REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CRIMINAL APPEAL 83 OF 1994

SALIM MACMASTERS ABDULLAH & ANOTHER…….....
……..APPELLANTS

AND

REPUBLIC…….....
……..RESPONDENTS

(Appeal from a conviction and sentence, Judgment Order, or as the case may be of the High Court of Kenya at Nairobi (Mr. Justice Oguk) dated 15th February, 1994

IN

H.C.CR.A. NO. 1298, 1299 OF 1994

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JUDGMENT OF THE COURT

The appeals of Salim Macmaster Abdullah and Francis Ndungu Mwaura were argued together before us. They arise from their convictions on a joint charge of robbery contrary to Section 296(1) of the Penal Code. Those convictions were recorded by the Resident Magistrate at Gatundu on 1st September, 1992 and were subsequently confirmed by the High Court (Oguk, J.) on 15th February, 1994. The appellants appeal a second time to this court and that being so, only matters of law fall for our consideration.

The only valid point of law raised by each appellant seems to us to be whether there were proper identification parades in respect of each appellant. Both the magistrate and the learned judge seem to have proceeded on the basis that each appellant was identified by Henry Njoroge Ngugi (P.W.1), the victim of the robbery, at properly conducted identification parades. In this, both courts below were not correct. It is true P.W.1 stated in his evidence that he identified each of the appellants at different identification parades, but that was the farthest the prosecution went. The prosecution did not, as it was their duty to do, call the police officer who conducted the alleged parades to testify before the magistrate and to produce the identification parade forms. Mr. Okumu, the Principal State Counsel, conceded before us that there was no acceptable evidence of any identification parades. Accordingly, the evidence of P.W.1 that he identified each appellant at an identification parade must be ignored and the magistrate and the learned judge erred in placing reliance upon that evidence. We shall ourselves ignore that evidence.

But having done so, it is clear to us that there was other abundant evidence upon which the convictions of these appellants were inevitable. P.W1 had electric lights on in his shop when the robbery took place. The appellants entered his shop, bought sodas first, drank the sodas and it was only after

about five or so minutes that they attacked him and robbed him of his money. During the hearing of the case before the magistrate, he was able to point out the two appellants as being among the persons who had robbed him. True this was a dock identification after a very considerable lapse of time, but the evidence of P.W1 was fully corroborated by that of Francis Mwaura Mwathe (P.W2) and Herman Kanyi Ngigi (P.W3). These latter two swore that the appellants and others hired their vehicle and that the two of them drove the appellants in the vehicle to the scene of the robbery. P.W2 was arrested in the vehicle close to the scene of the robbery. P.W3 who was driving the vehicle managed to escape and he himself went and reported the matter at Gatundu Police Station. The appellants had contended in the courts below and also before us that P.W2 and P.W3 were accomplices whose evidence required corroboration and, therefore, they could not corroborated P.W1. The magistrate found as a fact that the appellants had hired the vehicle of P.W2 and P.W3 for the purpose of collecting back the wife of Salim who was alleged to have run away from home. The magistrate was satisfied that P.W2 and P.W3 were not accomplices. The learned judge on first appeal confirmed the magistrate on this point, the judge pointing out that if P.W3 had been a participant in the robbery, it was unlikely that he himself would have gone to the police station to report the robbery. In respect of P.W2, the judge pointed out that he too had a perfect chance to escape from the vehicle but chose to do so. These were concurrent findings of fact by the lower court and they were based on the recorded evidence. The two courts were entitled to make these findings and there can be no legal basis for our interfering with them. The evidence of P.W1, P.W2 and P.W3 which was accepted proved beyond a peradventure that the two appellants were guilty of the offence laid their charge. There is no merit in any of the grounds which each appellant pedalled before us and the appeals against the convictions must fail. The sentences imposed were lawful and cannot be a matter for us. In the event, the appeal fails in toto and our order shall be that they are dismissed.

Dated and delivered at Nairobi this 3rd day of February, 1995.

J. M. GACHUHI

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR