

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 309 of 2004

(From original conviction and sentence in Criminal Case No. 31 80 of 2004 of the Senior Resident Magistrate's Court at Mombasa)

HASSAN ALI MADAFUAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

Hassan Ali Madafu, the appellant herein, was tried on a charge of robbery with violence contrary to Section 296(2) of the penal code. In the end he was convicted and sentenced to suffer death. Being dissatisfied he preferred this appeal. He put forward a total of 6 grounds of appeal. When the appeal came up for hearing the appellant solely relied on written submissions. Mr. Ondari, the learned Assistant director of public prosecutions conceded to the appeal.

This being the first appellate court, we are enjoined by law to re-evaluate the case that was before the trial court and arrive at our own conclusion but bearing in mind that we had no privilege of observing the demeanor of the witnesses. The case before the trial court appear to be short and straightforward. Beatrice Ngwono, the complainant in this case, told the trial court that on 18.11.2003 at about 1.00 p.m. she was walking from Likoni Church to her home. When she reached K. Dee area she was accosted by two young men who snatched her hand bag which contained a Holy Bible. Before she released her handbag to the two young men, one of them demanded to be given the handbag while the other threatened to stab her with a knife if she resisted. The snatched the handbag and took off. Members of the public gave a chase and caught up with one. The complainant identified him as the person who had snatched her handbag. The complainant's handbag was also recovered but it is not clear how the same was recovered. The mob escorted the suspect to Mtongwe Navy Officers where he was arrested and handed over to the police. At Likoni Police Station P.C. Simon Ondari re-arrested the suspect and took over possession of the handbag. The accused denied committing the offence when he was placed in his defence. He claimed he was arrested and beaten by a village vigilante known as Sungu Sungu while he was on his way home.

The learned Senior Resident Magistrate convicted the accused on the basis that he was found in possession of the complainant's handbag. The learned Senior Resident Magistrate applied the doctrine of recent possession to connect the appellant with the offence.

On appeal, the appellant urged this court to allow the appeal on the basis that he was not positively identified. The learned Assistant Director of Public Prosecutions conceded the appeal on this ground. We have considered this ground. It is obvious from the record that the conviction was sustained on the basis of the evidence of the complainant (P.W.1). she said she had been accosted by two men who were armed with a knife. Members of the public gave a chase and had the appellant arrested. There is no evidence as to how the appellant was arrested because none of the members of public testified. There is also no evidence to prove how the complainant's handbag was recovered. The appellant alleged in his defence that he was suspected to have stolen a mobile phone which was not claimed by the complainant. The defence set forth by the appellant created doubt which should have been given in favour of the appellant. We are satisfied that there is no evidence showing how the appellant was arrested. There is also no evidence as to who and how the complainant's handbag was recovered. This is because none of the members of the public who arrested the appellant testified. We are satisfied that the learned Assistant Director of Public Prosecutions rightly conceded to this appeal. In the end we allow the appeal by

quashing the conviction and setting aside the sentence of death. The appellant is hereby set free unless lawfully held.

Dated and delivered at Mombasa this 19th day of September 2008.

J. K. SERGON

F. AZANGALALA

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