



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 63A OF 2009

*(From Original Conviction and Sentence in Criminal Case No. 239 of 2008 of the
Principal Magistrate's Court*

at Kwale – Ogembo D.O, SRM)

1. MUTUA WAMBUA NZOMO
2. MUNGA MWALEWA..... APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

The two Appellants together with one WANDENDE DAVID MUNYOKI (*“Wandende”*) were arraigned in the Senior Resident Magistrate's Court at Kwale and charged with the offence of Robbery with Violence contrary to Section 296(2) of The Penal Code. The particulars of the offence as stated in the charge sheet were that:

“On the 22nd January, 2008 at around 11.00am at Mamba Village, Kinondo Location in Kwale District within the Coast Province, jointly with another not before court while armed with pangas robbed WILSON MASA KU MUKOSI of a bicycle make SIMBA and a Radio Sonitek immediately after the time of such robbery used actual violence to the said WILSON MUKOSI MASA KU MUKOSI and caused his death.”

Wandende pleaded guilty to the charges and was on 25th February 2008 sentenced to death. After full hearing the trial Magistrate convicted the two appellants and sentenced each one of them to death. Although the appellants filed separate appeals, the two were consolidated on 31st May, 2011. This appeal challenges both the conviction and sentence. At the hearing, the State did not oppose the appeal.

We have, as required when sitting as a first appeal court, re-evaluated the evidence adduced before the trial court and on our own assessment the conviction against the two appellants was wholly unwarranted.

The prosecution called a total of seven witnesses. While the two appellants each gave unsworn statements in their defence. Briefly, WILSON MASAKU MUKOSI (*the deceased*) met this gruesome death on the night of 22nd January 2008 while at his home in Shimba Hills. The deceased's bicycle, radio and clothes were found missing and later recovered from **Wandende**.

None of the witnesses who gave evidence directly incriminate the two appellants. In convicting the two the trial Magistrate had this to say:

“The prosecutions case seems to be based on the alleged statement of accused 1, Wandende David Musyoki that he had attacked the deceased while the accuseds 2 and 3 and one Ali still at large. The said accused 1 duly admitted the charges and was convicted upon his plea of guilty. From the evidence of the prosecution, he made the incriminatory statements in the presence of PW3 Mutuku Kilonzo, PW5 Mutinda Musau and also to the investigating officer PW6 Cpl Paul Lyambila.” (emphasis ours)

The evidence of PW3, in so far as is relevant to these proceedings, is that **Wandende** in the presence of PW4 and PW5 confessed that he had committed the offence together with the two appellants and one Ali. This account is corroborated by the PW4 and PW5. On his part, and separately, PW6 (*the investigating officer*) says that **Wandende** mentioned both appellants as co-perpetrators.

The learned Magistrates conviction rested solely on the statements allegedly made by **Wandende** to PW3, PW4, PW5 and PW6 implicating the two accused persons. What would be the value of those statements? Section 32(1) of the Evidence outlines circumstances under which a court can receive and consider a confession implicating a co-accused. Such a confession would not be admissible unless it is made in the manner contemplated by Section 25A of The Evidence Act which reads as follows:

“A confession or any admission of a fact tending to the proof of guilty made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice..”

Clearly, PW3, PW4 and PW5 were not competent to receive the confession of **Wandende**. As to PW6, even if he held a rank of a Chief Inspector of Police, he was disqualified from taking the confession as he was the investigating officer. The result is that the statements made by PW3, PW4, PW5 and PW6 on the alleged confession by **Wandende** were not admissible and could not form a basis for conviction.

The learned Magistrate also placed some weight on what the Magistrate says happened during the plea taking of **Wandende**. The trial court made these observations:-

“And while arraigned in court he duly entered a plea of guilty to the charges. The said accused 1 clearly stated the presence of and the participation of the accused before court in the incident.”

With respect to the learned Magistrate, the record of the plea proceedings does not have such a statement from **Wandende**. To the contrary, **Wandende** said this in mitigation;

“I was alone. I ask for leniency.”

Even if the statement in mitigation had implicated the appellants no reliance should have been placed on it as it does not amount to evidence. It was neither made on oath nor put to test by way of cross examination.

Ultimately, we reach the conclusion that the conviction of the 1st and 2nd Appellants was without basis. We do allow this appeal and quash the conviction of both appellants. Their death sentences are also

set aside, each of the accused is hereby set at liberty forthwith unless they are otherwise lawfully held.

Dated and delivered at Mombasa this 22nd day of November, 2011.

MARY KASANGO

F. TUIYOTT

JUDGE

JUDGE