for no apparent reason.

We have already stated that the appellants raised two main grounds of appeal. One is in respect of identification. It is the submission of the appellants that there was no positive identification against them. Mr. Monda, learned state counsel is of the view that the evidence tendered proved that the circumstances prevailing at the time supported positive identification of the appellants which was free from error. We have considered the written submissions filed by the appellants plus the oral submissions of the learned State Counsel. We have also re-evaluated the evidence tendered before the court below. It is not denied that the offence took place in broad daylight. It is the evidence of the complainant that the three appellants robbed in full view of the passengers who were on board of matatu registration No. KAQ 612T. The matatu drove to the nearby road block and came with the police who came to give a chase. It is said members of the public arrested two of the appellants while the third appellant was flashed out of the bush using tear gas. What is curious, is that the police who arrested the appellants did not testify. None of the passengers in matatu registration No. KAQ 612T was called upon to testify. The above categories of witnesses are very crucial in that they would be in a position to confirm the description of the appellants. The evidence and the judgment reveal that the appellants were convicted on evidence of a single identifying witness. We have taken note of the fact that there was a break from the point of the said robbery to the point of arrest. The complainant had to go to the nearby road block to get police assistance. The members of the public who arrested the appellants were not called upon to testify. The recorded evidence indicates that the complainant did not know the appellants. We have come to the conclusion that the identification by the complainant was not free from error. The possibility of a mistaken identity is likely to be the case in this appeal. We are convinced that it was not safe to rely on the evidence of a single identifying witness to sustain a conviction. It is obvious from the evidence on record that the case was poorly investigated by the police.

We have also considered the other ground of appeal argued by the appellants that is to say that the case was not proved beyond reasonable doubt. We do not wish to belabour on this point because it is obvious that we have entertained some reasonable doubt. In law we are entitled to give the benefit of that doubt in favour of the appellants.

In the end we allow the appeal by quashing the conviction and by setting aside the sentence. We direct the appellants to be released forthwith unless lawfully held.

Dated and delivered at Mombasa this 28th day of May 2008.

J.K. SERGON

F. AZANGALALA

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