REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 240 of 2004

1. MULAWA SULEIMAN SALIM JENJEWA]

2. RASHID GOGO]…….APPLICANTS

VERSUS

REPUBLIC……..RESPONDENT

J U D G M E N T

The appellant Mulawa Suleimani Salim, Jenjewa together with one Rashid Gogo were jointly charged, in the Senior Resident Magistrate's Court at Kwale with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were as follows:

COUNT (1)

The appellant and the said Rashid Gogo on the 14.6.2002 at Ngombeni village Ngombeni Location in Kwale district within Coast Province jointly with others not before court being armed with offensive weapon namely knife robbed Christopher Kalu Kithi of (1) cash 11000/- (2) mobile phone Nokia (3) a wrist watch Seiko 5 gold plated all valued at Ksh.43500/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Christopher Kalu Kithi.

COUNT (2)

The appellant and the said Rashid Gogo on 14.6.2002 at Ngombeni Village Ngombeni Location in Kwale District within Coast Province jointly with others not before court being armed with offensive weapon, a knife robbed Hamisi Hassan Mwachidzi of (1) Kanzu, (2) Kikoi, (3) Muchin hut, (4) Kasida clothe, (5) a wrist watch Seiko 5 all valued at 2,700/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Hamisi Hassan Mwachozi.

The appellant pleaded not guilty to both counts and the case proceeded to hearing before L.N. Mbatia then a Principal Magistrate who, after the conclusion of the prosecution's case, found that the appellant and the said Rashid Gogo had no case to answer on count 2 and accordingly acquitted them under the provisions of Section 210 of the Criminal Procedure Code. After a full trial, the Learned Principal Magistrate acquitted the 2nd accused of count 1 but found the appellant guilty on that count. She then proceeded to sentence the appellant to death.

The appellant was not satisfied with the conviction and the sentence. He has therefore appealed against both conviction and sentence on the primary ground that the findings of the Learned trial

Magistrate on identification were not sound considering all the circumstances of the case. The appellant has further alleged that his defence was not considered by the Learned trial Magistrate.

When the appeal came up for hearing, the Learned State Counsel who represented the respondent, opposed the appeal arguing that Learned Magistrate's finding on the identification of the appellant was based on sufficient material which was placed before her. In her view the identification parade mounted by the prosecution was properly conducted and the appellant was positively identified. On the appellant's complaint that his defence was not considered the learned State Counsel submitted that that is not the case as the record clearly shows that the same was correctly rejected. The learned State Counsel therefore urged that the appeal be dismissed as the evidence on record proved the charge.

The evidence upon which the trial Magistrate relied to convict the appellant was given by 5 witnesses. The complainant (PW1) Christopher Kalu Kithi accompanied by Hamisi Hassan Mwachozi (the complainant in count 2) on 14.6.2002 at about 9.30 a.m. were on their way to visit a witch doctor in Ngombeni area when they were accosted by four thugs. Three of the thugs held him and ransacked his trouser pockets from where they took the complainant's Nokia phone worth Kshs.10,730.00 and a cash sum of Ksh.11,000.00 which was in a wallet. One of the thugs got hold of the appellant's hand which had a Seiko 5 watch worth 25,000/= and produced a knife with which he threatened the appellant. The thugs then took the watch. They also took a Kikoi and cap from the appellant's companion.

The duo proceeded to their destination and informed their host of the robbery. The host took them to the local Chief who referred them to Diani Police Station where they reported the robbery. Later, the appellant was informed that the robbers had been arrested with his items. An identification parade was mounted at Diani Police Station in which the appellant participated as a witness. At the parade, the complainant identified the appellant as the person who had threatened him with a knife as he stole his watch. He also identified the appellant in the dock.

Mohammed Mohamed Nyamwe (PW2), was the Assistant Chief of Ngombeni area at the time of the robbery. He was visited at night by the 2nd accused in July 2002. The 2nd accused was in the company of his mother, Zubede Mohammed – (PW3) and a young man called Taifa. The team took to the Assistant Chief a watch make Seiko 5 which they said had been collected from a foot path. The Assistant Chief then gave the watch to Chief Omari Sensali. A few days later, PW3 Zubede Mohammed, made another trip to the Assistant Chief's home. That time she took to the Assistant Chief a Kikoi which he again took to the area Chief.

Zubede Mohammed testified that the 2nd accused is her son. She recalled hearing a conversation at her food kiosk that a watch had been sold to a Pemba boy. She confronted the boy and threatened to have him arrested if he failed to produce the watch. The boy obliged and gave her the watch which she took to PW2 in the company of her son and one Taifa. Zubede later, also heard that another boy called Skora had a Kikoi. She traced the boy's home and recovered the Kikoi and a cap which she again took to PW2.

PW4, IP Benson Musingi, is the officer who conducted the identification parade at which the appellant was identified by the complainant. PW5, PC Gabriel Koskey, received the complainant's report of robbery and investigated the case. In the course of his investigations, he was informed by PW2, the Assistant Chief, of the recovery of the stolen watch and Kikoi. On 31.7.2002, he arrested the appellant when he had gone to attend court in another matter. He further testified that at the identification parade mounted by PW4, the complainant identified the appellant. The appellant together with the 2nd accused were then charged with the offence for which they were tried.

The appellant in an unsworn testimony stated that when he had gone to attend the court in another case, the complainant told the police that, he (the appellant) was the one who had robbed him. He otherwise knew nothing about the offence.

The Learned trial Magistrate made findings of fact that the complainant positively identified the appellant at the identification parade which parade, so the trial Magistrate found, was properly conducted. The trial magistrate had no doubt in her mind that the appellant was one of the thugs who

robbed the complainant. She accordingly found him guilty as charged on count one (1) and convicted him accordingly.

As we consider this appeal, we bear in mind that this is a first appeal and we are duty bound to re-examine and re-evaluate the evidence that was adduced before the trial Magistrate to reach our own conclusions on the same, bearing in mind that we had no advantage of seeing and hearing the witnesses testify as the Learned trial Magistrate had. (See Okeno –V- R 1972 [1972] EA 32).

We are also alive to the established principle that an appeal court will not normally interfere with a finding of fact by the trial court, whether in Civil or Criminal case, unless it is based on no evidence, or on misapprehension of the evidence or the trial Magistrate is shown to have acted on wrong Principles in reaching the findings he did (See Chemagong –V- R [1984] KLR 61).

It is evident in the matter at hand that the case against the appellant was based upon the evidence of identification by a single witness. We have on our part gone thought that evidence and note that although the offence was committed in broad daylight, the complainant had not known the appellant before and did not say how long the incident took. He also did not describe the appellant in detail, indeed in such a manner as to give the police a clue as to whom to look for. The record is not clear as to how the appellant, whose description had not been given, was arrested for the offence with which he was tried and convicted. The complainant himself testified that he received a report that one of the robbers had been arrested with his items. There is no evidence that the appellant was found with any of the complainant's items. The recovered items were taken to the Assistant Chief (PW2) by Zubede Mohammed (PW3) who testified that she recovered the items from a Pemba boy or man and one called Skora. None of the accused was therefore found with any of the complainant's items. The question arises as to how the appellant was identified before his arrest since none of the stolen items was found with him or can be connected to him before the identification parade was mounted. This aspect of the prosecution's case was not considered by the Learned trial Magistrate at all. It is now trite law that before an identification parade is conducted, and for it to be properly conducted a witness should be asked to give the description of the accused (see Gabriel Kamau Njoroge – v – Republic [1982-88] 1 KAR 1134). That does not appear to have been done. In our view if the trial Magistrate had closely considered the same, she would have found that the appellant's evidence that when he went to court for another case, the complainant told the police that he was the one who had robbed him, deserved a second look. In which event the subsequent identification of the appellant by the complainant at the identification parade would not have been necessary. The appellant's testimony therefore reduced the weight to be placed upon the identification of the appellant at the said parade.

In RORIA –VS- R [1967] EA538 at Page 584 Sir Clement De Lestang V-P- stated as follows:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardner L.C said recently in the House of Lords in the course of a debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts:

"There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity."

That danger is, of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification."

In the case at hand, we are not satisfied that the Learned trial Magistrate appreciated that she was basing her conviction of the appellant solely on the evidence of identification by a single witness. Whereas we are fully alive to the fact that a conviction based upon such identification cannot be said to be unlawful, yet great caution should be exercised before conviction bearing in mind that the conviction automatically attracts the ultimate sentence of death. The Learned trial Magistrate stated that she had no doubt at all in her mind that the complainant positively identified the appellant as one of his assailants.

The Learned trial magistrate did not however consider the flaws discussed above with respect to how the appellant was arrested in connection with the offence for which he was tried and convicted. On the identification parade, the complainant merely said as follows:

"I was able to pick out the one who had threatened me with a knife as he stole my watch."

The complainant did not identify any mark, manner of dress, feature or any special characteristic that made him pick out the appellant. We have already observed that the appellant had been arrested earlier on the basis of a description which was not disclosed. We have also found above that although the complainant alleged that the appellant had been arrested with some of his items, that allegation was not supported by the evidence that was before the trial Magistrate. We conclude therefore that the complainant could have been mistaken about the appellant's identification.

In the premises, we are not satisfied that the identification of the appellant was water-tight. We therefore find and hold that the appellant's conviction was not based on sound evidence. We are unable to uphold the conviction. We allow the appeal, quash the conviction and set aside the sentence of death. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held. That is the order of the court.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 25TH DAY OF AUGUST 2008

L. NJAGI **F. AZANGALALA**

JUDGE **JUDGE**

Read in the presence of:

Onserio for the Respondent and the Accused in person.

F. AZANGALALA

JUDGE

25TH AUGUST 2008