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

Criminal Apeal 156 of 2005

1 SAID NGUTO MASILA

2 ALI OMAR ABDULRAHMAN………………….………APPELLANTS

AND

REPUBLIC……………………..……………………….RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Mombasa (Mwera& Maraga JJ.)

dated 10th May, 2005

in

H.C.CR. A. NOS. 341 & 352 OF 2003)

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JUDGMENT OF THE COURT

The two appellants, Saidi Nguto Masila (1st appellant) and Ali Omari Abdulrahman (2nd appellant) were originally jointly charged with two counts of robbery with violence contrary to **section 296(2)** of the Penal Code. They pleaded not guilty to both counts, were tried by the learned Senior Resident Magistrate at Kwale (Ms. L.N. Mbatia) convicted and consequently sentenced to death as mandatorily provided by the law. They appealed to the superior court (Mwera and Maraga JJ) which allowed their appeal on the second count but dismissed their appeal in respect of the first count. They now come to this Court by way of second appeal and that being so, only matters of law fall for consideration pursuant to **section 361 (1)** of the Criminal Procedure Code (Cap. 75 Laws of Kenya).

The particulars of the offence in respect of the first count, which is the subject of this judgment, were as follows:-

"1 SAIDI GOSO MACHILA

2 ALI OMARI ABDULURAMAN: On the day of 4th August, 2002, at Diani Beach White House area of Diani Location in Kwale District within Coast Province together with others not before court being armed with dangerous weapons namely pangas robbed Mwanahamisi Hussein of her property money amounting to Kshs. 10,000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Mwanahamisi Hussein."

The complainant Mwanahamisi Hussein (PW1) testified before the trial court to the effect that on the material night she was asleep in her house when she heard someone shouting. She woke up and suddenly saw people come in the house. The lamp was on. These people ordered Hussein to give them money. They threatened to kill her as one of them put an axe on her head. She pleaded with them not to kill her as she opened a suitcase, removed her purse in which there was Shs.10,000 which she handed over to them. The complainant went on to testify that she was able to recognize two of the robbers as the two appellants. She stated that she had known or seen both appellants before the robbery as the 1st appellant (Saidi Nguto Masila) used to visit her place while the 2nd appellant (Ali Omar Abdulrahman) was well known to her as they both went to Likoni Primary School where the 2nd appellant was known by the nick name of "Maonjo".

When put to their defence, the appellants denied having been anywhere near the complainant's house on the material night. In his unsworn statement, the 1st appellant stated that he was arrested on 17th September, 2002, taken to Diani Police Station where he remained for six days and then taken on an identification parade. He completed his statement by saying that he knew nothing about the robbery.

On his part, the 2nd appellant in his unsworn statement stated that he was arrested on 26th August, 2002 and taken to Diani Police Station for another case and that he knew nothing about the robbery charge.

The learned trial magistrate considered the evidence before her and in the course of her judgment stated:-

"The issue is whether the prosecution has proved its case against both accused persons beyond reasonable doubt on both counts.

When the robbers went into Mwanahamisi Hussein's bedroom (1st complainant), there was a lamp that was on in her room. She saw the robbers clearly and she recognized two of them who are the accused persons. She stated that the 2nd accused is one who ordered her to give him money and he is the one to whom she gave her purse containing 10,000. The 1st accused was, during the robbery standing next to the complainant with an axe over her head threatening to cut her up as she pleaded with him to spare her life. She knew them both from before. She used to see the 1st accused in White House area. He had dreadlocks and a long beard.

The 2nd accused also had dreadlocks and was well known to the complainant as they went to Likoni Primary School together. He used to go by the nickname Maonjo. She stated that they were not classmates but they were school mates. She picked the 1st accused out of the identification parade as one of the people who had robbed her. No identification parade was conducted on the 2nd accused person. She knew him from before and recognized him during the robbery as they went to the same Primary School."

Having so expressed herself the learned trial magistrate concluded her judgment thus:-

"I find that even though the accused persons were eventually arrested for unrelated offence and that none of the stolen property was recovered from them the evidence adduced against them is overwhelming and I find them guilty as charged and convict them accordingly on both counts."

Being dissatisfied by both conviction and sentence passed on them the appellants preferred an appeal to the superior court. The superior court considered all that was urged before them and in their judgment dismissing the appellants' appeal stated inter alia;-

"The learned trial magistrate went over the evidence as we ourselves have done. She found that PW1 identified the appellants positively. She proceeded to convict and sentence them. On our own review of the lower court record, we agree. The offence took place at night alright, but PW1 said that her room was lit with a lamp. It was never extinguished. For two minutes she identified Saidi who once lived near her. She later identified him on a parade even when he had shaved off his dreadlocks. His role in the robbery was to hold an axe to PW1'S head and threaten to split it. That should have been close enough. As for Ali it was by recognition. They had gone to school together and when he demanded for the money, she gave it to him. She said that she knew Ali by the name of "Maonjo" and she thus saw no need to describe him to the police. Seemingly her statement to the police did not carry his name. But we could not see, if she was not saying the truth, and some credible testimony it was, why Ali attempted to unsuccessfully allege bad blood between them.

As for the identification parade from which Saidi was picked up, it was carried out by I.P. Magondu PW.4. We examined the parade report and detected no fault with it. Indeed none was suggested.

We find that although no stolen property was recovered and the appellants were arrested for another offence altogether, they were properly identified as the robbers of the night in question. The identifying witness was one PW1 but from the strong evidence laid (sic) we do not think the learned trial magistrate fell in error to convict on it. She did not have to warn herself when doing so at that time because she was looking at whoever (sic) other witnesses said regarding the two counts that she found the appellants guilty of. But after the State conceded appeals on count 2 as

we have already said, we conclude that the learned trial magistrate made no mistake as regards count 1. Not on appreciating the evidence."

It is from the foregoing dismissal of their appeal that the appellants come before this Court by way of second appeal. And as we have already stated, this being a second appeal, only matters of law fall for consideration.

When the appeal came up for hearing before us on 15th January, 2007 Mr. C.A. Opulu appeared for both appellants while Mr. V.S. Monda, (State Counsel I) appeared for the State.

Mr Opulu made some spirited submissions that the charge sheet was fatally defective but when shown the trial magistrate's original file in which the charge and statements of the offence were clearly set out he quickly abandoned his submissions in that direction. Mr Opulu then concentrated on what we consider to be the main issue in this appeal; identification. He submitted that there was no proper identification as, according to PW1, the incident took about two minutes only and the only source of light was a lamp. He further submitted that both courts below were in error by failing to evaluate the evidence

On his part, Mr Monda asked us to dismiss this appeal in its entirety as, in his view, there is a concurrent finding by both courts below that the complainant gave credible evidence.

We have considered the submissions by Mr. Opulu for the appellants and Mr Monda for the State and we must say that the only point that falls for consideration in this appeal is the issue of identification. The robbery is said to have taken place at night when the only source of light was a lamp. The incident, like many incidents of this nature, did not take long since the assailants mission appears to have been to obtain cash from the victim and once the money was handed over to the assailants they left immediately. The complainant Hussein testified that she knew both appellants prior to this incident. This was therefore a case of recognition rather than identification. We appreciate that the evidence of a single identifying witness in difficult circumstances must be tested with the greatest care and can only be a basis for a conviction where the court is satisfied that the testimony of a single witness can safely be accepted as free from the possibility of error. – see **Abdallah bin Wendo & Another v. R [1953] 20 EACA 166 Roria v. R [1967] E.A 583 and Maitanyi v. Republic [1986] KLR. 198.**

As we have already stated, this was a case of recognition since the complainant knew the appellants prior to this incident. In **Anjononi v. R [1980] KLR. 59 at p.60** this Court stated:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than

identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"

It is also to be pointed out that there were concurrent findings of fact by the two courts below and as it has been stated many times by this Court, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts are shown demonstrably to have acted on wrong principles in making the findings **–** see **Chemagong v. R [1984] KLR 611.**

Having considered what has been urged before us we are satisfied that the appellants were convicted on very clear evidence of recognition. The two courts below properly considered the evidence of recognition and came to the same conclusion that the appellants were properly recognized during the robbery. We think they were lucky that the superior court allowed their appeal on the second count. They were clearly part of the same group which committed the offence in the second count. There is, however, nothing the Court can do on that aspect of the matter.

In view of the foregoing, we find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety. Order accordingly.

Dated and delivered at Mombasa this 19th day of January, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

<u>DEPUTY REGISTRAR</u>