



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CRIMINAL APPEAL NOs. 248 & 249 OF 2009**

*(From Original Conviction and Sentence in Criminal Case No. 195 of 2008 of the Principal Magistrate’s Court at Voi: P.N. Ndwiga – S.R.M.)*

**EMMANUEL MUTHOKA MUTISYA ..... 1<sup>ST</sup> APPELLANT**  
**JOSPHAT WAMBUA ..... 2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The two Appellants namely **EMMANUEL MUTHOKA MUTISYA** (hereinafter referred to as the 1<sup>st</sup> Appellant) and **JOSPHAT WAMBUA** (hereinafter referred to as the 2<sup>nd</sup> Appellant) both filed appeals against their conviction and sentences by the learned Senior Resident Magistrate sitting at Voi Law Courts. The two appeals were consolidated and were heard by this court as one. The two Appellants were on 19<sup>th</sup> March 2008 arraigned before the subordinate court and charged with two (2) counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. Both Appellants pleaded ‘*not guilty*’ to the charge and their trial commenced on 30<sup>th</sup> June 2008. The prosecution led by **INSPECTOR GITHOGE** called a total of seven (7) witnesses in support of their case.

The prosecution case revolved around two robbery incidents which occurred within minutes of each other on the evening of 14<sup>th</sup> March 2008 in Voi Township. **PW1 RONICA MUTHUI**, a nurse, told the court that on the material day she was at Voi Medical Clinic waiting to lock up at 7.30 p.m. The doctor who was attending patients that day **DR. ABSALOM WAMBUA KIIA PW2** had just stepped out to go to the toilet. Two men came into the clinic posing as patients. **PW1** ushered them into the reception area where there was a bed. One of the men demanded to be given the days collection. **PW1** hesitated, then the man pulled out what she recognized to be a toy pistol. **PW1** still declined to give out any money and instead engaged the men in an argument. The second man also pulled out a toy pistol. **PW1** began to scream in order to alert the doctor who was still outside. A struggle ensued as the men snatched her handbag. Three other robbers came in and joined the first two. One of them pulled **PW1** and she fell down fracturing her right hand in the process. The men took off with her handbag.

**PW4 ALFONSE WAMBUA KITONYI** told the court that on that material evening he was walking to get his vehicle from the car park. He heard a commotion and saw a lady **PW1** struggling with some men at the door of a clinic. At first he merely watching thinking it was a domestic dispute. Then he saw 4

men run out of the clinic. One pointed a pistol at him and orders him and two other passers-by to lie down. **PW4** immediately complied. The men stole from **PW4** two (2) mobile phones a Nokia 6070 and a wireless-telkom phone. They also took his wallet containing identity cards. **PW3 GABRIEL MUTUA MUNYAO** a waiter in the nearby '**Corner Pub**' said his boss Justus called police who came to the bar and rounded up seven men who were drinking therein. The men were all taken to Voi Police Station where **PW1** identified the 1<sup>st</sup> and 2<sup>nd</sup> Appellant as the men who had robbed her. They were placed in cells and later charged. Both Appellants were ruled to have a case to answer and were placed on their defence. They both made sworn statements denying any and all involvement in the two robbery incidents. On 18<sup>th</sup> November 2009, the learned trial magistrate delivered her judgement in which she convicted each Appellant on two counts of Robbery with Violence contrary to S. 296(2) of the Penal Code and thereafter sentenced each to death. The Appellants being dissatisfied with both conviction and sentence filed this appeal. **MR. MUTETI**, learned State Counsel who appeared for the Respondent State conceded the appeal.

We have carefully perused the record of the trial and on our own part notice several glaring anomalies. Firstly we note that out of all 7 prosecution witnesses, it is only one who is the complainant who testified that she was able to identify the robbers. Indeed her evidence that there were full lights on in the clinic, and the fact that she bravely engaged the robbers in a long argument and thereafter a struggle indicates that indeed she had both ample time and opportunity to see them well. In the case of **MAITANYI –VS- REPUBLIC [1986] KLR 198**, the Court of Appeal with respect to identification by a single witness, held as follows –

***“The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made”***

We have anxiously perused the judgement of the learned trial magistrate. She refers to the fact that the complainant alone identified the 2<sup>nd</sup> Appellant. The trial magistrate relies on an identification of the 1<sup>st</sup> Appellant by **PW3**. However in our view such identification is invalid to prove any involvement by the 1<sup>st</sup> Appellant in the robbery because **PW3** was not an eyewitness to that robbery. He only saw 3 men who included the 1<sup>st</sup> Appellant walking near the pub where he works. This cannot be relied upon as proof of the involvement of the 1<sup>st</sup> Appellant in the robbery and the learned trial magistrate erred in so finding. The trial magistrate did not at any point warn herself of the danger of convicting on the evidence of a single witness. Failure to do this in compliance with the decision in the **Maitanyi** case renders her conviction unsafe.

In addition we find that several key and crucial witnesses were not called to testify in the trial before the Senior Resident Magistrate's Court. **PW3** told the court that it was his boss **JUSTUS** who went to the clinic (where the robbery had occurred) and upon his return called an Inspector Musai of Voi Police Station. It may well be that this '**Justus**' observed something at the clinic which aroused his suspicion and led to his calling the police. However we cannot rely on mere speculation. This evidence ought to have been adduced from Justus himself. Failure to call him weakens the thread of evidence. Likewise **PW3** mentions one **MUSEMBI** whom he says came and told them that a man had been arrested in '**Abijan bar**' with a stolen phone. Once again this '**Musembi**' was not called to testify and describe himself to the court what he saw. This too is a serious omission by the prosecution. Lastly the prosecution witnesses including **PW3** and **PW7 INSPECTOR ALI HASSAN KOI** made reference to the two police officers **INSPECTOR MUSAI** and **INSPECTOR KIETI**, who went and arrested 7 men (including the 2 Appellants) from the bar where **PW3** worked. For 7 people to be found in a bar drinking is not unusual or suspicious. These officers (or at the very least one of them) ought to have been in court to explain what led to the arrest of the 7 men. These were police officers, public servants who have a duty to appear in court to testify more so when they played such a crucial role. Their failure to testify is a clumsy omission on the part of the prosecution and again weakens the thread of evidence. On the whole we find that in this case the prosecution failed to meet the legally established standard of proof. The convictions of the two accused persons on both counts was unsafe. We therefore quash the same. Likewise the death sentences

imposed are hereby set aside. Their appeals succeed. Both Appellants to be set at liberty forthwith unless they are otherwise lawfully held.

**Dated and Delivered in Mombasa this 31<sup>st</sup> day of March 2011.**

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**MOHAMED IBRAHIM**  
**JUDGE**

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**MAUREEN ODERO**  
**JUDGE**