



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.254 OF 1999

SAID MBOVU.....1ST APPELLANT

(Original Accused No.1)

V E R S U S

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.275 OD 1999

ZAINABU MUSA.....2ND
APPELLANT

(Original Accused No.3)

V E R S U S

REPUBLIC.....
RESPONDENT

(From Original Conviction and Sentence in Criminal Case No.3106 of 1998 of the Chief Magistrate’s Court at Mombasa – Jo-Anne Siganga, Ms. – S.R.M.)

J U D G M E N T

The appeals No.254 of 1999 and No.275 of 1999 were consolidated. The appellants were convicted of robbery with violence contrary to section 296(2) of the Penal Code and were sentenced to death. Their appeals to this court are against that conviction and sentence.

Briefly the prosecution case was that on the 14.9.98 at about 9 p.m. the appellants while armed with knives and pangas robbed PW.1 of cash e000/- and two radios and in the course of the robbery they injured PW.1 by stabbing him on the forehead with a knife. He reported the matter to the Police and he led the Police to the houses of the appellants and they were arrested and the radios recovered.

PW.1 in his evidence told the court that on 14.9.98 at about 7 p.m. when he arrived in his house from church he heard some noise from the house of his neighbour and he rushed there and found a crowd of people and reaching there he found the 2nd appellant fighting with another woman. When he tried to

intervene to separate the fight the Appellant turned on him and bite him on the left breast and leg and he sustained some injuries. He went away to his house and started washing his clothes. At about 9 p.m. the 2nd appellant went to his house accompanied by the 1st appellant claiming that they were Police Officers and ordered him to open the door. But before he opened they forced the door open and cut him with a knife ;and robbed him of cash shs.3000/- plus two radios and they escaped. He was able to see them well and identified them as the appellants. There was light from a chimney lamp. The 1st appellant in his defence denied the charge and stated that he knew nothing about the robbery, while the 2nd appellant in her defence had stated that the complainant was her husband but they had disagreed. PW.1 had sent a certain woman to collect their radio from her and this angered her and she fought with that woman. When PW.1 came in and tried to separate the fight, she could not give in and the husband turned on her and beat her. The complainant was annoyed because she had fought his girl-friend. She was rescued by the neighbours and she ran away. When she reported the matter to the Police, she was asked to go away as that was a domestic affair. Later PW.1 went to her house with the Police and she was arrested. The Police took away a radio from the house claiming that she had stolen it.

The 2nd Appellant in her grounds of appeal stated that the Trial Magistrate did not consider her defence in that there is no way they could fight at 7 p.m. and she goes back to rob him at 9 p.m. and the radio allegedly robbed belonged to the family.

I concur with the appellant. The learned Trial Magistrate had failed to consider her defence. There was no evidence from the doctor who allegedly examined the complainant. His evidence was crucial to clarify as to whether the injuries sustained by the complainant were caused by a knife or human teeth. The ingredient of the charge under Section 296(2) of the Penal Code were not proved as required in Criminal Law and the evidence was far much below what is required to prove and moreso a capital charge.

The upshot is that it would be unsafe to allow the conviction to stand.

The appeals of both the 1st and 2nd appellants are allowed, convictions quashed and sentences of death set aside and I order that the appellants be set free forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 9th day of October, 2001.

J.L.A. OSIEMO

J U D G E

G.A OM