REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 260 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 3638 of 2008 of the Chief Magistrate's Court at Mombasa: ***M. K. Mwangi – S.R.M.)***

SALIM A. LIWALI.....1ST APPELLANT

SIRYA M. MWANGOMBE.....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGEMENT

The two appellants namely **SALIM ABRAHAM LIWALI** (hereinafter referred to as *'the 1st Appellant'*) and **SIRYA MASHA MWANGOMBE alias JIMMY** (hereinafter referred to as *'the 2nd Appellant'*) have both filed this consolidated appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at the Mombasa Law Courts. The two Appellants were initially arraigned before the lower court on 1st December, 2008 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were given as follows:

> **"On the 14th day of November, 2008 at Kengeleni Lights along Mombasa-Malindi road in Mombasa District of the Coast Province, jointly with others not before court while armed with dangerous weap0ns namely pistols robbed ELIJAH BUURI WANDETO motor vehicle Reg. No. KBD 638G make Isuzu D Max pickup, Motorola mobile phone, shirt, belt, driving licence all valued at Kshs. 1,672,000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ELIJAH BUURI WANDETO."**

Both Appellants pleaded of *'Not Guilty'* to the charge. Their trial commenced on 19th January, 2009 at which trial the prosecution led by **CHIEF INSPECTOR NDUBI** called a total of ten (10) witnesses in support of their case.

PW2 ELIJAH MBUURI WANDETO told the court that on 14th November, 2008 at about 3.00 p.m. he had parked his vehicle an Isuzu pickup registration KBD 638G at the Kengeleni Lights along the

Mombasa-Malindi highway and was waiting for customers to hire the vehicle. A man whom **PW2** identifies as the 1st appellant approached him and asked to hire the pickup to ferry some goods from Kilifi to Kengeleni. They bargained and agreed on a price of Kshs. 4,000/= for the job. The 1st appellant said he needed to go to town but would return later. He returned at 6.00 p.m. and they set off for Kilifi. At Mtwapa they picked up a colleague of the 1st appellant and then at Kibaoni the two men said that they needed to pick a third man who would direct them to where the cargo was. This third man was the 2nd appellant. The 2nd appellant then directed **PW2** to drive towards Chumani. On the way the men asked **PW2** to stop claiming that they were pressed and needed to urinate. **PW2** stopped the vehicle and they all came out to relieve themselves. Upon finishing the 2nd appellant produced a gun and ordered **PW2** to release the vehicle to them. **PW2** did not resist. The men blindfolded him and removed his shirt which they used to tie him to a tree. They then drove off with the pickup. **PW2** managed to release himself and walked to a nearby house. He was directed to Loki police post and then to Kilifi police station where he reported the robbery.

Later on 20th November, 2008 they received a report that the vehicle had been recovered in Soweto area of Malindi. **PW2** went and found the vehicle had been totally vandalized – all four wheels removed, radio removed, dashboard destroyed. An informer led police to the home of the 2nd appellant. Police raided the house and arrested the 2nd appellant. Inside they found the vandalized parts of the vehicle, the Motorola phone belonging to **PW2**, belt and vehicle canvas. The 1st appellant was arrested by police for another offence and was identified by **PW2** as one of the men who had robbed him at an identification parade. The two appellants were then arraigned in court and charged.

At the close of the prosecution case both appellants were ruled to have a case to answer and were placed onto their defence. They both made sworn statements in which they each denied any role in the robbery of the vehicle. On 13th may, 2010 the learned trial magistrate delivered his judgment in which he convicted the two appellants of the offence of Robbery with Violence and thereafter sentenced each one to death. Being aggrieved each appellant filed this appeal against both conviction and sentence. At the hearing of the appeal **MR. ODHIAMBO** Advocate argued the appeal on behalf of both appellants whilst **MR. WAMOTO** learned State Counsel opposed the appeal. As a court of first appeal we are under an obligation to evaluate the evidence presented before the trial court for ourselves and thereafter to draw our even conclusions.

It is not in any dispute that **PW2** was in possession of a vehicle on the material day. **PW4 GEOFFREY NGARI WANDETO** told the court that he is the owner of the vehicle registration No. KBD 638G Isuzu pickup. He produces the log-book as an exhibit in court **Pexb1**. **PW4** states that he had given the vehicle to **PW2** who was his brother for use in light transportation work. The fact that **PW2** was robbed of the vehicle is also not in any doubt. The vehicle was recovered in Malindi having been vandalized and **PW2** made reports to both Loki police post and to Kilifi police station. The key question is that of identity. Has there been a clear and positive identification of the two appellants as amongst those who robbed **PW2**.

In this case **PW2** was at all material times alone. As such he is the only witness who was able to identify the two appellants. In the case of **MAITANYI VS REPUBLIC [1986] KLR** the Court of Appeal in discussing identification by a single witness had the following to say.

> **"Although it is trite law that a fact may be proved by the evidence of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult."**

Therefore where identification is being made by a single witness, more so in such a serious offence then great care must be taken to interrogate such evidence and find it to be water tight.

PW2 stated that when the 1st appellant first approached him it was 3.00 p.m. As such it was broad daylight. The two spent time together discussing the assignment and haggling over the price. The 1st

accused left but he eventually returned at 6.00 p.m. Again it was not yet dark and the witness was able to see him well. **PW2** and the 1st accused drove to Mtwapa together. All this time they were alone in each other's company. We have no doubt that given these circumstances **PW2** had ample time as well as opportunity to see the 1st appellant well. The identification was tested by way of an identification parade conducted by **PW9 INSPECTOR WILSON MALI** at the Malindi police station on 25th November, 2008. At that parade **PW2** did positively identify the 1st appellant as one of the men who had robbed him. The parade forms were duly filled out and were signed by the 1st appellant as a confirmation that he had no problem with the manner in which the parade was conducted. Counsel for the appellants submits that without there being evidence that **PW2** gave to the police an oral description of his attackers this identification cannot stand. With respect we do not agree. The failure by **PW2** to describe to police the physical features of the men who robbed him does not in any way negate his evidence on identification. What is important is whether the court finds it possible for the witness to have been able to identify the suspect in the circumstances which were prevailing at the time. Therefore with respect to the 1st appellant we are satisfied that there has been a clear, positive and reliable identification of him as one of the men who robbed **PW2** of the vehicle.

Regarding the 2nd appellant the situation is a bit different. According to **PW2** the first time he came across the 2nd appellant was at Chumani in Kilifi. By now it was 7.00 p.m. and therefore dark. However **PW2** did not just catch a fleeting glimpse of the 2nd appellant. Under cross-examination by the 2nd appellant at page 14 line 19 **PW2** explains:

> **"You boarded the vehicle at Kilifi at about 7.00 p.m. You sat next to me. You were the one giving directions as to where in Chumani we were going to. We drove to the interior,. We drove for about one hour before you stopped saying you were to attend a call of nature. There was sufficient lighting outside and inside the vehicle. I could see you clearly. When I finished urinating I turned and found you holding a pistol on my face……."**

Here again there is evidence that **PW2** had ample time and opportunity to see and identify the 2nd appellant. The two sat next to each other in close proximity inside the vehicle for over one hour. They were conversing as the 2nd appellant was the one directing **PW2** on which route to take. **PW2** is very specific on the role which the 2nd appellant played in the robbery. He is the one who pulled out a pistol and used it to threaten **PW2.** There was light inside the vehicle and from the street lights outside. Here again we find little possibility of error in identification.

In addition to this visual identification there exists further evidence which links the 2nd appellant to this offence. Police led by an informer raided the house of the 2nd appellant in Ziwa la Jarusi in Malindi together with **PW2**. At the hose **PW2** positively identified the 2nd appellant to the police. There is also evidence of recovery of a mobile phone Motorola V3 which the witness identified as his phone stolen during the robbery. There is also alleged to have been recovery of a shirt, belt which **PW2** claims to be his property as well as a vehicle canvas allegedly removed from the stolen vehicle. We are not ourselves satisfied with this evidence on the recovery **PW2** merely makes a blanket claim that the items recovered belong to him. He makes no effort to describe the shirt, belt and canvas in more detail. Not even the colours are described. These are items which are commonplace. Without further details and description they cannot be assumed to belong to **PW2**. We find that the evidence identifying the recovered items was poor and does not pass muster. This evidence of recovery cannot in our view be used to link the 2nd appellant to the crime. Similarly the identification parade in which the 2nd appellant was identified by **PW2** was in our view superfluous given that **PW2** was present at the house and witnessed the arrest of the 2nd appellant. The evidence adduced in an attempt to link the 2nd appellant to the vandalized vehicle is also weak. **PW7 FIKIRI CHANGAO** who claims he ferried some men who removed the tyres and battery from the vehicle was not able to identify the 2nd appellant at the police identification parade.

Be that as it may we have already found earlier that **PW2** made a positive visual identification of the 2nd appellant at the time of the incident and it is this identification which in our view clearly places the 2nd

appellant at the scene together with the 1st appellant.

As stated earlier this was a case that turned on identification. Despite this being identification by a single witness we are satisfied that it was watertight.

The two appellants lured **PW2** under the pretext that they wished to hire his vehicle. They led him to a lonely place before turning on him with a gun. They then stole the vehicle and drove away. All the elements of the offence of Robbery with Violence are present. We find that both the appellants were properly convicted and we do uphold their conviction.

On the question of sentence counsel has pleaded for a more lenient sentence submitting that the death penalty is no longer mandatory for such offences. No doubt counsel is relying on the case of **GODFREY NGOTHO MUTISO VS. REPUBLIC Mombasa Criminal Appeal No. 17 of 2008** which was decided by a 2-Judge Bench of the Court of Appeal. However a 5-Judge Bench of the same court in the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS VS. REPUBLIC Nairobi Criminal Appeal No. 5 of 2005** found the death sentence to be mandatory. We are aware that this question is now pending before the Supreme Court who we hope will make a final decision binding on all courts in the country. Pending that decision the death sentence remains mandatory for offences committed under section 296(2). We therefore are not inclined to interfere with the death sentence imposed by the trial court and we hereby confirm the same. This appeal fails in its entirety and is dismissed.

Dated and Delivered in Mombasa this 13th day of November, 2014.

M. ODERO **M. MUYA**

JUDGE **JUDGE**