



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 181 & 182 of 2004**

**MWAENZI NZOLE JEFFA.....APPELLANT**

**BENJONI HAMISI.....(DECEASED)**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

The appellants herein, were jointly tried on a charge of two counts. The first count is in respect of a charge of robbery with violence contrary to section 296 (2) of the Penal code. In the second count, they faced a charge of rape contrary to Section 140 of the penal. After undergoing a full trial the appellants were acquitted in count II but were convicted in count I and sentenced to suffer death. Being aggrieved, they are now before this court seeking to upset the conviction and sentence on appeal.

The appellants each filed a separate appeal which appeals were consolidated upon the application made by the state. On appeal, each appellant put forward a total of five (5) grounds in his petition of appeal. The appellants each filed and relied on written submissions upon obtaining leave of this court. The appeal is opposed by the state. Before considering the appeal we wish to set out in brief the case that was before the trial court.

The prosecution's case is that at about 8.00 p.m. on 14<sup>th</sup> day of

May 2003, M M, the complainant herein was heading back to her house having gone to take a bath when she was hit by someone from behind. When she turned to check, that person flashed a torch at her and ordered her to sit down and demanded to be given money. She rose to get the money but was again hit. She gave out a sum of Kshs.700/-. She saw men enter her room who were armed with pangas with the assistance of a lamp which was on. The gang continued to beat her when she was unable to give more money. The gang forced her to show them where she had kept her clothes. While she was doing that she heard one of the men who was outside her room tell those who were inside to threaten the complainant that they would insert a bottle into her private parts unless she surrendered more money. The complainant claimed she recognized that voice to be that of Mwainzi Nzole Jeffa, the 2<sup>nd</sup> appellant herein. The 2<sup>nd</sup> appellant is the complainant's brother-in-law, hence he was a person well known to her. It is said the gang ransacked the house as she lay on the bed facing down. They blindfolded and tied her hands behind her back before taking her to the forest where she was raped in turns. The complainant said the men demanded to be given the money her husband had recently brought when he visited her in Mombasa. The complainant said that it was only the 2<sup>nd</sup> appellant who knew that her husband had visited her with lots of money that time. The robbers forced her to lie down while facing the ground before going away. She managed to trace her way home where she opened the door for her children who had been locked inside the house by the gang. The complainant was taken to Kinango Police Station where she was issued with a p3 form and then taken to Kinango Hospital for treatment.

The two appellants were arrested for other offences and were

being held at Kwale Police Station. The Police officers from Kinango police station went to collect the accused when they learnt that the 2<sup>nd</sup> appellant who had been mentioned by the complainant was among those who has been arrested by Kwale police officers. On 17<sup>th</sup> October 2003, the complainant in company of police officers searched the home of Benjoni Hamisi, the 1<sup>st</sup> appellant, whereupon they

recovered several suspected stolen items which included 2 lessos and 1 Kitenge which belonged to the complainant.

When placed on their defence each of the accused persons gave an unsworn statement. Benjoni Hamisi Salim, the 1<sup>st</sup> appellant herein, said he was arrested on 16/10/2003 on suspicion of having stolen a sewing machine and other items. He said he took the police to his house where they searched and recovered sufurias and lessos which belonged to Halima Hamisi. He denied the charge. Mwanainzi Nzole, the 2<sup>nd</sup> appellant too denied committing the offence. He claimed he quarreled with his wife, the complainant's sister on 5/1/2003 before she left for her parent's home. He visited her in laws to make inquiries of her whereabouts and in the process he claimed he picked up a quarrel with his sister-in-law, the complainant. He was arrested on 11/10/03 and taken to Kwale police station where he was charged. He denied committing the offence. The 1<sup>st</sup> appellant summoned his sister, Halima Hamisi (D.W.3) to testify. He told the trial court that Police officers from Kinango police broke into her house while she was away. She claimed the police took away her property which included clothes, a bucket, plates and covers.

The trial magistrate considered the evidence tendered by the prosecution and the defence. She came to the conclusion that the clothes which were recovered from the 1<sup>st</sup> appellant's house

belonged to the complainant. She also concluded that the 2<sup>nd</sup> appellant was recognized by the complainant at the scene through his voice. According to the learned Senior Resident Magistrate, the evidence were overwhelming.

On appeal two main grounds were raised. The first ground is that the appellants were not placed at the scene of crime. In short, it is said that the appellants were not identified to be among the gang which violently robbed the complainant. Mr. Monda, the learned Senior State Counsel urged this court to find that the complainant placed the 2<sup>nd</sup> appellant Mwainzi Nzole Jeffa at the scene of crime when she recognized his voice. At this juncture we wish to point out that the appeal by Benjoni Hamisi was marked as having abated upon his death while undergoing treatment at Coast Provincial General Hospital on 14<sup>th</sup> July 2007. We wish to examine the evidence of identification of Mwainzi Nzole the surviving appellant herein. According to the evidence of MM. (P.W.1), She said she saw him enter into her house. He was her brother-in-law. He was married to her sister whom he has divorced. She said when the gang was ransacking the room she was made to lie down. She said she was assisted to see by a lamp which was on. We have considered the evidence of P.C. Charles Otieno Oyoo (P.W.4), the police officer who booked the report of the complainant at Kinango Police Station. He told the trial court that the complainant had told the police that she suspected that one of her relatives was among the gang which attacked her because she recognized the voice. She did not tell the police that she saw the 2<sup>nd</sup> appellant. It is also admitted by P.W. 4 on cross-examination that the police did not visit the 2<sup>nd</sup> appellant's home. After a careful consideration of the evidence we think there is doubt whether the 2<sup>nd</sup> appellant was recognized by the

complainant. We entertain this doubt for the following reasons: First, the complainant did not mention the name of the 2<sup>nd</sup> appellant to the police. She only said she suspected him to be among the gang because he was the only one who knew that her husband had visited her with lots of money. Secondly, the complainant did not state to the police that she had seen the 2<sup>nd</sup> appellant enter her house with the assistance of lights emanating from a lamp which was on. Even if she had claimed so, we still entertain some doubt because, by the time the 2<sup>nd</sup> appellant entered the complainant's house, she had been forced to lie on her bed while facing down.

Thirdly, if indeed the 2<sup>nd</sup> appellant had been mentioned by the complainant, then why didn't she take the police to her brother-in-law's homestead? She cannot claim not to know his home because her sister could easily assist in that regard.

Fourthly, it is apparent that there is a grudge between the 2<sup>nd</sup> appellant and the complainant which may have arisen due to the sour relationship between the 2<sup>nd</sup> appellant and the complainant's sister. For the

above reasons we agree that there was no positive identification of the 2<sup>nd</sup> appellant placing him at the scene of crime. On this account alone we allow the appeal by quashing the conviction and setting aside the sentence of death without considering the other ground of the defect of the charge. The 2<sup>nd</sup> appellant herein, Mwainzi Nzole is hereby set free forthwith unless lawfully held.

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of September 2008.**

**J.K. SERGON**

**F. AZANGALALA**

**J U D G E**

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