



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 34 of 2009
KARISA MWANGOMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein **KARISA MWANGOMBE** has filed this appeal against his conviction and sentence before the learned Senior Resident Magistrate sitting in Kilifi. The appellant together with another suspect [who has since absconded] had been jointly charged with the offence of Robbery with Violence contrary to S. 296 (2) of the Penal Code Cap. 63 Laws of Kenya. The particulars of the offence as stated in the charge sheet filed in court on 3.10.2005 were that

“KARISA MWANGOMBE alias CHAMUKERA: During the night of the 20th and 21st of July, 2005 at Mikanjuni near Kwa Ngala in Mtwapa location of Kilifi District of the coast Province jointly with others not before the court while armed with crude weapons namely axes, pangas, crowbars, and clubs robbed KHAMISI MWAMUYE of cash Kshs.18,000/=, one plane make Ivon No. 4 valued at Kshs.2,500/= and a traveling bag valued at Kshs.1,500/= all totaling Kshs.23,000/= and at or immediately before or immediately after the time of such robbery injured the said KHAMISI MWAMUYE”

The prosecution led by Inspector Ogola called a total of seven (7) witnesses in support of their case. Briefly the prosecution case was that on the night in question the complainant and his wife were asleep in their house. People claiming to be police officers knocked on their door and entered. They demanded the complainant’s identity card which he readily handed over. They also took cash Kshs.18,000/ which was inside the house. The men then took the complainant out of the house and hit him on the head with a metal tool. He fell unconscious. The complainant in his evidence stated that he was able to identify two of the men whom he recognized as residents of the village. After the robbery the complainant’s wife **FAIDA** called neighbors who rushed him to hospital. The incident was later reported to Mtwapa police station. On 23.09.2005 **CORPORAL SULUBU** arrested the accused. An identification parade was conducted by the police at which parade the complainant positively identified the accused.

At the close of the prosecution case, the learned trial magistrate ruled that the accused had a case to answer. The accused gave an unsworn defence and called no witnesses. On 28th July 2006 the learned Senior Resident Magistrate delivered his judgment in which he convicted the accused on the charge of Robbery with Violence contrary to Section 296 (2) Penal Code and subsequently sentenced him to death in accordance with the law. It is against this conviction and sentence that the appellant now appeals.

The appellant appeared in person at the hearing of his appeal. **Mr. Ogoti**, state counsel appeared on behalf of the Respondent state. Mr. Ogoti in his submissions conceded this appeal on the basis that the question of identification was not exhaustively analyzed by the trial court. We note that the robbery incident occurred at night. The complainant told the court that he was asleep in his house when people claiming to be police officers knocked on his door. The complainant stated that he was well able to identify two of the robbers since the lights in his house were on at the time. However the mere fact that lights were on would not of itself suggest that conditions were favourable for a clear and positive identification. We are well aware of the fact that “light” in this sense could mean a lantern, a tin lamp or an electric bulb. The complainant has not specified exactly which source of light he had in his house on the material day. Even if the complainant was referring to an electric bulb we take judicial notice of the fact that light bulbs come in many different strengths. The complainant has not stated whether the light was bright, or dim. Did the light cover the whole room or only part of the room. The complainant himself is the only identifying witness in this case. His wife **PW.2** who was with him in the room tells the court that she was unable to identify any of the robbers. This strikes us as somewhat curious. If the complainant was able to identify the appellant whom he claims to know well as one of

the attackers, then what prevented his wife who was with him in the same room, and presumably also a beneficiary of this same light from identifying any of the attackers.

This was a case in which the whole issue of identification revolved around one witness. No exhibits were recovered on the appellant. Thus the only evidence linking the appellant to the offence was the evidence of the complainant placing him at the scene. In these circumstances we feel that the learned trial magistrate had a duty to exhaustively interrogate the question of identification. It is clear from his judgement that he failed to do this. At page 15 line 16 of his judgement he writes

“If the 2nd accused [the appellant herein] was in the gang and the lights were on Khamisi would definitely identify him and this is what happened. The court is satisfied that the 2nd accused was positively identified at the scene by Khamisi as one of those who injured him and took his money”.

With all due respect this was a very cursory approach to a very crucial issue, indeed the key issue upon which the trial revolved. The trial magistrate erred by failing to closely consider the source and quality of the light at the scene. In the case of **MAITANYI – VS – REPUBLIC (1986) KLR 198** the Court of Appeal sitting in Nairobi held

“2. When testing the evidence of a single witness a careful enquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description”.

This was clearly not done in the present case. In order to justify the conviction of the appellant the evidence against him needed to be watertight. Our view is that the evidence on record dismally fails this test. The conviction rendered by the learned trial magistrate was, in the circumstances unsafe. Based on the foregoing we find merit in this present appeal. The conviction of the appellant is hereby quashed and the subsequent death sentence is set aside. The appellant to be released forth with unless he is otherwise lawfully held.

Dated and delivered in Malindi this 15th day of March 2010.

H. A. OMONDI

JUDGE

M. ODERO

JUDGE