



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 357 of 2008**

SALIM SWALEH MAPINGA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 1178 of 2008 in the Chief Magistrate's court at Makadara – Hon. Usui (SRM) on 12/4/2007)*

**JUDGMENT**

**1.Salim Swaleh Mapinga**, the appellant herein, was tried and convicted on one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, and one count of Cheating Contrary to **Section 315** of the **Penal Code**.

**2.**The brief particulars are that jointly with others not before court, while armed with an offensive weapon, namely a knife; they robbed Sergeant Crispin Nyaga Ivara of a cell phone valued at Kshs. 4,500/= and cash Kshs.3, 000 in count No. I, on 6<sup>th</sup> April 2008. On the same date they fraudulently obtained cash of Kshs. 1,400 from Sergeant Crispin Nyaga Ivara in count No. II.

**3.**Upon conviction he was sentenced to suffer death in **count I**, while in **count II**, he was sentenced to serve twelve months imprisonment. Being aggrieved by the conviction and sentence, the appellant filed an appeal whose grounds were that the plea was taken in contravention of **Section 77(1) (2)** of the repealed constitution, the evidence of identification by **PW1** was not free from the possibility of mistake, the prosecution did not prove the charge against him, that the death sentence imposed upon him was unconstitutional, and that his plausible defence was rejected in the face of a weak prosecution case.

4.The prosecutions case in sum, was that **PW1** who is the complainant in both **count I** and **II**, was inside a bus at Accra road on his way to Mombasa on the 6<sup>th</sup> April 2008 at about 1:30 am. He noticed the Appellant, hawking phones outside the bus and invited him inside where he bargained for a Nokia 6610 phone. He paid Kshs. 1,400/= for it.

5.An argument ensued when the appellant attempted to substitute the phone with a dummy. The Appellant called in his cohorts who attacked **PW1** and stole his wallet containing cash Kshs.3,000/= motorolla phone C 168 as well as the phone he had just purchased. One of the attackers was armed with a knife which they used to cut **PW1**'s clothes and to threaten him.

6.The attackers alighted from the bus as the other passengers screamed. Shortly thereafter, the Appellant was brought back to the bus under arrest. He was found in possession of a Nokia 6610 and a dummy phone. The police took the Appellant and **PW1** to the police station where they recorded a statement from **PW1** and subsequently charged the appellant.

7.**PW2** was on mobile patrol duties along River road on 6<sup>th</sup> April 2008 at 1.20 a.m. with two of his colleagues when the Appellant was brought to the patrol vehicle by two police officers. He was accused of having committed a robbery. The arresting officers handed over a phone make Nokia 6610, a dummy phone and Kshs. 550/= at the police station.

8. The issues for determination are:

*i. Whether the plea was taken in contravention of **Section 77(1) (2)** of the constitution (repealed);*

*ii. Whether the identification was free from the possibility of mistake;*

*iii. Whether the charges against the appellant were proved to the required standard;*

*iv. Whether the sentence to suffer death imposed upon the appellant was unconstitutional;*

*v. Whether his defence was plausible.*

***Whether the plea was taken in contravention of Section 77(1) (2) of the constitution (repealed)***

**9. Section 77. (1)** of the repealed Constitution provided for fair hearing in criminal cases, and read as follows:-

***“If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law***

S77. (2) of the repealed Constitution provided that;

***“.....Every person who is charged with criminal offence shall be informed as soon as reasonably practicable in a language that he understands in details of the nature of offence”***

**10.** The court record indicates that the charges were read out to the Appellant, and that the court provided English/Kiswahili interpretation. The appellant replied in Kiswahili: - ***“Not true”*** to both counts, and a plea of ***“Not guilty”*** was entered on 8<sup>th</sup> April 2008. There is therefore no contravention of the law and the plea was taken in accordance with the law.

***Whether the identification was free from the possibility of mistake.***

**11.** From the court record, the Appellant was invited into the bus by **PW1** where the transaction for the purchase of the mobile phone took place. The time was 1.30 am. **PW1** testified that there was sufficient light which enabled him to see all the people very well. The close proximity with the appellant during the bargaining stage enabled **PW1** to see the Appellant properly. The trial Magistrate made the following observation on the issue of identification:

***“If the person who was selling the phone was able to see the complainant, I am satisfied there was sufficient light to enable the complainant identify his attackers without any difficulties”***

**12.** On the question of identification we have also considered the case of **CLEOPHAS OTIENO WAMUNGA -vs- REPUBLIC, CR. APP. NO. OF 1982**, at KISUMU- *Court of appeal-(unreported)*,

in which the court rendered itself thus:

***“Evidence of Visual Identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the Defendant depends wholly or to a great extent on the correctness of one or more Identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the Defendant on reliance on the correctness of the identification. The way to approach the evidence was succinctly stated by Lord Widgery, C.J. in the well-known case of REPUBLIC –VS- TURNBULL (1970) 3 ALL E.R. 549.....”.***

**13.** PW3 testified that PW1 could easily have identified his attackers as there was bright light on the streets. The lights were a few steps from the bus and were illuminating the bus creating visibility. PW4 confirmed that the scene of the attack was well-lit, making identification possible. Both PW2 and PW4 saw no need for an identification parade since PW1 had identified the Appellant at the scene, and the two were brought to the Police station together. The learned trial Magistrate found that the circumstances favouring proper and accurate identification were present

***Whether the charges against the appellant were proved to required standard,***

**14.** On the ground that the charges against the appellant were not proved, to the required standard, the evidence on record shows that the police caught up with the appellant some twenty minutes after the robbery. They recovered the phone that had just been stolen from PW1 together with the dummy which was to be passed off as a phone to him. The Appellant was running from the direction of the scene of crime.

**15.** The trial court found that the dummy phone produced in evidence had the same features described by the Appellant, and was therefore satisfied that it was the one used at the scene of attack to trick PW1 who had paid Kshs. 1,400 to the appellant.

**16.** The learned trial Magistrate noted the clothes which PW1 was wearing at the time of the attack. They were produced as exhibits and their tattered state was sufficient evidence of the violence meted against PW1, who said that the appellant and his cohorts used a knife to tear his clothes.

**17.** We note however that although it was alleged that the Appellant was armed with a knife during the robbery, the knife was never recovered. There is however, evidence that the attackers numbered more than one during the robbery, and that there was threat to use violence against the person of PW1 and

infact a knife was used to slice his clothes. The provisions of **Section 296(2)** of the **Penal Code** were therefore satisfied. **Section 296** provides that:

**“If the offender is armed with any dangerous or offensive weapons or instrument, or is in company with one or more other person or persons, or if, 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, he shall be sentenced to death.”**

*Whether the sentence to suffer death imposed upon the appellant was unconstitutional,*

**18.**On the ground that the sentence to suffer death as imposed upon the appellant was unconstitutional, we have considered the relevant provisions of the law. According to **Article 24(1)** of the Constitution, a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. The Constitution itself provides in **Article 26(3)** that:

**“A person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written law.”**

Further, the right to life is not included in **Article 25** of the **Constitution** among the rights which are illimitable. The, legislative intent is therefore clear on the legality of the death penalty, since it is provided for in the Constitution and in statutes.

**19.**The appellant in his unsworn testimony told the court that he was arrested at about midnight while crossing the road. The arresting officer took him to the opposite direction where they found a vehicle parked and people standing outside it. One man alleged that he had been attacked by a person who sold him some phones. The appellant was then taken to a nearby police station and charged after two days.

**20.****PW3** was on patrol duties along river road with other police officers when they heard screams from Accra road which he estimated to be 100 metres away. They then saw five men running from the direction of the screams towards them. They accosted the men and managed to arrest the Appellant. They went back towards the direction of the screams with the Appellant and found people in a bus who identified the Appellant as one of the persons who had just robbed **PW1**. They handed Appellant to the

mobile Police patrol.

**21.** The need for caution is therefore important in the instant case considering the manner in which the appellant was arrested. The trial Court did not caution itself on the danger of convicting the Appellants on the evidence of visual identification. That however, need not be fatal to the prosecution case if, as was the case herein there was sufficient evidence on record.

**22.**All in all we find that the appeals on conviction in respect of each of the two counts are wanting in merit. We dismiss the appeals and uphold the convictions in respect of each count.

The appellant is hereby sentenced to suffer death in **count I** and the sentence in **count II** is ordered to remain in abeyance.

It is so ordered.

**SIGNED DATED** and **DELIVERED** in open court this **15<sup>th</sup>** day of **April 2013**.

**F. A. OCHIENG**

**L. A. ACHODE**

**JUDGE**

**JUDGE**