REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 204 OF 2011

SALIM ABDALLA NZEVEH ....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 20 of 2010 of the Senior Resident Magistrate's Court at Kwale: E.K. Usui Macharia -SRM)

JUDGMENT

SALIM ABDALLA NZEVEH hereinafter referred to as the Appellant was Convicted on two counts of robbery with violence contrary to section 296(2) of the Criminal Procedure Code and Sentenced to suffer death on the first Count. Sentence on the second count was put in abeyance.

The appellant has listed eight grounds in this appeal. The first one being that there was no valid and proper charge before the Court.

Secondly, that the ingredients of the charge of robbery with violence were not proved and that the Conviction was against the weight of evidence.

It is also contended that the proceedings were a nullity.

The particulars on the first count are that on the 23rd day of November, 2009 at Diani Villas Diani Location of Kwale County, jointly with others not before the court and while armed with dangerous weapons namely pangas and clubs robbed **EUNICE ACHIENG ATATO** of her cash Ksh. 20,000/= three leather handbags and at or immediately before or immediately after the time of such robbery used actual violence and wounded the said **EUNICE ACHIENG ATATO.**

On the 2nd count it is alleged that on the same day and time he robbed one **WILLEM WINTER** of his wallet containing 780 Euros mobile phone make Nokia and a machine for measuring blood pressure, and that he did threaten to use actual violence to the said **WILLEM WINTER**.

The brief facts of this case are that the first and second Complainants are a husband and wife. At the time of this incident they were staying in one of the 28 houses at Diani Villas at Diani-Ukunda.

These houses were guarded by one watchman during the day and three at night.

On the fateful night of 23rd November, 2009 the two were asleep at night when they were woken by

sounds at the door.

The second Complainant **WILLEM WINTER** was the first one to notice the presence of intruders in their compound. Upon checking through the window he saw a group of people some wearing the uniform of their security guards. Entrance was gained through breaking the main door with a huge stone.

In relation to the appellants identification, this is what PW 1 told the Court at page 10 line 9 of the proceedings,

> **"I escaped to the sitting room to raise alarm. Before I got there I met a man standing near the door. I saw him clearly as the balcony light was on and the door was open. I saw it was Salim. I called his name out as I was standing near the door under the bar. The alarm was right under the bar.Salim is the Accused at the dock. I knew him very well. He supplied me with fish …............ He realized that Ihad recognized him. He put the torch on the ground and hit me on the head with a club. I fell on my head facing the ground. He beat me on the back around the ribs. He spoke and asked for money. He said "mama toa pesa". I told him I had no money. He said he knew I had money and he would kill me if I never produced.......... He plucked my hair. He placed my head on a stone which was used to break the door. He then hit me on the right jaw. I told him the money was in the handbag and he could pick ….....I heard Salims voice tell the others "Tokeni twende". He even left his torch where he had placed it earlier.**

When being cross-examined by Counsel for the Accused. She conceded that in her statement to police it was not indicated that she had seen the Appellants. The statement had also not indicated the appellant as the one who had hit her with a club but states that two men hit her with a piece of timber and they put her head on a stone. That when she complained she was told to tell the rest to the Court.

This is what the Learned Trial Magistrate observed in her judgment at page 40 line 9,

> **" I am satisfied that the light from the balcony was strong enough so as to enable her see her assailants well. The fact of calling out accused's name is an indication that she was in a position to see him well. There was also further evidence from the same witness that she recognized the Accused person. She said she was able to do so because he regularly sold fish to her. She further testified that she recognized the Accused person when he ordered the attackers to leave....".**

She relied on the case of **Chege Vs Republic 1985 KLR** where it was held in respect of voice identification,

> **"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the Accused person's voice that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it".**

Upon evaluation of the evidence adduced before the trial Court we do find that there was disconnect between what the Complainant (PW1) recorded at the police station and what she testified in Court.

In her statement recorded by police. She did not mention the appellant in name or by description as the one she had met at the sitting room and called out his name as Salim. She also did not record that she had heard Salim say to to others **"Tokeni twende"**.

That may explain the reason why an identification parade was conducted because she appears not to have disclosed to the police officers that the appellant was known to her before.

We also find it rather intriguing the fact that the police proceeded to conduct an identification parade for the same witness who had called members of public to arrest the appellant, when she came across him about a month after the incident. We are also at a loss as to what evidentiary value could be attached to the identification parade.

Chief Inspector Vitalis Ochindo is the officer who conducted the identification parade. He testified that the witness Eunice Achieng Otato (PW1) had asked each of the parade members to speak. The speech was **“mention your name”**.

The words she had allegedly heard the Appellant utter were, **“Tokeni twende”**. These are the ideal words which should have formed the basis of the voice identification and directed to each parade member to utter but not any other words that were not uttered at the time of the robbery.

We are of the considered view that the identification parade itself was not without substantial defects.

Rule 6(L) of police force standing orders Chapter 46 provides,

> **“If the witness desires to see the Accused person walk, hear him speak, see him with his hat on or off, this should be done, but in this event the whole parade should be asked to do likewise”.**

From the evidence of the officer conducting the identification parade its not clear whether every member of the parade was told to utter the same words as the Appellant.

We also note that rule 6 (n) of the force standing orders provides for fairness in the conduct of parades thus,

> **“the parade must be conducted with scrupulous fairness, otherwise the value of the identifications as evidence will be lessened, or nullified”.**

This incident took place in the dead of the night. The lights were not on, though it is said that the one at the corridor of the house provided some light when the main door was open. The attackers were more than four. We find that the circumstances obtaining at the time did not afford favourable conditions for identification. Suspicion was placed on the appellant because he used to sell fish to the Complainant.

We are satisfied that the Conviction was not safe. It is accordingly quashed and the Sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

Judgment dated and delivered in open Court this 10th day of July, 2013.

…..................   ..…..............

M. ODERO   M. MUYA

JUDGE   JUDGE

<u>In the presence of:-</u>

Learned Counsel for the Defence

State Counsel

Court clerk