



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 154 OF 2009

[From Original Conviction and Sentence in Criminal Case No. 603 of 2008 of the Chief Magistrate's Court at Mombasa: **C.P. Mwangi – C.M.**]

JOSEPH MUTUA KAVISI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **JOSEPH MUTUA KAVISI**, has filed this appeal to challenge his conviction and sentence by the learned Chief Magistrate Mombasa. The Appellant was on 7th March 2008 arraigned before the subordinate court on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the offence were that –

“On the 10th day of December 2007 at CASTLE ROYAL HOTEL in Mombasa District within Coast Province, jointly with another not before court, while armed with offensive weapons namely a pistol and knives, robbed JACKSON KAKUNZA NYAMAWI 6000 US Dollars, 2,500 Euros and Kshs.400,000/- all valued at Kshs.1,016,500/- and at or immediately before or immediately after the time of such robbery used actual violence to the said JACKSON KAKUNZA NYAMAWI.”

The Appellant pleaded ‘**not guilty**’ to the charge and his trial commenced on 18th April 2008 at which trial the prosecution led by **INSPECTOR MARY**, called a total of seven (7) witnesses to prove their case. The complainant **JACKSON NYAMAWI** told the court that he is engaged in the business of changing money. On 10th December 2007, he met with the Appellant whom he knew well as a client at the Castle Hotel in Mombasa. The Appellant told him that he wished to exchange 300 pounds and 500 Euros. The complainant then left to go and collect the equivalent in Kenya shillings which was to be Kshs.350,000/-. Shortly thereafter he returned to the hotel having on his person a total of Kshs.1,016,550/-. The Appellant then suggested that they move to a private area of the hotel in order to carry out the exchange. They moved into the toilets. As the complainant began to count the money, the Appellant pulled out a pistol, pointed it at him and demanded the money. The complainant tried to resist whereupon the Appellant stabbed him five times in the chest and shoulder and took off with the money leaving **PW1** with the knife still sticking out of his shoulder. Hotel workers heard the complainant’s cries for help and came to his rescue. They rushed him to hospital where he was admitted for two weeks. On 28th February 2008 the complainant spotted the Appellant walking along Moi Avenue in Mombasa. He

managed to call police who apprehended him.

At the close of the prosecution case the Appellant was found to have a case to answer. He gave a sworn defence in which he denied any involvement in the robbery. On 18th August 2009 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the offence of Robbery with Violence contrary to S. 296(2) of the Penal Code and thereafter sentenced him to death. It is against this conviction and sentence that the Appellant now appeals. **MR. ONSERIO**, learned State Counsel appeared for the Respondent State and urged the court to uphold both the conviction and sentence. The Appellant who was unrepresented chose to rely entirely upon his written submissions.

We have perused the record of the proceedings in the lower court. We note that in her judgement the learned trial magistrate failed to address the question of whether the incident described could be termed a robbery with violence as envisaged by S. 296(2) of the Penal Code. In the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549**, the ingredients of this offence were clearly set out by the Court of Appeal as follows:-

“Robbery with Violence is committed in any of the following circumstances:

- 1. The offender is armed with any dangerous and offensive weapon or instrument; or***
- 2. The offender is in company with one or more other person or persons; or***
- 3. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.”***

The use of the word ‘or’ means that proof of **any one** of these three ingredients will suffice to prove an offence under S. 296(2) of the Penal Code. In his narration to the court, **PW1** stated that his assailant was armed with a pistol which is both a dangerous and offensive weapon. In the course of the robbery the complainant was stabbed five times. **PW2 NATHANIEL NDEJE NDALE**, who rescued **PW1** from the toilets where he had been attacked confirms that he found him bleeding heavily from stab wounds in his chest. He also confirms that he found a knife still lodged the complainant’s body. The said knife was produced in court as an exhibit **Pexb1** and was positively identified by both **PW1** and **PW2**. **PW4 DR. LAWRENCE NGONE** is the medical officer at Coast General Hospital. He examined the complainant on 3rd March 2008 and noted stab wounds in his jaw, abdomen and neck region. The force of the stabs perforated the complainant’s intestines which necessitated an operation. **PW4** filled and signed the P3 form which he produces in court as an exhibit **Pexb2**. There is therefore overwhelming evidence that the complainant was attacked and seriously injured in the course of this robbery. As such the incident did indeed amount to a Robbery with Violence.

The main grounds of appeal relied upon by the Appellant in his written submissions are those of Identification and Insufficiency of Evidence. **PW1** told the court that the robbery occurred at the Castle Hotel in Mombasa. He stated that he had received a message from the Appellant whom he knew well to meet him at that venue. **PW5 PETER MUSILI MULI** a clothes vendor along Moi Avenue tells the court that on 10th December 2007 at about 9.00 A.M. he was at his place of work when the accused approached him and asked for the complainant. When **PW5** told him that the complainant had not yet arrived he left a phone number to be given to him. When **PW1** arrived **PW5** gave him the telephone number. **PW5** has positively identified the accused in court as the man who came looking for the complainant. The complainant told the court that upon receiving the message he went and met the Appellant at Castle Hotel. The time was 10.00 A.M. It was broad daylight and visibility was good. The complainant spoke to the Appellant who claimed that he had some foreign currency to exchange. He left to collect the equivalent in Kenya shillings and after a brief interlude returned to the same hotel where he linked up with the Appellant again. Clearly the two spent an ample amount of time in each others company. The complainant had much more than a fleeting glance at the Appellant.

In order to carry out transaction of exchanging the cash, the two men moved to the hotel toilets. Once inside the Appellant pulled out a gun and ordered the complainant to lie down. When the complainant resisted these orders the Appellant proceeded to stab him. **PW2 NATHANIEL NDEJE NDALE**, a cleaner at the hotel told the court that at 10.30 A.M. one of the hotel guards alerted him to the

fact that there was a man crying in the toilets. **PW2** went to check and on his way bumped into the Appellant coming out of the same toilet. Appellant told him that there was a man committing suicide in there. **PW2** went in and found the complainant lying in a pool of blood on the ground with a knife stuck in his body. **PW2** did identify the Appellant as the man who he saw coming out of the toilet at the material time. This places the Appellant at the scene of the crime. However upon a careful reading of the record we note that certain anomalies exist with relation to the identification of the accused which anomalies we cannot overlook. As we have stated earlier the incident occurred in the day time and the conditions were optimum for a positive identification. **PW1** identifies the Appellant as the man who left a message to be given to the complainant and **PW2** identifies the Appellant as the man whom he saw leaving the toilet where the complainant was later found stabbed and critically injured. However we are concerned that the police did not bother to mount an identification parade at which these two witnesses could be called upon to confirm their identification of the Appellant. What remains therefore is mere 'dock identification'. In the case of **PATRICK NABISWA –VS- REPUBLIC CRIMINAL APPEAL NO. 80 of 1997** the Court of Appeal held as follows

“Where the police arrest a suspect on the basis of other evidence and there are witnesses who might be called to identify the suspect it is prudent to arrange for and hold an identification parade”

Likewise in the more recent case of **MURAGE and ANOTHER –VS- REPUBLIC [2006] 2 E.A. 219**, the Court of Appeal sitting in Nakuru held in a similar case that mere '**dock identification**' without a prior identification parade was **worthless** [our emphasis]. This is exactly the situation that exists in the present case. **PW1** and **PW2** merely identified the Appellant in the dock before the trial court. The police omitted to mount an identification parade which omission is fatal to their case thus this dock identification is in the words of the Court of Appeal '**worthless**'.

Secondly on this issue of identification, the complainant relies on evidence of recognition as he claims that he knew the Appellant very well, as a regular customer. It is surprising therefore that whereas the complainant in his evidence stated that he knew the Appellant as '**Mutua**' under cross-examination by defence counsel he admits that in his written statement to the police he declared that he did not know the accused's name. If at the time of making his statement immediately after the incident, the complainant did not know the Appellant's name, it is very curious that at the time of his testimony in court he names the Appellant as Mutua. When and how did he get to know the Appellant's name? This is in our view a major contradiction in the evidence of the complainant, one which raises doubt as to whether he actually knew the Appellant as he had alleged. The learned trial magistrate erred in failing to consider this contradiction as it places grave doubt on the complainant's identification of the Appellant. From the anomalies and inconsistencies we have pointed out, we find that the identification of the Appellant by the prosecution witnesses was neither sound nor reliable, notwithstanding the optimal conditions pertaining at the time. The law is that where doubts exist on a matter in issue the benefit of doubt must be awarded to the Appellant.

Without a sound and reliable identification of the Appellant the one who robbed the complainant his conviction of the offence is not sound and we cannot confirm the same. Due to the abundant doubts on the issue of identification we do hereby quash the Appellant's conviction for the offence of Robbery with Violence contrary to S. 296(2) of the Penal Code. The subsequent death sentence is also set aside. In a nutshell this appeal succeeds. The Appellant is to be released forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 11th day of February 2011.

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MOHAMED IBRAHIM

MAUREEN ODERO

JUDGE

JUDGE