



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO.204 OF 2009**

**BETWEEN**

**DICKSON MUGOSI MATIKO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

(Being an appeal from original conviction and sentence of the SPM's Court at Migori

dated 16<sup>th</sup> April 2009 in Criminal Case No.420 of 2008 – E. O. Awino, Ag. SPM)

**JUDGMENT**

**Introduction**

1. The appellant herein Dickson Mugosi Matiko was the accused in SPM's court at Migori criminal case No.420 of 2008. He was charged with Robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 5<sup>th</sup> day of September 2008 at Isebania Township in Kuria District within Nyanza Province, jointly with others not before court while armed with AK 47 rifles robbed Mohamed Hashi Kshs.964700, 75 US dollars and TZ Shs.200,000 and at or immediately before or immediately after such robbery used actual violence by shooting one Samuel Ongono Omwege.

**The Prosecution Case**

2. After entering a plea of not guilty to the charges the trial ensued. PW1 was Mohammed Hashi a businessman at Sirare. He told the court that on 5<sup>th</sup> September 2008 he was in his shop with his son Mohamud selling their wares. Suddenly he heard gunshots and 2 people entered the shop. By then it was around 5.45 p.m. They demanded money from his son at gun point as he hid under a table. They were saying 'toa ela' and one of them had a yellow T-shirt and was walking up and down. The robbers made away with over one Million Kshs., TZ Shs, Dollar, Cards etc. That during the robbery, one AP was shot and injured.
3. PW2 was Samwel Ongono Omwange, a businessman who sells soda and exchanges money at the Kenya/Tanzania border. He told the court that on 5<sup>th</sup> September 2008 at 1.30 p.m., there were gunshots and he saw people coming out. He saw one person shooting towards the policeman who was wearing a red jacket. He was also shot and thrown up at the upper right thigh. He regained consciousness at Ombo Mission Hospital though at time of hearing, the bullet was still lodged in the body. He made a report and a P3 form was issued. He produced the P3 form which was marked **PMF1-1** and confirmed that he was not robbed. He could however, not identify any

- robber and he did not know the appellant in this case.
4. PW3 was Stephen Kerario a Clinical Officer at Isebania Sub-District Hospital. He corroborated PW2's testimony on the issue of the P3 form and confirmed that he treated PW2 at St. Joseph Ombo on 11<sup>th</sup> September 2008. PW2 had been shot during a robbery. Upon examination of PW2, PW3 confirmed that he had been shot on the left thigh and a bullet was still lodged inside his left thigh. That the degree was assessed as maim. He produced the P3 form as **Exhibit 1**.
  5. PW4 was No.216056 IP Wafula of Kuria west District. He told the court that on 5<sup>th</sup> September 2008 at 5.45 p.m., he was within Isebania town with other colleagues. They heard gun shots within the shopping centre; they proceeded to the scene and saw one robber behind a motor vehicle with an AK47. When the robber saw him he shot at him and wounded him in his stomach. He also saw one robber in a yellow T-shirt coming to assist the injured and on realizing the robbers were many he took cover. The robbers also threw a hand grenade at him and he was injured on his head and on the hip. He ran up to Isebania police post bleeding on the head and hands and met the OCPD and OCS. He then surrendered his pistol to them and was taken to the Tanzania side of the border for treatment. He was later discharged and referred to Eldoret Referral Hospital for further treatment. He was operated on the head after scanning.
  6. He later wrote his statement and stated that he only saw one robber who had a yellow T-shirt. He identified the yellow T-shirt which was marked MF1-2. However in concluding his evidence in chief PW4 stated that he could not recall the appellant clearly.
  7. PW5 was No.14412 PC Nelson Moiben of Isebania police post. He was the investigating officer. He told the court that on 5<sup>th</sup> September 2008 at 6 p.m. he was in his house when he heard gunshots. He ran to the station and found the town under attack. He armed himself and took cover in an exit route of the town at a valley, near a dam.
  8. He then saw 4 people near the border heading towards the dam. The people also saw him and his colleagues and shot at them. He recognized one of attackers who wore a yellow T-shirt. That person then entered a banana plantation and PW5 and colleagues managed to crawl and take cover with his colleague. One person emerged. PW5 and colleague told him to surrender. He complied and they subdued him. Meanwhile their fellow officers were also in pursuit and were shooting at them. He took the T-shirt of the appellant, flagged it and held the appellant as fire was exchanged.
  9. The officers saw them and came. Members of the public also came and wanted to lynch the appellant but PW5 and his colleagues managed to take appellant to the station. However they did not recover any weapon from the appellant, nor did they recover Kshs.960,000/=, US Dollars and Tanzania shillings that had been stolen from the shop of Mohamed, PW1.
  10. PW5 told the court that it was unfortunate that his colleagues did not realize quickly enough that the party of which PW5 was a member had actually captured the appellant, and as a result thereof, they (PW5's colleagues) continued to engage them in exchange of fire which led to the escape of the other suspects. PW5 also testified that the appellant pleaded with the officers to release him so that he could give them millions of shillings. The officers did not release the appellant. PW5 produced the yellow T-Shirt as **P. Exhibit 1**.
  11. PW6 was Mohamud Mohammed Hassan, PW1's son. He corroborated PW1's testimony on the robbery at their shop, clarifying that he gave out at gun point Tshs.200,000, Kshs.964,800 and US dollars 75 all of which was in a box. PW6 stated further that because everything happened so fast and there was shooting, he remained on the floor for about 30 minutes and only saw the appellant after arrest.
  12. PW7 was No.50812 Corporal Benjamin Wanyonyi of Isebania

police station. He corroborated PW5's testimony as to what happened after they heard gunshots. He testified that as the police were pursuing the robbers, they (robbers) entered the nearby banana farms and all that they (officers) could do was to exchange fire. He also testified that the suspect who was arrested by PW5 wore a yellow T-shirt (**P. Exhibit 1**). PW7 produced the P3 form in respect of AP Wafula (PW1) as (**P. Exhibit 3**), because the doctor was not present to produce the exhibit. PW7 also testified that no recoveries of the stolen items were made.

#### The Defence Case

13. At the close of the prosecution's case, the trial court put the appellant on his defence. The

appellant gave a sworn statement with no witnesses. He told the court that he was a hawker and that on the day in question, he had come to buy padlocks on the Kenyan side when he heard gunshots. He was then told to stop and he stopped. He was arrested, interrogated and made to lie down before being taken to the police station. He also testified that since he had no identity card on him, he was said to be one of the robbers. He was beaten to name the others and when he failed to name others, he was made to carry the cross of others.

### Judgment of the Trial Court

14. After carefully evaluating the evidence before it, the trial court in its judgment found the appellant guilty as charged, convicted him and sentenced him to suffer death as by law provided.

### The Appeal

15. The appellant being dissatisfied with both conviction and

sentence preferred this appeal. In his homemade petition of appeal filed in court on 28<sup>th</sup> September 2009, he has petitioned against the conviction and sentence on the following 8 grounds:-

1. *That the learned trial magistrate erred in law and facts by failing to appreciate the fact that mistaken identity are always there.(sic)*
2. *That the trial magistrate erred in law and facts [in failing] to appreciate the evidence of identification which must have been under difficult circumstance due to the gun shots.*
3. *That the yellow T-shirt was admitted to belong to the appellant yet there was no full proof.*
4. *That the learned trial magistrate erred in both law and fact by appreciating the chain of arrest to be chase and arrest yet the link was not complete.*
5. *That the learned trial magistrate placed reliance to convict on the contradictory evidence over the issue of attire by the key witnesses.*
6. *That the prosecution failed to prove the case beyond all reasonable doubt by failing to avail a vital evidence to clear the onus placed upon him i.e. the investigation officer.*
7. *That the trial court erred by concluding that the appellant was connected to the referred crime yet there was no direct or circumstantial evidence pointing to the appellant.*
8. *That the trial court misunderstood/failed to appreciate the appellant's sworn defence thereby coming to a wrong conclusion.*

16. The appellant therefore prays that the appeal be allowed, the conviction quashed and the sentence of death be set aside so that he is set at liberty.

### The Submissions

17. When the appeal came before us on 14<sup>th</sup> October 2013, Mr. Soire

learned counsel for the appellant argued grounds 1, 2 and 5 of the petition together and grounds 6 and 7 together, and ground 8 by itself which touches on the charge sheet as a point of law.

18. Firstly on the charge sheet, counsel submitted that the charge sheet did not show that the person robbed was PW1 since PW6 stated that it was from him that the robbers demanded the money and that it was him who gave out the money to the robbers. Counsel urged us to find that the person robbed was PW6 and not PW1.

19. Secondly on grounds 1, 2 and 5 on identification Mr. Soire submitted that the evidence of the yellow T-shirt was not sufficient to positively identify the appellant as the one who committed the robbery. That apart from PW1 who said he saw one of the robbers dressed in a yellow T-shirt, PW4 did not say how far he was from the place where the robbery took place. Furthermore, that the circumstances prevailing at the time meant that there was a possibility of error in identifying the appellant that is to say, there were lots of gunshots as stated by PW1 and PW4 and exchange

- of fire. Therefore the identification of appellant was not sufficient.
20. Thirdly on ground 4 counsel submitted that the chain of events from commission of offence to arrest of the appellant was not complete as from the entire evidence the person who was arrested and charged was appellant based on the fact that he was wearing a yellow T-shirt. Counsel submitted that it was not clear from the evidence that the appellant was the one who was chased from the shop to the point of arrest. That in the circumstances, there was reasonable doubt in the evidence. In addition counsel submitted that though the appellant does not deny his arrest he explains that he had come to buy padlocks from Kenya as he was a Tanzanian and was caught up in all the drama as he tried to escape from the gun fire. Counsel urged us to allow the appeal and to set the appellant free.
21. The appeal was opposed by the State. Mr. Imbali learned counsel for the State submitted, concerning the charge sheet that the same was not defective and was properly framed and that the appellant was arraigned before court on the right charge. That PW1 Mohamed Hashi is the father to PW6 and both were categorical that on 5<sup>th</sup> September 2008 at 5.45 p.m. they were robbed by a group of people, among them the appellant. That the appellant was in all scenes and there was no doubt that he was one of the robbers.
22. Mr. Imbali further submitted that the yellow T-shirt was found on appellant at the time of arrest; that PW1 saw one of the robbers dressed in yellow T-shirt at the shop during the robbery. That PW4 saw appellant in yellow T-shirt trying to assist his fellow robber after PW4 had shot that robber and that PW5 saw him in the same T-shirt as he tried to escape, and arrested him.
23. On alibi defence counsel submitted that the same does not hold water as the case against the appellant was water tight. He also submitted that appellant does not deny having been arrested at scene, and that in the circumstances an identification parade would not be necessary as PW5 and PW7 are the ones who arrested the appellant before he could escape. Counsel urged court to dismiss the appeal.
24. In reply, Mr. Soire learned counsel for the appellant briefly submitted that the only link of the appellant to the offence was a yellow T-shirt, but that there was no evidence to show that the appellant was the person seen at the scene of the robbery wearing the yellow T-shirt and that he was the same person who was arrested by PW5 wearing a yellow T-Shirt.

#### First Appeal

25. This being a first appeal, we are in law required to re-evaluate the evidence tendered before the trial court so as to come to our own conclusion on the same. We have however to take into account the fact that we do not have the advantage of hearing and seeing the witnesses as did the trial court. See **Okeno –vs- Republic [1972] EA 32; Pandya –vs- R[19757] EA 336, Mwangi –vs- Republic [2004] 2 KLR 28** and **Ngui –vs- Republic [1984] KLR 729**. We are also under a duty to consider and carefully weigh the judgment of the trial court and only to upset it if we are satisfied that the conclusions reached by the trial court are based on wrong principles or that the evidence on record does not support those conclusions.

#### Issues for determination

26. After carefully reconsidering the evidence before the trial court, the petition and oral submissions from respective counsel, the following are the issues for determination:
1. *Was the charge sheet in this case defective?*
  2. *Did the prosecution prove its case beyond reasonable doubt that the appellant was among the robbers?*
27. On the first issue, the charge sheet states that the money was stolen from Mohammed Hashi, PW1, who was, from the evidence, the owner of the shop and father to PW6. PW6 stated that the money had been withdrawn by PW1 from Barclays Bank. The question is: when is a charge sheet declared defective by a court in such circumstances?
28. In **Kilome –vs- Republic [1990] KLR 193**, the appellant was convicted of kiosk breaking and stealing contrary to **Section 306 (a) and 279 (b) of the Penal Code (Cap 63)**. The appellant's

conviction was mainly based on his possession of a skirt which had been stolen a few days earlier. The statement of offence alleged that the kiosk was a dwelling place, not a shop, store or any other place of business. The appellant however, seemed to have understood the charge he faced and put up a defence to it.

29. On appeal, and on whether or not the charge sheet was defective, the Court held that in determining whether or not a charge is defective, and whether or not such a defect is curable or incurable, the main concern of the court is whether there is prejudice occasioned to the accused in defending himself because of the words used in framing the charge.
30. In the instant case, we are satisfied that no prejudice was occasioned to the appellant when it was stated in the charge sheet that it was Hohammed Hashi who was robbed. In any case, the appellant put up a defence to the allegations, explaining his presence at the scene during the cross fire. In the premises, we find and hold that the charge sheet was not defective.
31. The second issue for determination is whether the prosecution witnesses clearly and properly identified the appellant as being one and the same person who was seen at the scene wearing a yellow T-shirt and assisting his fallen colleague and as the same person who was arrested by PW5. In other words, did the prosecution establish an unbroken chain of vision between the time the appellant was seen allegedly assisting his colleague and the time of his arrest by PW5?
32. From the evidence, it appears that none of the prosecution witnesses, other than PW5 and PW7 could identify the facial features of the man allegedly wearing a yellow T-shirt at the time of the robbery. PW1 stated the following in part of his evidence in chief:-

**“It was 5.45 p.m., they demanded money from the boy with the gun. I went down the table. I saw only one gun. “toa ela” One had a yellow T-shirt and was walking up and down.---the one with yellow T-shirt was arrested.”**

33. PW4 testified to the following concerning the person with a yellow T-shirt.

**“We heard gunshots within the [Isebania] shopping centre. We responded, to the scene. I observed and saw one with AK 47, he was behind a motor vehicle, he saw me and I had a ciska pistol and I saw him as a stranger I shot 3 rounds and shot him in the stomach. He pulled on the ground and took cover where I could not reach him. I saw one with yellow T-shirt coming to assist the injured they were many and I took cover. I heard hand grenade and was hit on the head and on the limp.”**

34. On the same issue of the yellow T-shirt, PW5 also stated the following:-

**“I heard gun shots. I ran to the station. I found town under attack. I armed myself and we took cover [at] an exit route of the town at a valley. We saw 4 people near the border towards the dam. They saw us and they shot at us. One had a yellow T-shirt. He entered the banana plantation. We managed to crawl and take cover with my colleague. One person emerged and we told him to surrender. He complied then we subdued him.”**

35. What is clear from the above evidence is that the man in the yellow T-shirt was seen by PW1 as he passed up and down at the shop armed with a gun as the other robbers demanded money. PW4 also testified that when he and his colleagues responded to the gunfire by the robbers, he saw one robber who was armed with an AK 47 rifle hiding behind a vehicle. He (PW4) shot at that robber and hit him in the stomach. The robber fell and rolled on the ground. PW4 then saw another robber rushing to where the injured robber was and tried to help him. The one giving the assistance was dressed in a yellow T-shirt. Thereafter, PW4 was hit on the head with a grenade and got injured.
36. PW5 stated that he and other colleagues ran to the town upon hearing gun shots. He stationed himself near one of the exit routes from the town at a valley. He saw people who were armed trying to escape. The people shot at them (PW5 and colleagues) and he saw that one of those people shooting at them and trying to escape was a man dressed in a yellow T-shirt. The person entered a banana plantation but later emerged after PW5 and his colleague had taken cover. PW5 and his colleague ordered the man to surrender. He did so and was subdued. The man who

- surrendered was the one wearing a yellow T-shirt. He was arrested.
37. PW7 also testified to the fact that 4 of the 6 robbers ran to the Kenyan side of the town, and that the appellant who was eventually arrested by PW5 was among those 4 robbers who ran to the Kenyan side. PW7 also saw the appellant who was dressed in a yellow T-shirt.
38. From all the above evidence, and after carefully considering the appellant's defence, which defence does not in any way shake the prosecution's case, we are satisfied that the prosecution evidence clearly places the appellant at the scene of the attack from his presence at the shop, to where he ran to assist his injured colleague, to fleeing with 3 others into the banana plantation and being seen by PW1, PW4 and PW5 and to finally being apprehended by PW5 still dressed in the same yellow T-shirt.
39. A question might arise as to whether there were any special features on the T-shirt thus making it easily identifiable by the prosecution witnesses. Though no description of such features was given, we are satisfied with the chain of events from the time the robbers entered PW1's shop, to the car where the injured robber was to the flight to the banana plantation by the appellant and his eventual arrest by PW5. We find the appellant's contention that he was innocently caught in a cross-fire as unconvincing as it was untrue.

### Conclusion

40. Taking into account the ratio decidendi in the case of **Sawe –vs- Republic [2003] KLR 364**, we are satisfied that the inculpatory facts in this case are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt.
41. IN short, we are saying that the prosecution proved its case against the appellant to the required standard by establishing a clear nexus between the appellant and the charge of robbery with violence.
42. The appeal is therefore found to be lacking in merit. The same is hereby dismissed on both conviction and sentence.
43. The appellant has a right of appeal to the Court of Appeal within the next 14 days from the date hereof.
44. Orders accordingly.

**Dated and delivered at Kisii this 31<sup>st</sup> day of July, 2014**

**R.N. SITATI**

**E.M. MURIITHI**

**JUDGE.**

**JUDGE.**

In the presence of:

Mr. Mageto h/b for Soire for the Appellant

Mr. Majale (present) for the Respondent

Mr. Bibu - Court Clerk