



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 194 of 2011

MAKAME DUME APPELLANT

=VERSUS=

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 64 of 2011 of the Senior Resident Magistrate's Court at Kaloleni: S. Wewa – S.R.M.)

JUDGEMENT

The Appellant **MAKAME DUME** has filed this appeal challenging his conviction by the learned Senior Resident Magistrate sitting at Kaloleni Law Courts. The Appellant was first arraigned in court on 1st March 2011 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that:

“On the 27th day of February 2011 at Mikiriani Village, Kaloleni Location in Kaloleni District within Coast Province jointly with others not before court, being armed with dangerous weapons namely stones and pangas robbed John Karubia Muthii of 12 pieces of Y-12 twisted bars valued at Kshs.12,000/-“

The Appellant entered a plea of **“Not Guilty”** to the charge and his trial commenced on 4th April 2011. The prosecution called a total of six (6) witnesses. **PW3 EILINGESA NGENENE** told the court that on the night of 27th and 28th February he was on duty with a colleague in Athi River guarding the property of SS. Mehta & Company. At about 1.30 A.M. a group of five men armed with stones and pangas attacked them. **PW3** and his colleague ran away and hid. He was hit with a stone by the robbers. The guards called for help from the police. **PW2 APC NORMAN MWASI** responded to the call for help by **PW3**. He and others met with the five attackers and challenged them to stop. The men ran off but police managed to arrest one of them. The Appellant led them to a nearby home where 12 pieces of wire rods stolen from the company were recovered. **PW5 EVERLYNE YAA WAA** the owner of that home told the court that on the material night at 2.00 A.M. the Appellant came and knocked on her door with police. They took away the 12 metal rods. The accused was later charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed onto his defence. He opted to make an unsworn statement in which he denied any involvement in the theft. On 16th August 2011 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the charge of Robbery with Violence and thereafter sentenced him to death. Being dissatisfied by both his conviction and sentence the Appellant filed this appeal. **MR. TANUI** learned State Counsel acted for the State and opposed the appeal.

We have tried our best to decipher the record of the trial before the lower court but with little success. The manner of recording adopted by the trial magistrate renders the proceedings virtually unintelligible. A trial court is under an obligation to ensure that evidence is recorded in a coherent manner that will enable any subsequent appeal court to follow the same. Nevertheless we did soldier on in an attempt to analyze what we could of the evidence.

PW3 told the court that he was able to identify the Appellant with the aid of the moonlight. However **PW3** does not explain how far he was standing from the Appellant when he saw him. Further **PW3** has stated that at the time he was under attack by a hail of stones and that he ran away in order to secure his safety. In those circumstances we find it highly unlikely that this witness could have had a clear and unfettered view of the attackers. It is alleged that Appellant led police to the home of **PW5** where the stolen wire rods were recovered. In her evidence **PW5** said that it was her brother-in called '**Paulo Herbert**' who took the wire rods to her home. At page 9 line 11 she states:

“My brother-in-law namely Paulo Herbert had brought them. I had left home when I came back and found them”

From this evidence it is not clear exactly when those rods were taken to her home. Was it on the night in question or prior to that night? Further under cross-examination **PW5** goes on to say:

“Those who brought knocked. I did not open. You said it was Makame Dume. Was with some children”

PW5 thus states that she did not see who took the exhibits to her home. She says a voice said it was Makame Dume [the Appellant herein]. **PW5** did not clarify whether she was able to recognize the voice as that of the Appellant. Who were these children who came to her house at 2.00 A.M.? The evidence is not cogent does not flow and as we stated earlier is difficult to decipher.

On the whole we find that there remains a doubt regarding the guilt of the Appellant. The benefit of that doubt must be accorded to the Appellant. As such we do hereby quash his conviction on the charge of Robbery with Violence. The subsequent death sentence is also set aside. This appeal succeeds. The Appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Mombasa this 9th day of November 2012.

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M. ODERO

JUDGE

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G. NZIOKA

JUDGE

In the presence of:

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