



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NOS. 359, 360 & 361 OF 2010

BETWEEN

1. ABAR JUMA NZAI *alias* PILLA
2. OMAR ALI JUMA *alias* MBUCHI
3. ISMALE MOHAMED.....APPELLANTS

AND

REPUBLIC .....RESPONDENT

*(An appeal against the judgment of the High Court of Kenya at Malindi (Omondi & Odero, JJ.) dated 21<sup>st</sup> September, 2010*

in

H.C.Cr.A. Nos. 93, 94 & 95 of 2009)

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JUDGMENT OF THE COURT

The three appellants namely, *Abar Juma Nzai alias Pilla, Omar Ali Juma alias Mbuchi and Ismael Mohammed* were charged with the offence of robbery contrary to **section 296(2)** of the Penal Code. The particulars of the offence were that on the 28<sup>th</sup> day of May, 2008 at Mtwapa Township in Kilifi District within Coast Province, jointly with others not before court, being armed with dangerous weapons namely pangas, robbed *Rehema Mwinyihaji* one suitcase containing assorted clothes and documents, mobile phone make Nokia 2610, one golden bracelet, one golden chain, two golden earrings, digital calculator and cash Kshs.30,000/= all valued at **Kshs.108,000/=** and at or immediately before or immediately after the time of such robbery murdered one *Jimmy Karisa*.

The trial proceeded before **J. Nduna** the then Kilifi Senior Resident Magistrate who on 29<sup>th</sup> June, 2009 sentenced each of the appellants to suffer death as prescribed by law. The appellants were dissatisfied with the conviction and sentence and filed an appeal in the superior court. On 21<sup>st</sup> September, 2010 **Omondi & Odero, JJ.** dismissed the appellants' appeals and confirmed the sentence of death, hence this appeal.

Each of the appellants filed separate grounds of appeal. However, during the hearing, Mr. Ngumbau Mutua, the learned counsel for the appellants crystallized the grounds into three namely:-

- i) ***Failure to evaluate the evidence exhaustively***
- ii) ***Failure to consider the defences raised by the appellants***
- iii) ***Failure to make a finding that section 151 of the CPC was contravened.***

The learned counsel for the appellants attacked the purported dying declaration as according to him there was no proof of death; that two appellants were arrested after being beaten by a mob and there was no nexus between them and the commission of the offence.

**Mr. Oyiembo**, the learned Assistant Deputy Director of Public Prosecutions opposed the appeal on the grounds that the appellants were very well known to the complainant and further that there was a dying declaration. He did not think the lack of proof of the death of the watchman was fatal to the conviction.

We have carefully analysed the evidence. It is not in dispute that the complainant knew the three appellants very well. On the night of the attack, that is 27<sup>th</sup> May, 2008, the attackers carried several items from her house. She reported to the police and recorded a statement. She told the court that she gave out the names of the boys who attacked her. She was later called to attend an identification parade. In her evidence she said the incident lasted 2-3 minutes and she was able to see the appellants using two electric bulbs. She told the court that indeed she spoke to the appellant who numbered six. In her testimony in court she gave the names of the three appellants as the persons who attacked her on 27<sup>th</sup> May, 2008. On the other hand PW2 testified that when he responded to the distress call of the complainant, "*she told me that some young men had attacked the watchman*". PW2 told the court that the watchman that if he was to die, then it was **Pilla, Mole** and **Ng'ang'a** who were responsible. He told the court that he knew the 1<sup>st</sup> appellant as Pilla. Indeed he was cross-examined by the 1<sup>st</sup> appellant on that and his answer was "*You are Pilla*". It is noteworthy that PW1 never ever referred to the 1<sup>st</sup> appellant as Pilla. Who was this Pilla? Was he the 1<sup>st</sup> appellant? Was the person that the watchman referred to as "*Pilla*" the 1<sup>st</sup> appellant? I say this with tremendous caution as apart from **Pilla**, there was **Mole** and **Ng'ang'a** who were mentioned in the dying declaration and who appear not to be the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. Besides, it is clear that at the time the three appellants were arrested neither PW1 nor PW2 were at the scene. PW3 **Patrick Mataza** said that on 28<sup>th</sup> May, 2008 at about 12.00 noon he went to Mtwapa and found a mob that had descended on the 1<sup>st</sup> appellant and one other known as **Hassan (or Mohamed) Ninja**. The two were being beaten and the mob said they are the ones who attacked PW1. This Ninja was later released and none of the witnesses identified him.

On 30<sup>th</sup> May, 2008 PW3 rescued **Omar Ali Juma**, the 2<sup>nd</sup> appellant from a mob. According to PW3, members of the public informed him that the two had been identified as the people who attacked PW1. In his further testimony, he stated that PW1 had informed him that one of the attackers was nicknamed "*Pilla*". He did not know anything about **Ismael Mohamed**, the 3<sup>rd</sup> appellant. If indeed PW1 identified the three appellants and she gave out their names and the mob inflicted mob justice on the 1<sup>st</sup> appellant and one Ninja as they are the ones who had attacked PW1, where did the mob get the information that Ninja was one of the assailants as Ninja was not mentioned by PW1? PW1 told the court that she identified the three in court. Again at what point was the mob given the three names by PW1? It would appear that there is no nexus between the evidence of PW1 and the subsequent infliction of mob

justice on 1<sup>st</sup>, 3<sup>rd</sup> appellants as well as Ninja. It is also clear from the record that there was another suspect who was beaten to death. Who was this suspect and who mentioned him if PW1 zeroed down on only the three that were in court? Could it be a case that wherein the complainant knew the three very well, they may not have been part of the gang that attacked PW1 but were arrested as they were found being beaten by a mob? One of those namely Ninja was later released and according to PW5 because no one identified him. The other one died. So were the three arrested and thereafter identified by PW1 unlike Ninja who was not identified. It is also disturbing that PW3 told the court that PW1 had told him that one of the suspects was called Pilla. PW1 herself never made mention of the name Pilla but referred to the 1<sup>st</sup> appellant as **Abar Juma Nzai**. The 1<sup>st</sup> appellant and Ninja were rescued from a mob justice on 28<sup>th</sup> May, 2008 and according to PW4, **Stephen Mbogo**, the 3<sup>rd</sup> appellant was also rescued from a mob on 28<sup>th</sup> May, 2005 after a lady came to the police station and requested for help as her son was being beaten by a mob.

It is true to state that there was no nexus between the commission of the offence and the appellants. All the three appellants were rescued from mob justice. One other namely Ninja who was also beaten by the mob was later released whilst another one died. Who told the mob about the five suspects yet PW1 identified only the three in court? Could the mob have descended on three innocent persons just like the other two? Again as to the dying declaration the watchman talked of **Pilla, Mole** and **Ng'ang'a**. Who was **Mole** and who was **Ng'ang'a**? Was the 1<sup>st</sup> appellant also known as Pilla? PW1 never said so. It is only PW2 who said that the 1<sup>st</sup> appellant was known as Pilla. The 1<sup>st</sup> appellant seemed to deny this and upon cross-examining PW2, PW2 answered “*you are known as Pilla*”.

The upshot of this is that it is unclear whether PW1 actually gave the names of the three appellants to the police at the time of recording her statement. But even assuming that she did so, did she also tell members of the public? If so, why did the members of the public also descend on Ninja and the other who died and yet these two were not mentioned by PW1? As stated above PW1 never referred to the 1<sup>st</sup> appellant as Pilla. Indeed PW3 told the court that PW1 told him that the 1<sup>st</sup> appellant is nick-named Pilla. PW1 never said so and the only person who mentioned Pilla was PW2 and the watchman in his dying declaration. It was not proved beyond doubt that the 1<sup>st</sup> appellant was “*Pilla*”. It was also not established that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants took part in the robbery as there is no nexus between the commission of the offence and the arrest. It is noteworthy that none of the stolen items were found on them.

We are therefore in agreement with the appellants' counsel that the evidence was not sufficiently evaluated and analysed, lack of which casts a reasonable doubt as to whether the appellants were properly convicted.

Accordingly, the appellants' appeal is allowed, conviction quashed and sentences imposed on each appellant is set aside. It is further ordered that the appellants be set at liberty forthwith unless lawfully held.

**Dated and delivered at Malindi this 9th day of October, 2013.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**