

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.163 OF 2001

MOHAMED JUMA NGONI APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.164 OF 2001

MOHAMED SALIM BILLY APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being appeals from Original Conviction and Sentence in Criminal Case No. 18
of 2000 of the Chief Magistrate's Court at Mombasa – J.S. Mushelle, SPM)

J U D G M E N T

The Appellants were charged with the offence of Robbery with violence contrary to Section 296 (2) and after trial they were found guilty and sentenced to death as provided by law.

They have filed this appeal against conviction and sentence. Both appellants have filed separate ground of appeal but the grounds are similar. They both complain that the evidence of identification was not satisfactory in that it was night and the attack was sudden and also that dock identification not reliable. On this issue the facts are that three persons approached the premises (a shop) guarded by PW.1. One person entered the shop where one complainant PW.2 was still waiting for customers. It was about 9.45 p.m. The other person stood outside by the place where the guard PW.1 was keeping guard near the door of the shop. The third person was standing outside by the roadside a few meters away. There was another witness who was also outside. He was the husband of PW.2.

The two men who were later to be accused 1 and 2 held conversation with PW.1 and PW.2. Accused one was Mohamed Juma Ngoni (hereinafter referred to as Ngoni) and accused 2 was Mohamed Salim Billy (hereinafter referred to as Billy). It was Ngoni who threatened the guard (PW.1); Billy is the one who entered the shop and met PW.2. He threatened to stab her unless she gave out money. He took Shs.700/- from the shop. He was inside the shop for about 5-7- minutes. He had rasta hair style. He was wearing white T-shirt with blue stripes. He had nose cut. There was security lights outside and electric light inside the shop. When the two person were arrested and taken to police station PW.4 searched them and found on Ngoni 40/- and wrist watch marked AUTO 5. Billy had money. Billy was injured and was rushed to hospital. PW.1 identified the watch as his because it was cut when it was removed from his wrist. The accused had rasta hair style. Both the appellants gave unsworn statements and said they were injured. Billy said he was injured in both head and nose. They both denied the charges.

It appears as if no identification parade was held. There is no evidence except the statement of PW.1 who on cross examination states "I attended identification parade" There is no other mention. In these circumstances it is clear that the two appellants were caught on the same night. They had embarked not only on the robbery of the present complainants but on other neighbours. These neighbours were not

called upon to give evidence, but it is admitted that the appellants were arrested by members of public and brought to the police station.

There were no other complainants other than the two PW.1 and Pw.2.

There is suggestion that the watch found with them was common item such as would be purchased by anyone anywhere. However the owner PW.1 was able to identify some marks and the way the strap was cut as the one robbed from him. So this common watch valued at Sh.700/- was the connection between the appellants and the robbery. The ingredients of the offence under Section 296(2) Penal Code were however not fully met. The appellants did not use actual force but threatened to use violence. The other ingredients that they were more than one and were armed with offensive weapons, were present. Therefore this offence falls under Section 296(1).

We therefore reduce the offence from 296(2) to the lesser one under 296(1) for which we convict. The sentence of death is hereby set aside. The appellants shall serve sentence of imprisonment for a period of 7 years.

Dated at Mombasa this 30th Day of July, 2002.

D.A. ONYACHA

JUDGE

J. KHAMINWA

COMMISSIONER OF ASSIZE