REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

CORAM: OMOLO, GITHINJI & DEVERELL, JJ.A.

Criminal Appeal 5 of 2005

BETWEEN

1. DAVID ODHIAMBO]

2. GEORGE OMONDI] ……..…….. APPELLANTS

AND

REPUBLIC …….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Mombasa (Khaminwa & Maraga, JJ) dated 3rd December,

2004

in

H.C.CR.A. NO. 442 & 444 OF 2002)

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JUDGMENT OF THE COURT

DAVID ODHIAMBO and **GEORGE OMONDI**, hereinafter the first and the second appellant respectively, were tried and convicted by the Senior Resident Magistrate of Mombasa on two charges, one of robbery with violence contrary to **section 296(2)** of the Penal Code and a second one of rape contrary to **section 140** of the Penal Code. On the charge of robbery with violence, it was alleged that on 6th January, 2002 at [*particulars witheld*] village in Mombasa District, the appellants while armed with a knife, jointly robbed H.A. of a pair of shoes and cash K.shs. 100/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said H.A. The second charge of rape against the appellants stated that on the same day at the same place the appellants had unlawful carnal knowledge of H.A. without her consent. In the charge of rape, the prosecution did not actually include the word “unlawful” in the particulars of the charge, and though no complaint was raised about that, we would draw the attention of those whose duty it is to draw-up charges and to trial magistrates that rape as defined in **section 139** of the Penal Code is that---

> **"Any person who has unlawful carnal knowledge of a woman or girl without her consent -------- ."**

There can be no reason for not giving the statutory definition of rape in the particulars of the charge. The same applies to the provisions of **section 143** (abduction of girls under sixteen years of age), **section 144** (indecent assaults on females) and section 145 (1) and (2) (defilement and attempted defilement of girls under 14 years). In future, we would expect the prosecution and trial magistrates to ensure compliance with these elementary requirements. We shall say no more than that on that aspect of the matter.

The first charge of robbery simply alleged that the appellants were armed with a **"knife"** when they attacked the complainant A (PW1). **Section 296(2)** of the Penal Code states that:-

> **"If the offender is armed with any dangerous or offensive weapon or instrument ------- he shall be sentenced to death."**

The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery **under section 296(2)** and the one defined under section 295 of the Penal Code. There are other ingredients or elements under **section 296(2**) such as being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under **section 296(2),** the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295.

JOHANA NDUNGU V REPUBLIC, Criminal Appeal No. 116 of 1995 (unreported) explained the various elements or ingredients which must be proved under section 296(2) of the Penal Code and any of which, if proved, there would be no discretion on the part of the trial court but to convict **under section 296(2).** The Court took the matter further in the case of **JUMA V REPUBLIC** [2003]2 EA 471 where it held that where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was a dangerous or offensive one. The reason for that is that a knife, for example, or a stone, is not an inherently dangerous or offensive items. A knife can and often is used under very many circumstances for entirely peaceful purposes. So that if it is being alleged that the knife was being used for dangerous or offensive purpose, it must be stated so in the particulars of the charge under section 296(2) to distinguish such a charge from one **under section 295** punishable by **section 296.** Put in another way, a knife is not an intrinsically dangerous weapon; it is the use to which the weapon or instrument is put that makes it dangerous or offensive. Even a gun is not necessarily a dangerous or offensive weapon; a gun can be used in target practice, for example, and put to that use it is not an inherently dangerous weapon. A wheel spanner for example, is a tool or an instrument. But it can be adapted to perform offensive or dangerous purposes and if it is being alleged that the appellant was armed with a wheel spanner during the robbery, the same must be described in the particulars of the charge as being a dangerous or offensive weapon before evidence is led to show the use to which it was put to make it dangerous or offensive. **Section 89**(4) of the Penal Code, for example, defines an offensive weapon as meaning:-

> **"------- any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use."**

So the test of whether an article can be described as dangerous or offensive is really the use or the purpose for which the person possessing it intends to put it to. That is why **JUMA V REPUBLIC**, supra, insisted that if the prosecution intends to prove under **section 296(2)** of the Penal Code that the knife with which the appellant was armed was a dangerous or offensive weapon, they must allege so in the particulars of the charge and seek to prove that by evidence. Otherwise there would be no difference between a charge under section 295 of the Penal Code and one **under section 296(2)** of the same Code.

The charge of robbery brought against the appellants was, with respect, defective as it failed to allege a vital ingredient thereof, namely that the knife was a dangerous or offensive weapon. The conviction recorded against each appellant must, accordingly be quashed. We do so and set aside the sentence of

death imposed thereon as respects each appellant.

That now brings us to the second charge of rape and on that aspect of the matter, we have little difficulty in coming to the conclusion that the appellants were convicted on sound evidence which proved that charge beyond any reasonable doubts. The offence took place around 7.30 p.m. but the unshaken evidence of the complainant was that there were street lights close to where the appellants took her in order to satisfy their sexual lusts. They were with her for quite sometime and she described in detail, the role played by each one of them during the incident and after they finished with her, they escorted her back to the place where they had found her waiting for her transport home. When she was examined by a doctor the same night, and the injuries seen on her were consistent with a sexual assault. The assault on her was on 6th January, 2002 and on 20th February, 2002 and again on 18th March, 2003, she had no difficulty at all in picking each appellant from an identification parade. The trial magistrate warned herself of the dangers of convicting on the evidence of a single witness but after that warning was nevertheless satisfied that A. had properly identified these appellants during the incident. The High Court, on first appeal, confirmed the magistrate's findings. We can find no reason for interfering with their concurrent findings. Issues such as the validity of the parades and why the appellant's husband was not called to testify which were raised by Mr. Buti on behalf of the appellants have really no validity to the conviction recorded against the appellant on the charge of rape. We reject these issues as unfounded. The sentences of fourteen years imprisonment imposed on that count were lawful and were eminently deserved, except that the two courts below failed to order that the sentences be served with hard labour as is required under **section 140** of the Penal Code. The appeal against conviction and sentence on count two fails and is dismissed except that the prison sentence shall be served with hard labour.

Dated and delivered at Mombasa this 29th day of July, 2005.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.