



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Criminal Appeal 357 of 2003**

**MOHAMED JUMA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENTS**

*(From Original Conviction and sentence in Criminal case no. 1162 of 2003 of the Chief Magistrate's court at Mombasa.)*

**JUDGEMENT**

The Appellant herein and one Hamisi Suleiman were tried for the offence of robbery with violence contrary to Section 296(2) of the Penal Code by J. S. Mushelle, the then Senior Principal Magistrate sitting at Mombasa. The learned Senior Principal Magistrate set free Hamisi Suleiman but convicted and sentenced the Appellant to suffer death as per the law. It had been alleged that on the 23<sup>rd</sup> day of April 2003, at about 7.30am at Hongera area of Kisauni in Mombasa District within Coast Province jointly with others not before court, being armed with a panga robbed James Nyambu of his wrist watch make Adidas Quartz and cash kshs. 100 all valued at kshs. 600/= . Being dissatisfied with that decision the Appellant preferred this appeal.

On appeal, the Appellant put forward five (5) grounds in support of his appeal. When the appeal came up for hearing two main grounds were argued namely: First, that the charge was fatally defective and secondly that there was no sufficient evidence to establish the offence of robbery with violence under Section 296(2) of the Penal Code.

The case before the trial court appear to be short and straightforward. The prosecution's case was to the effect that on the 23<sup>rd</sup> day of April 2003, the complainant James Nyambu Ndolo (PW1) was walking to his home having just alighted from a matatu at about 7.30am when he came across three (3) people who then ordered him to stop and sit down. The gang threatened to kill him if he attempted to scream. The gang grabbed the complainant's wrist watch plus kshs. 100/= and fled the scene. The complainant raised an alarm and members of the public responded by giving a chase. The Appellant and one Mohammed Suleiman were arrested while hiding in a disused house not far from the scene of crime. The Complainant (PW1) managed to recognize the Appellant as one of the people who robbed him. None of the stolen property items were recovered from that house. A panga was recovered therein which was later on produced as an exhibit in evidence.

The Appellant gave an unsworn statement in his defence. He claimed that on 23<sup>rd</sup> April 2003, he was with Kilonzi (PW1) taking chang'aa when they picked a quarrel which resulted into a fight. The Appellant stated that they were thrown out of that house and each went his way. On his way he said he heard PW1 shouting 'thief', 'thief, and suddenly members of the public and the police pounced on him where he was thoroughly beaten up apprehended and later taken to Nyali Police Station where charges of robbery with violence were preferred against. That is the summary of the case that was before the trial court. We wish to now consider the grounds of appeal argued before us.

The first ground of appeal is to the effect that the charge which the Appellant was tried on was fatally

defective in that the same did not have all the ingredients of the offence. Unfortunately Miss Mwaniki, the learned state counsel did not address us on this issue. We have considered this ground and we are of the humble view that there is some truth about the Appellant's contention. A close perusal of the charge sheet will reveal that the same does not contain the necessary particulars to base a charge of robbery with violence under Section 296(2) of the Penal Code. There were no particulars showing that violence was used against the Complainant. There was no allegation that the panga recovered at the disused house was a dangerous or offensive weapon. We are convinced that the charge was incurably defective for want of the vital ingredients of the offence. The Court of Appeal came to the same conclusion in the case of Suleiman Juma alias Tom =versus= Republic Criminal Appeal No. 181 of 2002 in which it said:

*"We have considered the particulars of the charge and it cannot be denied that the charge refers to the Appellant having been armed with knives. The particulars of the charge do not clearly state whether the knife was a dangerous weapon. Under S.296 (2) of the Penal Code the charge must state that the accused was armed with a dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at or immediately before or immediately after the time of the robbery the accused wound beats or strikes or uses any other personal violence to any person. In this appeal the charge as laid was defective as it did not clearly specify the essential ingredients of the offence under S.296 (2) of the Penal Code."*

The second ground argued on appeal is to the effect that there was no sufficient evidence to establish the offence of robbery with violence. We have carefully re-evaluated the evidence on record and we make the following observations.

First, that there was no evidence that violence was used against the Complainant. Secondly, there was no clear evidence that the Appellant was in company of another person. We say so because the persons who were alleged to have been with the Appellant were never described by the witnesses. Our finding on this issue is buttressed by the fact that there was no serious investigations in this matter. The police who investigated this case i.e PW3 and PW4 merely recorded statements on persons brought by members of the public. They did not even visit the scene to carry out serious investigations. The charge preferred against the Appellant is a very serious one hence the prosecution's burden of proof is heavier than in ordinary cases. We think the evidence on record was unsafe to sustain a conviction of such a magnitude.

For the above reasons we allow the appeal with the result that the conviction is quashed and the sentence is set aside. The Appellant is set free forthwith.

Dated and delivered this 23<sup>rd</sup> day of October,2006

**J. K. SERGON**

**JUDGE**

**L. NJAGI**

**JUDGE**