

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.230 OF 2000**

**(From Original Conviction and Sentence in Criminal Case No.3822 of 1999
of the Chief Magistrate's Court at Mombasa – B. Maloba, Ms. – S.R.M.)**

HASSAN HAMADI ABDALLA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT OF COURT

The appellant was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to death. The appellant appeals against conviction mainly since the sentence is mandatory. The incident of the robbery is said to have occurred on the night of 17th – 18th in November, 1999 at 1 a.m. The complainant who gave evidence during the trial as PW.1 sustained multiple injuries, some of them serious. He lost a bicycle, a T.V., radio and 3 cameras and several other items enumerated in the charge sheet. The matter was reported to the Police who visited the scene of crime. The complainant ended in a hospital for treatment and was admitted for 10 days. In his evidence PW.1 merely narrated the story of how he was attacked. He gave no evidence of recognition or identification of his attacker. He however stated that among the properties stolen by the robbers was a cap which was later recovered by PW.2 allegedly from the appellant on 17th November, 1999 at 6 p.m. PW.2 had given the cap to security officer. When PW.2 was cross-examined he changed his story and stated that he arrested the appellant not on 17th November, 1999 at 6 p.m. but on 18th November, 1999 at 1 a.m. PW.4, a Police Officer received the robbery report and received the cap aforementioned with a report that it belonged to the complainant and that it had been recovered from the appellant.

We have considered the evidence on the record as did the trial Magistrate who convicted the appellant. We are not satisfied that there is sufficient evidence on the record upon which the trial Magistrate's conviction could be based. The appellant was arrested on 19th November, 1999 by PW.4, No. Pc. Joseph Ogonga not PW.2. The only reason why PW.4 arrested the appellant is that he was allegedly found with the cap in question, by PW.2. The latter was an unreliable witness. He did not know when he recovered the cap. He gave several versions of the time. The cap itself was not properly identified by the complainant PW.1 to be his. Stating that the cap was his alone without specifically pointing to the identifying marks, was not adequate. Recent possession which the trial Magistrate appears to have relied on, was not proved. In the absence of any other independent evidence the honourable trial Magistrate established no link between appellant and the crime. It was not safe to convict.

The State Counsel rightly, could not support the conviction on the grounds aforementioned.

The upshot is that this appeal succeeds. The conviction is quashed and the sentence is set aside. The appellant is to be released forthwith unless lawfully held. It is so ordered.

Dated and delivered at Mombasa this 19th day of March, 2002.

D. A. ONYANCHA

J U D G E

J. KHAMINWA

COMMISSIONER OF ASSIZE