



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Criminal Appeal 300 of 1997**

**SAID ABED SAID ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**(From Original Conviction and Sentence in Criminal Case No. 1020 of 1997 of the Chief Magistrate's Court at Mombasa - J. Siganga -Senior Resident Magistrate)**

**JUDGEMENT**

The Appellant herein laid out four grounds of Appeal in his Petition which he also argued in person before us. In his Amended grounds of Appeal he states:

*"1. That the learned trial Magistrate erred in holding that the evidence of P.W.2 pertaining to my arrest and recovery of the exhibited items was corroborated by the evidence of P.W.3 without proper finding that P.W.3 was not among the Police Officers who were together with P.W.2 during the arrest as per the evidence of P.W.2.*

*2. That the learned trial Magistrate erred or misdirected herself in finding that the complainant's injuries were caused by the appellant during the struggle without proper seeing that there was no evidence on record that the injuries were actually caused by the appellant.*

*3. That the learned trial Magistrate erred in law and facts in finding that the prosecution had proved their case beyond reasonable doubt. 4. That the learned trial Magistrate did not give proper consideration to my defence but favoured the prosecution side thereby rejecting my defence unreasonably".*

The particulars of the offence, which the learned trial Magistrate found were established, were that the Appellant did on 29.3.97 at 12 midnight in Kitaruni village, Mombasa jointly with others not before the

court, being armed with dangerous weapons namely knives, rob one Daniel Okello Omer of his cash money Shs. 2,000/=, a wrist watch make quartz valued at Shs. 800/= and used violence on the complainant immediately before, during or after the robbery.

The complainant was a Senior Private in the Kenya Army stationed at Nyali Barracks. He was coming from his brother's house at "Third World", Mtongwe, in Likoni area at about midnight.

He was walking alone, Then he saw ahead of him on the road a group of people crossing. As he reached that point they emerged from the side of the road and started asking whether he was not one of the

Policemen who had chased them earlier. He denied that and continued walking. After walking 400 meters he heard footsteps behind him and turned round to see four people following him. He sensed danger when they split' into two and walked on each side of him. Suddenly they grabbed him and removed all his money Shs. 2,000/=, wrist watch and wallet containing his work documents. All four started beating him with hands and fists. One removed a knife but the complainant grabbed him. The others produced knives also and he screamed for help as he struggled with one of them, Asaloon car appeared at that moment and four Police Officers emergedthere from. Three of the assailants fled while the complainant heldthe fourth firmly. The Police came and rescued him. As theyapproached, the man held by the complainant threw down the knife heheld. The man was the Appellant. The Police recovered the knife,the wallet and watch from the scene. They took the complainant andthe Appellant to Likoni Police Station where the complainantnoticed he had suffered injuries on the cheek and hand. He wastaken for treatment at the Navy Hospital Mtogwe.

Before the Police came, the struggle had taken about 2 - 3minutes. A P3 Form was filled in at Coast General Hospital and wasproduced in evidence by the Investigating Officer P.W.2 PC GabrielMuoki.

The Police Officers who emerged from a foreign registeredsaloon car were P.W.2 PC Gabriel Muoki, CPL Lucas Kania (P.W.3), PC Katana and the driver PC Gabriel Galgokhi. Two of them testifiedon the events of that night. The learned Senior ResidentMagistrate found their evidence consistent and - corroborative ofeach other and both corroborative of the complainant's evidence.

The first ground of attack was that there was an error in thefinding that P.W.3 Cpl Kanja was present at the scene with otherofficers and therefore corroborated the evidence of both P.W.2 andthe complainant. The basis' for such assertion was that the namesof the Police Officers mentioned by P.W.2 PC Muoki, included one"Cpl Keya" and not Cpl Kanja who testified as P.W.3.

On this assertion<sup>1</sup> we have made reference to the original handwritten record on the evidence of P.W.2 and he clearlymentioned Cpl Kanja and not "Cpl Keya" as one of the officerspresent at the scene with him. It is obvious that there was atyping error in the name of Cpl Kanja. He gave a detailed accountof what he saw on oath and said he was with P.W.2 Cpl Muoki. Thefinding that they were together was not

therefore erroneous, and we would dismiss that assertion by the Appellant.

The second and third complaints relate to the injuries suffered by the complainant. The submission made in this regard is that there was no proof of such injuries since the P3 completed by a Doctor was instead produced by P.W.2, a Police Officer. There was no explanation for the absence of the Doctor before the P3 form was produced by P.W.2. In the process the Appellant was deprived of the opportunity of cross examining the Doctor.

Even if such inquiries were established, at any rate, he submitted, there was no evidence that they were caused by the Appellant since the complainant only realized he had been injured when they reached Likoni Police Station.

On the first limb of this complaint we suspect that the Appellant, who does not say so in so many words, was alluding to the decision of the Court of Appeal in Rajab Abdalla -vs- Republic Msa CrA 86/97 (UR) where it was held that a P3 form produced by a Police Officer was irregularly and improperly produced contrary to Section 33(b) of the Evidence Act. That decision has however since been rationalised in BONIFACE KARERE NDERI -V- REPUBLIC Nyeri CrA 39/98 in which the Court of Appeal stated: "*The ABDALLAH case was decided on the presumption that the P3 form was produced in the trial court under Section 33(b). In which case before the evidence on the P3 form could be admitted through the hand of a person other than the maker it was necessary to first establish that the maker of the said P3 form was dead, or could not be found, or had become incapable of giving evidence or his attendance could not be procured without an amount of unreasonable delay or expense. In this case we do not know under which provision i.e. whether Section 33(b) or Section 77(1) of the Evidence Act PC Kiprono produced the post-mortem report and the report of the Government Analyst. Those documents could have been produced under either Section. The difference is that under Section 33 the reason for the unavailability of the maker must first be established<sup>1</sup> before accepting the evidence in the document, whereas under Section 77(1) any competent witness in criminal proceedings may produce the relevant document. Consequently it would not be appropriate for us at this late stage to decide the provision of the Evidence Act under which the two documents were produced in evidence. This case is distinguishable from ABDALLA 'S case on the grounds we have outlined above"*

*Underlining ours*

In view of the holding in that case that document may be produced in evidence under either Section 33 or 77 of the Evidence

Act, we see no compelling reason for holding that the P3 form in this case was irregularly or improperly produced in evidence. But that is not the end of the matter. The injuries on the Appellant were noticed by the two Policemen who gave evidence. Even without the P3 form, we are not prepared to find that there

was no violence meted out on the complainant as we believe, as the trial Magistrate did, that there was a violent struggle as the Appellant was held firmly by the complainant until that fortuitous moment three or some minutes later when the Police arrived. There was evidence accepted by the trial Magistrate and we also accept it, that there were other persons in the company of the Appellant all of whom set upon the complainant. On that premise the offence of Robbery with violence under Section 296(2) Penal Code is constituted even without considering whether there was an offensive weapon held or not. That is the wording of the Section itself and was amplified by the Court of Appeal in NDUNGU -Vs- REPUBLIC CR.A 116/95 (UR).

We have said enough to show that we see no merit in those two grounds of appeal.

The final ground of ; Appeal is that the defence was not considered. We think it was. The defence essentially claimed that the appellant was framed as he was merely going home after watching a video at 8 p.m. on the material day when he met some people who asked him to identify himself which he did. They said he was a robber and whisked him away to Likoni Police Station and charged him with the offence. That evidence did not shake the trial Magistrate's belief that it was the Appellant who was found in the tight grip of the complainant at midnight and was arrested while his compatriots fled. She saw the witnesses in the witness box and was able to assess their credibility. We come to the same conclusion as we think there are no reasonable doubts raised in the prosecution case.

It is only left for us to say that the State through Senior Principal State Counsel, Mr. Gacivih supported the conviction and the sentence and, we think, rightly so.

The Appeal is dismissed in its entirety.

Dated at Mombasa this 23<sup>rd</sup> day of July 1999.

A Hayanga

JUDGE

P.N. Waki

JUDGE