



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 21 OF 2013**

*(From the original Conviction and Sentence in the Criminal Case No. 2414/2010 of the Chief Magistrate's Court at Mombasa: T. Tanchu – SRM)*

WYCLIFF OTIENO NGODE ALIAS TOTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

The appellant **WYCLIFF OTIENO NGODE alias TOTI** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The appellant had been first arraigned in court on 10<sup>th</sup> August, 2010 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were given as follows:

**“On the 17<sup>th</sup> day of July, 2009 at Kiwerera area in Likoni Location Mombasa District within Coast Province jointly with others not before court while armed with offensive weapon namely Smith and Wesson revolver serial number ANP 3631 robbed SAMSON ORWA of his cash money Kshs. 150,000/=, safaricom, orange, zain and Telkom credit scratch cards all valued at Kshs. 28,000/= all total value of Kshs. 178,000/= and at or immediately after the time of such Robbery used actual violence to the said SAMSONORWA.”**

Two other accused persons namely ‘*Sharifa Mohamed*’ the (2<sup>nd</sup> accused) and ‘*Tobias Odhiambo Otieno*’ (the 3<sup>rd</sup> accused) who were charged with the appellant on various other counts were eventually acquitted by the trial court and are therefore not parties in this appeal. The appellant entered a plea of ‘*NOT GUILTY*’ to the charge.

The hearing commenced before the trial court on 15<sup>th</sup> November, 2010. The prosecution called a total of five (5) witnesses in support of their case. The complainant **SAMSON ORWA OKENO** told the court that he works as a salesman with Wiretel Kenya Limited, a company which deals in the sale of mobile phones and scratch cards. **PW1** stated that his duty is to move around on a motorbike supplied by his employer selling scratch cards of various denominations to the public. At the end of the day he is required to return to his office to submit the money he has collected for the sales of the day.

On 17<sup>th</sup> July, 2009 at about 7.00 a.m. **PW1** went out to work as usual. At 3.30 p.m. he returned to his house in the Kiwarera area of Likoni to count the money he had collected before taking the same to the

office as required. **PW1** sat inside his house on his bed counting the money, and he heard a knock. The door-curtain was pushed open and two men one armed with a pistol came in. They ordered him to lie down. **PW1** lay down and the men tied his hands and legs. They stole a bracelet he was wearing as well as the money he had been counting and some of the scratch cards. After the men left **PW1** shouted for help. Neighbours came and untied him. He went and reported the matter to police. The same night one Inspector Owuor called **PW1** and informed him that police had apprehended some suspects with scratch cards and cash. The next day **PW1** went to Consolata area and found one suspect had been gunned down. He positively identified the dead man as the one who had threatened him with a gun. He later saw the appellant under arrest at the police station. **PW1** availed to the police a book in which he had recorded the serial numbers of the scratch cards he had **Pexb1**. He identified the recovered scratch cards as amongst those which had been stolen from him. The appellant was eventually arraigned in court and charged with the offence of Robbery with Violence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. The appellant elected to give a sworn statement in which he denied any and all involvement in the robbery. On 18<sup>th</sup> February, 2013 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of Robbery with Violence and thereafter sentenced him to death. Being aggrieved the appellant filed this present appeal.

**MR. MAGOLO** Advocate argued the appeal on behalf of the appellant. **MR. GIOCHE** learned state counsel made submissions in support of the conviction and sentence of the appellant.

As a court of first appeal we are under an obligation to re-examine and re-evaluate the evidence adduced before the trial court and to draw out own conclusions on the same. [See **AJODE VS. REPUBLIC [2002] KLR**]. From the submissions of counsel two main issues arise as grounds of appeal both of which require determination. These are

- Defective charge sheet
- Identification

Mr. Magolo for the appellant argues that the charge sheet as framed was fatally defective. This is because the appellant was charged with the offence of Robbery with Violence contrary to **section 296(2)** of the Penal Code. This counsel submits the provision which provides for the sentence for the offence. He submits that the appellant ought to have been charged with an offence contract to **section 295** of the Penal Code which **creates** the offence of Robbery with Violence **as read with** section 296(2) which provides for the death sentence upon conviction. He therefore submits that the charge is not valid and on this basis alone the appeal ought to succeed. Whilst it is indeed true that section 295 which creates the offence of robbery was not cited in the charge sheet does this omission render the charge sheet fatally defective? We think not. The crucial question is whether this omission prejudiced the appellant in any way. Again our answer is in the negative. The appellant was not under any misapprehension of what charges he was facing. The particulars which were read out to him clearly indicated that the offence which he was facing was that of aggravated robbery. The charge read out to the appellant was that of ‘*Robbery with Violence*’ or in Kiswahili ‘*uwizi ya mabavu*’. The particulars of the charge clearly made reference to the use of dangerous weapon to wit a Smith and Wesson revolver and also made reference to the use of actual violence against the victim. The appellant pleaded to the charge - he did not seek any clarification of the charges he faced. He participated robustly in the trial. We have no doubt that the charges were clear and that the appellant was fully aware of the nature of the charge which he faced. This is a matter which has come up in several appeals and has even been brought before the Court of Appeal for determination. In the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS VS. REPUBLIC CRA NO. 5 OF 2008** a five-Judge Bench of the Court of Appeal cited their own ruling in the case of **SIMON MATERU MUNIALU VS. REPUBLIC 2007 eKLR** where they held that

**“the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It**

is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case.”

**These ingredients are not in section 295 which creates the offence of robbery. In short section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and that might create confusion.**

**In our considered view, section 137 of the Criminal Procedure Code would be complied with if an accused person is charged, as the appellant was, under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence. Under section 296(2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment ..... [emphasis added]**

Kenya being a jurisdiction which applies the principle of ‘*stare decisis*’ and the Court of Appeal being superior to the High Court we are bound by this decision. No more need be said on this point.

The next major ground of appeal raised was that of identification. In order to secure the conviction the prosecution was required to persuade the trial court beyond a reasonable doubt that the appellant was one of the two men who attacked and robbed **PW1**. There was only one eye-witness to the robbery and that was **PW1** himself. We have anxiously examined his evidence. At no time at all did **PW1** identify the appellant as one of the men who robbed him. The man whom he identified as having pointed the gun at him during the robbery was gunned down by the police and is not in court. **PW1** stated that he only saw the appellant at the police station and even then **PW1** did not identify the appellant as one of the men who had robbed him. The robbery incident occurred at 3.00 p. It was broad daylight. As such there was sufficient visibility to enable **PW1** see and identify his attackers. Indeed he did identify the man who pointed a gun at him. We have no doubt that if **PW1** had been able to positively identify the appellant as one of the robbers he would have said this in his evidence.

At attempt was made to link the appellant to the robbery by virtue of the cash and scratch cards which were allegedly recovered on his person. The police state that they recovered cash Kshs. 28,000/= hidden inside the appellant’s underwear. It is not an offence for any person to have on his person this amount of cash. We find no tangible evidence to link the money recovered on the appellant to the cash which was stolen from **PW1**. **PW1** did not record the serial numbers of the notes he had. Further **PW1** stated that he had notes of all different denominations yet the money found on the appellant was all in denominations of 1000/=. In his evidence at page 46 line 14 **PW5** the investigating officer confirms this when he states

**“Complainant came to the police station and saw the money but he had not taken their serial numbers. We found Kshs. 1,000/= denominations on you. Different denominations were stolen from the complainant.”**

Therefore this cannot be the money stolen from **PW1**.

With respect to the recovered scratch cards **PW2 CORPORAL MICHAEL SITUMA** told the court that he recovered the scratch cards on the bed in the house where the appellant was found to be resting with a woman said to be his girlfriend. As it transpired in the evidence this house did not belong to the appellant. The house belonged to his sister called ‘*Lillian*’ who was also arrested by police but was later released. There is no evidence that it was the appellant who took the scratch cards to that house. Nobody saw him take them there. Even on the basis of circumstantial evidence the link is tenuous. The very real possibility that some other person took the scratch cards to that house has not been satisfactorily excluded. Furthermore it is not proved that the recovered scratch cards are the very same ones which had been stolen from **PW1**. **SERGEANT SAMUEL AWUOR PW5** who was the investigating officer told the court that **PW1** brought to the police a book in which he had recorded the serial numbers of the

scratch cards he had. At no time was any comparison made either by **PW1**, or **PW5** or even by the trial court itself of the serial numbers recorded in the book and the serial numbers on the recovered scratch cards. There is nothing to show that they were the same. In his evidence at page 46 line 18 **PW5** concedes that

**“Complainant did not give the serial numbers of the scratch cards.”**

How then can the recovered scratch cards be said to belong to **PW1**. Scratch cards are very common items and are found in plenty all over the country. The scratch cards recovered in that house could have come from anywhere.

From the evidence of **PW5** it becomes apparent that the police only arrested the appellant because he was known to be a notorious law-breaker in the area. In his evidence at page 39 line 21 **PW5** states

**“We left the scene and I called my informers and informed them of the incident to help me in investigations. I gave them a list of suspects –**

- **Wycliffe Otieno alias Toti (the appellant herein)**
- **Musa**
- **Kili**
- **Ken”**

It is clear that the name of the appellant as a suspect in this particular offence originated from **PW5**. It was not information which he obtained from his informers. It was he who told his informers who they should go and look for. How did **PW5** who did not witness the robbery conclude that the appellant was involved, given that even the victim **PW1** did not identify or name the appellant to the police? **PW2** in his evidence at page 19 line 18 states

**“Owuor (PW5) said ‘Toti’ [appellant] was involved in the robbery and had information of where you had run to.....”**

**PW2** goes on to state in cross-examination by the appellant at page 20 line 5

**“I used to hear about you committing robberies.”**

It is clear that in arresting the appellant **PW2** and **PW5** were influenced not by tangible or concrete evidence, but by their pre-conceived ideas about the appellant. In short there is nothing to place appellant at the scene of the robbery and nothing to prove his involvement in the robbery.

We take issue with certain conclusions drawn by the learned trial magistrate in his judgment. At page 73 line 7 he states

**“The finding of the said scratch cards and a gun in the house where accused 1 was shows that he was involved in robbing the complainant. Also the fact that a while later the 1<sup>st</sup> accused was found to have hidden Kshs. 20,000/= in his pants goes a long way in making an inference that indeed accused 1 was involved in the robbery and was hiding the money.”**

Firstly as we have demonstrated no concrete link has been shown to exist between appellant and either the stolen money or the recovered scratch cards. This conclusion of the trial magistrate is not supported by the facts on record. Secondly where a man (or woman) chooses to hide their cash is a personal choice and is not suggestive of guilt nor is it the purview of this appeal. Thirdly, the fact of recovery of a gun in the house where the appellant was arrested is not indication of guilt because the said house did not belong to the appellant. Further, the police did not charge the appellant with the illegal possession of that firearm. Instead they charged his co-accused one ‘*Sharifa Mohamed*’ who was ultimately acquitted of that charge by the trial court. If the police had reason to believe that there was a link between the appellant and the gun we have no doubt that they would not have hesitated to charge him appropriately.

We must also fault the reliance by the learned trial magistrate on circumstantial evidence as a basis for convicting the appellant. The circumstantial evidence is easily demolished upon a close scrutiny and does not form a sufficient basis for inferring guilt.

Based on the foregoing we find that there was no sufficient evidence to link the appellant to the robbery against the complainant. His conviction in our view had no basis and we do hereby quash that conviction. The subsequent death sentence is also set aside. The upshot is that this appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Mombasa this 28<sup>th</sup> day of May, 2014.**

**M. ODERO**

**S. MUKUNYA**

**JUDGE**

**MUKUNYA**

In the presence of

Ms. Kagori for State

Mr. magolo for Appellant