



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.188 OF 1999

RAJAB TSOFA.....1ST
APPELLANT

(Original Accused No.2)

V E R S U S

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.189 OF 1999

RASHID SALIM.....2ND APPELLANT

(Original Accused No.3)

V E R S U S

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.190 OF 1999

ALI NZIVO.....3RD
APPELLANT

(Original Accused No.1)

V E R S U S

REPUBLIC.....RESPONDENT

**of the (From Original Conviction and Sentence in Criminal Case No.262 of 1998
Senior Resident Magistrate's Court at Kilifi – P.M. Ndungu, Esq., - S.R.M.)**

J U D G M E N T

The Appeals No.188 of 1999, No.189 of 1999 and No.190 of 1999 were consolidated.

The Appellants were convicted of attempted robbery with violence contrary to Section 297(2) of the Penal Code and of assault causing actual bodily harm contrary to Section 251 of the Penal Code. They were sentenced to death for the two attempted robbery with violence and sentenced to two years imprisonment for the assault. Their appeals to this court are against the said convictions and sentences.

The prosecution case was that on the 15th April, 1998 at about 11.30 p.m. while PW.1 and PW.2 were in their house PW.3 called them and alerted them that there were robbers in their homestead and she advised them not to come out. PW.3 is the mother of PW.2 and PW.2 is the husband of PW.1. But immediately thereafter, their door was smashed and assailants entered. One of those assailants who was armed with a panga cut PW.1 on the head. She identified that assailant as the 1st Appellant. He demanded for money. He again cut her on the shoulder and also on the back. The other two robbers took PW.2 out while the 1st Appellant remained with her. PW.1 shouted for help. PW.1 saw and identified the 1st Appellant whom she had seen before. The 1st Appellant took PW.1 outside the house and she managed to observe him properly. There was bright moonlight. Nothing was robbed from them.

The Appellants were identified by both PW.1, PW.2 and PW.3 during the robbery.

The evidence of PW.1, PW.2 and PW.3 is corroborated by that of PW.6 their neighbour who heard the scream. When he heard the screams he rushed to the house of PW.1. On the way he met with the Appellants running away. There was moonlight and he also had a torch which he flashed and saw the Appellants very well and was able to recognize them. They disappeared into the bush. They gave the names of the assailants to the Assistant Chief who looked for the suspects and arrested them and took them to the Police Station. PW.4 was able to trace the assailants since he was given their names and they came from the local village.

The Appellants in their defence admitted that they were at the scene of the robbery on the material date at about the same time the robbery was committed but their only explanation was that they had gone to the home of the complainant when they heard screams from there. When they reached the home of PW.1 they said that they had been attacked by robbers who escaped when they screamed. They inquired from PW.1 of what had happened and PW.1 told them that they had been attacked by robbers. The Appellants went to their homes after the PW.1 and PW.2 had been taken to the hospital.

In our view the identification of the Appellants as the people who attacked PW.1 and PW.2 in an attempt to rob them and inflicted injuries on them was free from the possibility of error or mistake. Their denials in their defence was rightly rejected. We have no hesitation in dismissing the appeal against convictions.

A conviction under Section 296(2) attracts a mandatory death sentence. The Appellants were sentenced to death. The sentences were lawful and do not call for our interference. We dismiss the appeal against sentence as well.

It is so ordered.

Dated and delivered at Mombasa this 5th day of October, 2001.

J.L.A. OSIEMO

J U D G E

C.A. OMWITSA

COMMISSIONER OF ASSIZE