



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL APPEAL NO 38 OF 2016**

**PAUL TIPANDE MUKARE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 85 of 2010 in the Senior Resident Magistrate's Court at Taveta delivered by Hon C.N. Ndegwa (SRM) on 15<sup>th</sup> February 2011)**

**JUDGMENT**

1. The Appellant herein, Paul Tipande Mukare, was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the 15<sup>th</sup> February 2010 at around 7.30 p.m. at Lesesia Village in Taveta district of the Coast province, he robbed Joseph Ndoti Musango (hereinafter referred to as "PW 1") of motorcycle make TVS Star Registration Number KMCH 239A (hereinafter referred to as "the subject "Motor Cycle") valued at Kshs 87,000/=, a mobile phone make Nokia 1200, an Identity Card (ID) and cash Kshs1,400/= all valued at Kshs 90,400/= and immediately before the time of such robbery wounded him.
2. The Learned Trial Magistrate, Hon C.N. Ndegwa, Senior Resident Magistrate, convicted him and sentenced him to suffer death in the manner prescribed by the law.
3. Being dissatisfied with the said judgment, on 5<sup>th</sup> August 2016, he filed his Notice of Motion application seeking leave to be allowed to file his Appeal out of time, which application was allowed and his Petition of Appeal deemed to have been duly filed and served. At the time, he relied on five (5) Grounds of Appeal.
4. On 20<sup>th</sup> December 2016, he filed Amended Grounds of Appeal. This time, he relied on six (6) Amended Grounds of Appeal. On 21<sup>st</sup> September 2017, he filed other Grounds of Appeal and Written Submissions. The Respondent filed its Written Submissions dated 30<sup>th</sup> October 2017 on 1<sup>st</sup> November 2017.
5. When the matter came up on 1<sup>st</sup> November 2017 both he and the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

**LEGAL ANALYSIS**

6. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the

Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

7. After perusing the Appellant’s and the State’s Written Submissions and in particular the three (3) sets of Grounds of Appeal, it appeared to this court that the issues that had really been placed before it for determination were as follows:-

- 1. Whether or not the Charge sheet was defective;**
- 2. Whether or not the Appellant’s rights to fair trial were infringed upon;**
- 3. Whether or not the Appellant was properly identified;**
- 4. Whether or not the prosecution proved its case beyond reasonable doubt.**

8. In view of the repetition of the Grounds of Appeal, this court was unable to categorise the same and found it prudent to address the issues raised under the distinct headings shown hereunder.

### **I. CHARGE SHEET**

9. The Appellant submitted that the Charge Sheet as drafted was defective. He submitted that despite having been charged under Section 296 (2) of the Penal Code, the ingredients of the charge were not proven against him. He stated that no weapon was produced as evidence as having been used during the alleged incident. He further submitted that since the attacker was alleged to have been alone during the incident he averred that the prosecution erred in charging him under Section 296 (2) of the Penal Code.

10. The State relied on the case of **Dima Denge Dima & Others vs Republic Criminal Appeal No300 of 2007** where the Court of Appeal held that in a case of robbery with violence, the prosecution was only required to prove one ingredient of section 296 (2) of the Penal Code. It submitted that from the particulars indicated in the charge sheet, PW 1 was wounded during the commission of the robbery which was sufficient proof of robbery with violence. It added that although the Charge Sheet did not disclose the weapon used, this did not make the charge sheet defective.

11. Once again this court found itself in agreement with the State’s submissions in this regard. The use of the word “or” is disjunctive and not conjunctive. It means that only one of the ingredients should be demonstrated to prove the offence of robbery with violence. It was not necessary for the Prosecution to have produced a weapon as an exhibit. The Appellant would also not have got off the hook even if he was alone if the Prosecution proved that at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other personal violence to PW 1.

12. Indeed under Section 296(2) of the Penal Code, only any of the following ingredients would have to exist to prove the offence of robbery with violence:-

- 1. the offender must be armed with any dangerous or offensive weapon or instrument; or (emphasis court)**
- 2. the offender must be in the company of one or more other person or persons; or (emphasis court)**
- 3. at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**

13. Going further, a Charge Sheet does not become defective merely because the prosecution has not proved the facts in the charge sheet case through the evidence that has been adduced during trial. If the evidence that is presented in court does not prove any offence, the trial court is obligated to acquit an accused person as envisaged in Section 210 and Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya) as the prosecution will either have failed to demonstrate that a *prima facie* has been established or to prove its case beyond reasonable doubt.

14. This court was thus not persuaded that the Appellant herein ought to be acquitted on the ground that the Charge Sheet was defective because he did not demonstrate how the same was defective, which this court did not find to have been the case and/or how it caused him prejudice. The question of whether or not the Prosecution had proved its case was a different matter altogether.

## **II. APPELLANT'S RIGHT TO FAIR TRIAL**

15. Whereas the Appellant had listed the Ground of Appeal that his constitutional rights were infringed upon as he was charged over three (3) days after he had been arrested, he did elaborate this argument. The State did not also address itself to the said issue. This court was of the view that making a determination on the said issue without the same having been argued would be based on an assumption of what the issue was. Notably, the Appellant may have opted to abandon the same altogether.

16. Having said so, this court noted his arguments that during Cross-examination, Isaac Kyamaru (hereinafter referred to as "PW 2") testified in a language that he was not familiar with and that because he did not understand the language his constitutional rights enshrined under Article 50 (2)(m) of the Constitution of Kenya, 2010 were violated. He added that PW 2 was also not identified to him, unlike with the other Prosecution witnesses.

17. On its part, the State argued that all the Prosecution witnesses testified in Kiswahili language which fact was recorded by the Learned Trial Magistrate and that if PW 2 spoke in a language that he did not understand, then he would not have been able to Cross-examine PW 2.

18. Whereas the Learned Trial Magistrate did not indicate which language PW 2 testified in when he continued with his evidence on 6<sup>th</sup> July 2010, it was apparent from the proceedings that the Appellant Cross-examined him in a language that they both understood. Notably, the Appellant would not have been able to sustain a conversation with PW 2 if he was speaking in a language he could not understand, a fact that was rightly pointed out by the State.

19. The failure by the Learned Trial Magistrate to have indicated the language of the proceedings on the said date, though serious, could not be deemed to have occasioned the Appellant prejudice due to the fact that he Cross-examined PW 2 at length. It did appear to this court that the Appellant was merely relying on a technicality which did not hold any water. It was not therefore satisfied that the Appellant's Appeal ought to be allowed on this Ground.

## **III. PROOF OF THE PROSECUTION'S CASE**

### **A. IDENTIFICATION**

20. The Appellant submitted that the Trial Court failed to take his sworn testimony into consideration. He argued out that the assailant did not threaten PW 1 that he would attack him and that PW 1 did not describe the time of the incident to assist the court determine whether it was possible for him to have had opportunity to identify his assailant.

21. He pointed out that PW 1 lost consciousness for a long time before he came to. He further pointed out that the incident took place at night when it was dark making it hard for witnesses to make a positive identification especially since the assailant was a stranger to PW 1.

22. It was his further submission that the victim did not give a description of the assailant's physical

features or clothing at the material time to assist the police in tracing and arresting him. He added that PW 1 failed to disclose to the court if he gave a description of his assailant to the police. He submitted that PW 1 testified that he reported the attack to Holili Police Station yet no police officer from that Police Station testified during the trial.

23. He also pointed out that Mutindi Kaleli (hereinafter referred to as “PW 3”) told the court that there was a teacher who resembled the said assailant and consequently, there was a possibility of there having been a mistaken identity. He submitted that PW 3 said that the Appellant was the only one who had a gap in his front teeth and that was why she was able to identify him during the Identification Parade. He also said that while PW 3 testified that there were eight (8) people in the Identification Parade, Number 219226 Chief Inspector Kuria Mwangi (hereinafter referred to as “PW 8”) testified that they were nine (9) members in the said Identification Parade.

24. It was also his averment that the Identification Parade was not conducted in accordance with the law and that PW 8 who conducted the identification parade testified that the members of the parade were of the same height, size, colour and complexion. He pointed out that PW 2 testified that he (the Appellant) looked different from the other members of the Identification Parade. He contended that it was not necessary for PW 2 to have identified him in the Identification Parade as he had averred that he had seen him before.

25. It was therefore his submission that the visual evidence relied upon by the Trial Court to convict him was not credible. He argued that the circumstances of the alleged incident were not favourable for positive identification of PW 1’s assailant.

26. On its part, the State submitted that although the First Report was made at Holili Police Station, the matter was taken over by Taveta Police Station on the same date of the alleged offence. It stated that although PW 1 did not disclose to the court whether or not he gave a description of the assailant to the Police, from the testimony of Number 88169 PC Franklin Githinji (hereinafter referred to as “PW 7”), it was him who led to the arrest of the Appellant. It added that it was not the Police who sought the Appellant on their own and arrested him.

27. It further averred that the report made to Taveta Police Station would not have assisted as it was made by Julius Phillip Mulandi (hereinafter referred to as “PW 4”) who did not witness the robbery and would thus not have been able to identify the assailant.

28. It further submitted that PW 1 testified that he was a boda boda operator and that on the material day, the Appellant boarded a motorcycle at approximately 5.30pm. It argued that since the two (2) of them spent over an hour together in sufficient light, there could not have been any possibility of mistaken identity or conditions that could have affected the Appellant’s positive identification. It averred that the period was sufficient for PW 1 to have taken in the Appellant’s facial features, especially since they were up close and had negotiated during the day.

29. It further submitted that although PW 2 and PW 3 did not witness the robbery, they testified that PW 1 had indeed carried the Appellant to PW 3’s homestead and that they left her homestead together. It also pointed out that PW 2 testified that there was a lamp in PW 3’s house that enabled him and PW 3 clearly see the Appellant’s facial features. It relied on the case of **Abdalla Wendo vs Republic (1953) 20 EACA 166** where it was held that great care had to be taken when dealing with the evidence of a single witness.

30. It was its averment that the Identification Parade was properly conducted and that it was proper for PW 8 to have chosen different people with almost similar characteristics to test the eye witnesses’ accuracy. It pointed out that it was logical that none of the members would be completely similar. It stated that the Identification Parade Form was adduced before court demonstrating the correct number of members present for the parade. It averred that the contradiction between PW 2 and PW 8 on the number of members of the identification was minor and did not affect the Prosecution’s case as PW 2 made a positive identification.

31. It was its further contention that the Trial Court considered the Appellant's defence in its judgment. It pointed out that the Appellant gave an alibi defence whereby he stated that he went to his house at 6.00pm and that he was with his wife till morning. It pointed out that he never called his wife and the owners of the stall who were his neighbours at his shop as witnesses to corroborate the fact that they had seen him in Loitokitok on the material date. It added he never raised his defence early during the trial and that there was overwhelming evidence which placed him with the victim on the material day of the offence.

32. A perusal of the proceedings showed that PW 1 ferried a passenger from Taveta Stage to Lesesia Village at about 5.30 pm. The distance appeared to have been quite far as PW 2 testified that PW 1 and the passenger approached him at about 7.00pm seeking to be shown Matayo's house. The Appellant had supposedly asked PW 1 to take him to Matayo's house at Lesesia Village. The long distance between Taveta and Lesesia was confirmed by PW 3 who stated that on the material date, she asked the passenger who had come to her house looking for his girlfriend's house to sleep overnight as he was a visitor.

33. As both PW 2 and PW 3 allegedly saw the person when it was dark, the question of positive identification became a pertinent issue. It was not clear what the lighting conditions in PW 3's house were for PW 2 and PW 3 to have identified him. Although PW 2 talked of there having been a lamp in PW 3's house, PW 3's evidence was silent on the lighting conditions at the material .

34. It was also not clear from PW 2's and PW 3's evidence how long they interacted with the said person for them to have been able to positively identify him in an identification parade as having been the Appellant herein. This was particularly important because both PW 2 and PW 3 did not know the said person before the material date. It was the considered view of this court that relying on their evidence to corroborate PW 1's evidence on identification of the said person was too risky.

35. Turning to PW 1, he stated that the person approached him at Taveta Stage. It was evident from his evidence that this person was not known to him previously. Indeed, after he was discharged from Mawenzi Hospital in Tanzania where he had been admitted after losing consciousness from being stabbed by the passenger, he said that he went to the Taveta Stage where he got information that the Appellant herein was known by some of his colleagues.

36. Going further, although the State had ably argued that PW 1 and his passenger spent over an hour together making it easy for PW 1 to identify his passenger, it was not clear to this court what description PW 1 gave to his colleagues at the Taveta Stage for them to positively state that his passenger had been the Appellant herein, in fact, giving a name leading to him being searched at Loitokitok. Further, there was a gap as to how the people in Loitokitok knew it was the Appellant who was being looked for bearing in mind that PW 1 had not known him previously.

37. Clearly, PW1 did not disclose how he obtained the said information leading to the Appellant's arrest. It was therefore imperative that the colleague(s) who gave him the information adduce evidence. Notably, Section 143 of the Evidence Act Cap 80 (Laws of Kenya) gives discretion to the Prosecution to decide the number of witnesses it shall call in a case to prove a fact. However, failure to call a crucial witness can deal a fatal blow to its case.

38. It appeared to this court that since PW 2's and PW 3's evidence on identification of PW 1's passenger could not be verified to the required standard, this left PW 1 as a single witness in the case herein. In the case of **Abdalla Wendo vs Republic** (Supra), the Court of Appeal rendered itself as follows:-

**“Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that such conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial and or direct, pointing to guilt, from which a judge it jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”**

39. Although the State argued that the Identification Parade was conducted properly, taking the evidence of PW 1, PW 2 and PW 3 in totality, this court was not entirely convinced that it was free from error in the identification of the Appellant herein due to the gaps in explaining the lighting conditions at the material time. The fact that the Appellant herein was arrested by PW 7 did not negate the fact that he relied on PW 1's evidence to arrest him yet persons who led PW 1 to Loitokitok were never called as witnesses in the case herein.

40. Whereas there was a possibility that the Appellant could have injured PW 1 as they were going back to Taveta, it did not make any sense why the Appellant would have hired PW 1 to take him to a far place without harming him, go into a stranger's house looking for his girlfriend, only for him to harm him as they were going back to Taveta.

41. This court found it necessary to interrogate the evidence carefully due to the fact that PW 6's evidence showed that PW 1 was treated for drug intoxication. Indeed, PW 1 stated that after travelling one hundred and fifty (150) metres, he felt a pain on the left side of the neck and lost consciousness. It was not clear from the evidence that was adduced at what point PW 1 was intoxicated by drugs. It was also not clear how far Lesesia was from Holili and how long he remained unconscious.

42. This was pertinent because he said that he came round at about 8.00pm when he screamed and people came to where he was and told him that they had seen a motor bike being ridden towards Holili whereupon they went to Holili and reported the matter at Holili Police Station. The question that arose in the mind of this court was whether there were no other motor cycles in the area where he lost consciousness for people to tell him that they had seen a motor bike going towards Holili. Assuming that they had indeed seen a motor cycle heading to Holili direction, no witness was called to corroborate his evidence in that regard and more so to confirm that indeed the motor cycle that was seen going to towards Holili was his.

43. In view of the foregoing gaps and inconsistencies, this court was hesitant to find that the Prosecution adduced sufficient evidence to demonstrate that the Appellant herein was the person who stabbed PW 1. Indeed, the many gaps in this case caused this court to ask itself whether indeed it was a case of mistaken identity or if PW 1, PW 2, PW 3 and the Appellant herein were known to each other previously. The Appellant was under no obligation to fill the gaps in its case by calling witnesses to prove his alibi at Loitokitok when it had not discharged its burden of proof. Indeed, the Appellant also had a constitutional right to remain silent and let the Prosecution prove its case.

## **B. MEDICAL EVIDENCE**

44. Despite having found that the circumstances of the Appellant's identification were not favourable and his Appeal would have succeeded on this ground, this court nonetheless found it necessary to address the medical evidence that was adduced by the Prosecution with a view to addressing the question as to whether or not the Prosecution had proved its case beyond reasonable doubt.

45. The Appellant contended that the medical evidence that was adduced by the Prosecution failed to prove the case beyond reasonable doubt. He pointed out that although Dr Odep Dianga (hereinafter referred to as "PW 6") testified that the victim was treated in Tanzania and the notes used to fill the P3 form were from Tanzania, no doctor from Tanzania came to give evidence.

46. He further pointed out that PW 6 failed to disclose the names of the doctors who treated the victim in Tanzania and the doctor who filled the P3 form. He also observed that PW 6 did not suggest that he knew the authors of the medical treatment notes or the P3 form.

47. On its part, the State argued that PW 1 testified that he had been attacked and he suffered a neck wound on his left side of the neck and he sought treatment at Mawenzi Hospital, a fact that was corroborated by PW 4 who testified that he was among the people who took PW 1 for treatment at Mawenzi hospital after he lost consciousness while at Holili Police Station.

48. It pointed out that the treatment notes were dated 15<sup>th</sup> February 2010 which was the exact same date that the prosecution witnesses confirmed that PW 1 was injured and taken to hospital. It stated that although PW 6 did not initially treat PW 1 and did not know which medical officer treated him initially, he confirmed that he examined him on 15<sup>th</sup> March 2010 and observed a scar on his neck.

49. It added that PW 6 testified that he had seen PW 1's treatment notes indicating that he had been taken to hospital while unconscious on 5<sup>th</sup> February 2010 having a stab wound approximately 1 cm long and that the approximate age of the injury at the time of initial observation was six (6) hours.

50. This court was concerned by PW 1's evidence that he suffered a stab wound on his neck that caused him to lose consciousness. If as PW 6 testified that PW 1 had a 1 cm long deep wound, then it was perplexing when he examined him about a month later on 16<sup>th</sup> March 2010, all he observed was a scar. Logically, it would have been expected that PW 6 would have observed a healing wound by this time and not merely a scar. The details of the stab wound and blood clots was not contained in any medical documents from Mawenzi Hospital Tanzania making this court ask itself where PW 6 obtained the information to complete the P3 Form.

51. In any event, PW 6 did not explain how he verified the authenticity of the medical documents from Mawenzi Hospital Tanzania because he was not familiar with the handwriting of the doctor who first saw PW 1 at the said hospital and further the Prosecution never laid any basis to rely on photocopies of the said documents.

52. In addition, this court noted from the said P3 Form and medical documents from Mawenzi Hospital Tanzania that PW 1 sustained a stab wound on the mandibular area, a fact that was confirmed by the P3 Form. This was a totally different area from the left side of the neck that PW 1 had referred to as having been stabbed. If indeed, PW 1 meant that he was injured in the mandibular area and merely referred to it as the left side of the neck, then the Prosecution was obligated to clarify the said fact to avoid the court concluding that the medical reports did not corroborate his evidence of where he was injured.

53. A criminal case should never be decided on a balance of probability. It must be proven beyond reasonable doubt. Having considered the evidence that was adduced by the Prosecution, this court was not satisfied that it had adduced evidence to prove the offence that faced the Appellant to the required standard, being proof beyond reasonable doubt.

## **DISPOSITION**

54. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 30<sup>th</sup> November 2016 was merited.

55. Doubts were raised in the mind of this court lending it to give the Appellant benefit of doubt. This court therefore hereby quashes the conviction and sets aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

56. It is so ordered.

**DATED and DELIVERED at VOI this 17<sup>th</sup> day of January 2018**

**J. KAMAU**

**JUDGE**

In the presence of:-

Paul TipandeMokare - Appellant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk