

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE

CRIMINAL APPEAL NO.311 OF 1998

**(Being appeal From Original Conviction and Sentence in Criminal Case
No.1807 of 1997 of the Principal Magistrate's Court at Mombasa – G. Aburili,
SPM)**

ABDALLA HAMISI JUMA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

Abdalla Hamisi Juma was convicted and sentenced to death for offence of robbery with violence contrary to Section 292(2) Penal Code. He now appeals against the conviction and sentence.

The prosecution case is that on 28th May 1997 at 7.00 p.m. the complainant and his wife had parked their car KUN580 by roadside to repair a tyre puncture. PW.1 Nzole Ndeme was changing the tyre when his wife Kezia Rwamba (PW.2) was standing by watching him. There was bright light supplied by the security lights across the road lighting the Bixa factory in Tiwi. Just as the husband was about to finish repairing the puncture four men approached them. Two offered to help but complainant turned the offer down saying he had about to finish the job.

Just as the complainant was moving to enter into the driver's seat in the vehicle one man out of the four approached him and started stabbing him with a knife. He offered them money and they took all the money he had amounting to Shs.10,000/-. Another man was harassing his wife, Kezia, who was pregnant. The men took the items the couple had. They cut her with a panga on the forehead. After robbery they left. The witnesses first sought medical help and thereafter went to Diani Police Station to report.

On 10.6.97 the complainant and his wife were called to police station where at identification parade they identified the appellant. The evidence of identification of the two witnesses, PW.1 and PW.2, is clear and firm and unchallenged by the defence of the Appellant. In his defence the Appellant explains how he was arrested on 5/6/97 but of the events of 28th May 1997, offers only a simple denial.

Whereas an accused is never required to prove his innocence if the evidence of the prosecution is strong, clear and unchallenged the court has to weigh it against the silence of the appellant.

The Appellant complains that the identification by complainant and his wife was not positive, they did not explain the intensity and location of light and there were inconsistencies in their evidence. The record shows that there was ample light from security lights of Bixa Factory across the road. Indeed it was this strong light that enabled the complainant to repair his tyre puncture. The appellant was just in front of the vehicle and he was one of the persons holding the wife (PW.2). The Appellant was also described as being a short small bodied person. These grounds of appeal have no merit.

The other ground that the identification parade was invalidated in several features and prejudicial is also unsupported by evidence. The prescribed form exhibited at the trial shows that the Appellant fully participated and did not take any objections. The present allegations can only be said to be afterthought and not genuine.

The last grounds that it was not established how the appellant was arrested. It is clear that the offence

was committed on 28.5.97 and reported to the police immediately. The arrest according to evidence of appellant, was on 5th June, 1997. All the time the police were looking for the suspect and it is immaterial whether they were acting on information or descriptions their work was to find the suspects. The evidence of witnesses show that descriptions were given to police when reporting. The Appellant did not pursue this matter at the trial.

There is on record an application to file a supplementary ground of appeal filed on 10/8/2001. The complaint is that the charge sheet is defective as the particulars contained stolen items belonging to PW.2. The two witnesses should have each carried different charge sheet. It is not clear if the necessary leave was obtained before adding this new ground. However the charge sheet relates to one transaction at a single incident. The provisions of section 135 Criminal Procedure Code specifies how charges are to be written in the charge sheet. It is for the prosecution to decide on which offence to charge. In this case the items stolen belong to husband and wife and it is always difficult to differentiate rights in property in such a case. The inclusion of all items in the charge sheet did not prejudice the appellant in any way. The punishment for the offence is not related to the amount of items stolen.

For these reasons we find that the offence was proved beyond reasonable doubt and we see no reason to interfere with the sentence.

The appeal is therefore dismissed.

Dated at Mombasa this 2nd Day of October 2001.

A.I. HAYANGA

JUDGE

J. KHAMINWA

COMMISSIONER OF ASSIZE