REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 93,97 OF 2008

DENIEL NYAMU MUTUA.....1ST APPELLANT

MWALANYA KITAU MUTUA.....2ND APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(From the original conviction and sentence in Criminal Case No.2970 of 2006 of the Chief Magistrate's Court at Thika by F. Nyakundi – Senior Resident Magistrate)

J U D G M E N T

The appellants, **DANIEL NYAMU MUTUA** and **MWALUNYA KITAU MUTUA** were convicted as follows;

(a) DANIEL NYAMU MUTUA, for the offence of Robbery with violence contrary to *section 296 (2) of the Penal Code.*

The particulars of that offence were that on 3rd July 2006, at 2.00a.m, he together with 3 other accused persons and other persons not before the court, while armed with dangerous weapons namely axes, pangas, slashers, rungus and a welding machine, robbed STEPHEN MUTAVI MUINDU (PW 3) of KShs.200/-, and immediately after the time of such robbery used personal violence on the complainant.

For that offence, the 1st appellant was sentenced to death.

(b) MWALANYA KITAU MUTUA, for the offences of Attempted Robbery with violence *contrary to section 297 (2) of the Penal Code;* ***and for Malicious Damage to Property. Both offences were committed at the same place and time i.e. on the night of 2nd/3rd July 2006, at Ekalala Village, Ekalala Location, Machakos District.***

The appellant was said to have been in the company of the other 3 accused persons together with other persons who were not before the court.

They were armed with dangerous weapons, namely pangas, rungus, axes and a gas welding machine.

In the course of attempting to rob the complainant, FRANCIS MUTISYA (PW 1), they are said to have used personal violence on the complainant.

They are also said to have willfully and unlawfully damaged six (6) windows valued at Kshs.25,000/-. The windows were the property of the complainant *(PW 1).*

For the offence of Attempted Robbery, the 2nd appellant was sentenced to death, whilst for the offence of Malicious Damage to Property, he was sentenced to two (2) years imprisonment.

When canvassing the appeal, Mr. Were, the learned advocate for the appellants, submitted that the convictions were based on insufficient and contradictory evidence. He split his submissions in line with each of the 3 counts, in respect to which the appellants were convicted. We shall remain faithful to his chosen method of presentation.

COUNT 1 – ATTEMPTED ROBBERY WITH VIOLENCE

None of the prosecution witnesses testified that there was any attempted robbery. The evidence on record shows that all the witnesses indicated that the people who had “visited” the complainant’s home on the material night, had made it clear that they were looking for him, personally.

Apparently, they had previously "visited" **PW 1** on two (2) occasions, and robbed him. Thereafter, some of their accomplices had been arrested and charged in 2 cases before the court at Thika. As the said accomplices were in custody awaiting trial, their colleagues decided that the key witness, who was **PW 1**, should be killed, so as to protect those who were then in custody.

The learned state counsel conceded that there was no evidence before the trial court that any of the persons who "visited" **PW 1** on the material night had attempted to rob him.

In our considered view, that concession was appropriate, for the reasons given by the 1st appellant. Therefore, the conviction on Count 1 is hereby quashed, and the conviction set aside.

COUNT 2 – MALICIOUS DAMAGE TO PROPERTY

It was the contention of the 2nd appellant that the complainant failed to provide the trial court with any exhibits to support the assertion that his property had been maliciously damaged.

And even though **PW 1** did say that the exhibits were in the hands of the police, it later transpired that some exhibits were actually retained by **PW 4**, who is a brother of **PW 1**.

The said exhibits were broken pieces of glass and of window grills.

Meanwhile, because no photographs were taken, to show the damage suffered; and because the damage was allegedly repaired before the trial court could visit the scene of crime, yet no receipts were produced to prove the repairs, the 2nd appellant submitted that there was no evidence of the damage.

The 2nd appellant also asserted that the alleged powerful torch which **PW 1** had shone, when his house was being damaged, should have been exhibited. As it was not produced in court, the 2nd appellant submitted that the torch may not even have existed.

Thirdly, the 2nd appellant submitted that **PW 6** and **PW 7** gave contradictory accounts about the manner in which the appellants were arrested. He said that whilst **PW 6** testified that 3 of the 4 suspects boarded the matatu after emerging from some bushes; **PW 7** had said that those 3 suspects had emerged from a kiosk.

The appellants also submitted that **PW 1** was an unreliable witness. That submission stems from the fact

that **PW 1** had jumped down from the roof of his house, to escape the people who were intent on doing him harm. As a consequence, **PW 1** broke both legs.

Therefore, the appellants submit that **PW 1** could not have run to his sister-in-law's place thereafter. But **PW 1** apparently did just that!

On the other hand, if **PW 1** had truly broken both his legs, as the witnesses who went to his house thereafter stated, then their evidence was not supported by the medical evidence, which showed that P**W 1** only suffered the "fractured dislocation" of his left ankle.

But the respondent pointed out that when the thugs were smashing the windows and also cutting the grills to **PW 1's** house, the complainant was able to see the face of the 2nd appellant. Thereafter, **PW 1** not only told the police that he could identify the person whose face he had seen, but he also described the person.

From the record, it is not clear when **PW 1** described the 2nd appellant, i.e. we cannot tell whether the description was given before or after the appellants were arrested.

It is also not evident who exactly was provided with the said description.

In any event, the said description did not play any role in the arrest of the appellants. The appellants are said to have boarded a matatu which **PW 1** had hired to ferry police officers to patrol the road which the thugs were suspected to have taken.

The prosecution case was that the thugs assumed that the matatu was ferrying regular customers, and that therefore, it would provide them with a means of leaving the area where the offences had been committed.

When the matatu stopped after the police officers had seen **PW 1's** vehicle approaching, the four (4) thugs who had been inside the matatu, tried to escape. However, they were apprehended.

But, just where had the four (4) thugs boarded the matatu? According to **PW 6**, the 2nd appellant stopped the matatu near a place called "Kwa Staff". After the vehicle stopped;

"3 others who were in the bushes came out and joined him."

On the other hand, **PW 7**, who was with **PW 6** in the same matatu testified that;

"We reached a place called "Kwa Staff." There was a small structure/kiosk on the side of the road. A person emerged and stopped the vehicle. When the vehicle stopped, 3 other people who were inside the kiosk came out and they all entered the vehicle."

Later, after those 4 men were arrested after they tried to escape, **PW 1** is said to have identified them as the 4 people who had tried to break into his house. That is what **PW 7** said.

However, **PW 1** had testified that he was only able to identify the 2nd appellant. Therefore, it cannot have been possible that when four (4) people were apprehended, he was able to identify all of them.

PW 1 testified as follows;

"I was standing by a corner and shining my torch which was stronger than theirs. I managed to see one of them in the face. It was someone I had not known before but I could identify him."

As **PW 3** also said that he only identified that 1st appellant, we can only conclude that the other accused persons, (who are not party to this appeal), were only arrested because they allegedly tried to escape from the matatu. It is not because **PW 1** or **PW 3** identified them or described them.

If the description had been given to the police prior to the arrest, the police should have arrested the suspects immediately they boarded the matatu. At that time, the 2 police officers in the matatu, were together with eight (8) other members of the public.

PW 2, ELIZABETH KATIVO MUTISYA, is the wife to the complainant. Her evidence was that she was inside their house when the thugs arrived and started smashing the windows and cutting the grills. It is **PW 2** who told her husband to climb onto the ceiling, when she realized that the men were intent on killing him. She said;

"I did not see who these people were. It is my husband who had a torch, and every time he could flash the torch on them, they could hide."

In effect, the thugs were striving to avoid identification. In the circumstances, it is possible that **PW 1** did identify one of them, as he said in his evidence. But it is also possible that **PW 1's** said identification of that one person may have been honest but mistaken.

PW 1 said that when he jumped from the roof of his house, he broke both his legs. Nonetheless, he was thereafter able to run to the house of his brother, Wilson Kioko **(PW 4).**

During cross-examination, **PW 1** said he had no proof that he broke both his legs when he jumped from the roof.

The complainant's wife **(PW 2)** and the complainant's brother **(PW 4),** both said that the complainant broke both his legs. The complainant's driver **(PW 5)** also said that the complainant broke both his legs.

However, DR. DANSON MUYA, testified that **PW 1** had no other injuries save for "a fractured dislocation on the left ankle."

Although it is clear that the complainant was injured, the degree of his injuries appears to have been exaggerated, as the doctor's findings did not support his assertions.

It is also curious that when the doctor **(PW 9)** obtained the history from the complainant, he was told that the injury was sustained when he **(PW 1)** was assaulted by persons known to him.

In effect, the medical evidence made available to the court did not support the complainant's contention.

We therefore find that it would be unsafe to uphold the conviction on count 2.

COUNT 3 – ROBBERY WITH VIOLENCE

The complainant was **PW 3**. On 3rd July 2006, he was woken up by the barking of his dogs, at about 2.00a.m. He thought that a young man named Mutisya had arrived, as the said young man was supposed to ferry **PW 3's** goods to the market, at about 5.00a.m.

However, it transpired that the people who had come were robbers. Lights were on. That enabled **PW 3** to see 2 people at the window of his bedroom. He saw the 1st appellant, who had a broken tooth.

The men demanded money from **PW 3.** He had only KShs.200/- which he gave them. When they demanded more money, he threw the wallet on the bed, where the robbers reached, through the window. They had smashed the glass panes.

After they ascertained that the wallet had no more money, they left it on the bed.

Early the next morning, **PW 3** passed through the hospital where some suspects were being treated. **PW 3** identified the 1st appellant at the hospital.

During cross-examination, **PW 1** suggested to **PW 3** that although he had a broken tooth, the said tooth only broke when he was beaten up by a mob who removed them from the matatu which they had boarded to travel back to Nairobi.

PW 8 confirmed that the suspects had bags which contained their clothes. However, the police were not interested in those bags.

The appellants both said, in their defences, that they were innocent passengers in the matatu, when they were mistaken for thugs. They produced documents to show that they were employed at Design Wear Limited, Embakasi, Nairobi.

They called the Ware-house manager of that company, Mr. VISHUAL R. SHAH, who produced their respective payslips. He also testified that the appellants were at their place of work until 1.00p.m. on Saturday. The appellants were expected to be back at work on the next Monday.

According to the appellants, they had to board a matatu at about 1.00.m. on Monday, if they were to get to their place of work by 8.00a.m.

As the police verified that the matatu they were in had eight (8) other persons before the four (4) suspects boarded it, we find that it was not an unusual occurrence for persons to board matatus at about 2.00a.m. Indeed, that is why the alleged suspects were not arrested automatically when they board the vehicle.

In effect, the explanation tendered by the appellants, in their defences, was plausible.

PW 3 allegedly saw the 1st appellant outside his house. The solar lighting was on. However, **PW 3** did not tell the court how far away from the house, the suspect was, and where the light was, in relation to the spot where the suspect was when **PW 3** saw him.

And although the charge sheet specified that the robbers were armed with axes, pangas, slashers and rungus, **PW 3** did not mention any such weapons.

PW3 did not even testify that the robbers used any personal violence on him, as asserted in the charge sheet.

In similar vein, neither **PW 1** (who was the complainant on Count 1), nor his wife **(PW 2)** testified that the persons who raided their house were armed with pangas, rungus and axes, as asserted in the charge sheet.

In the result, as the defences put forward by the appellants, were plausible, we find that they cast reasonable doubt on the prosecution case.

Secondly, the prosecution did not lead evidence to prove the elements set out in the charge sheet.

It would thus be unsafe to uphold conviction.

In conclusion, the appeal is allowed. The convictions in all the 3 counts are quashed, and the sentences set aside. We order that the appellants be set at liberty forthwith unless they are or either of them is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi this 7th day of May, 2012.

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FRED A. OCHIENG **L.A. ACHODE**

JUDGE **JUDGE**