



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 138 of 2006

MOHAMED KASIRI MULI APPELLANT
VERSUS
REPUBLIC RESPONDENT
JUDGEMENT

This is the first appeal of the appellant **MOHAMED KASIRI MULI alias MEDI**, against his conviction and sentence by the learned Senior Resident Magistrate, sitting at the Mombasa Law Courts. The appellant had been charged before the Lower Court with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**. The particulars of the charge were as follows

“On the 30th day of October 2004, at Shimanzi area within Mombasa District of the coast Province, jointly with others not before court while armed with an offensive weapon namely panga robbed **MIRITI MURIUKI SALESIO** of cash 1,000/=, wrist watch make Seiko and a mobile phone make **SONY J70** all valued at Kshs.10,500/= and at or immediately before or immediately after the time of such a robbery threatened to use actual violence to the said **MIRITI MURIUKI SALESIO**”. The prosecution case commenced on 1.12.2005 in which three (3) witnesses were called to testify in support thereof. At the close of the prosecution case the appellant was ruled to have a case to answer and was placed on his defence. He elected to give an unsworn statement and called no witnesses. On 4.5.2006 the learned trial magistrate delivered her judgment in which she convicted the appellant for the offence of Robbery with Violence contrary Section 296 (2) of the Penal Code; and sentenced him to death in accordance with the law. It is against this conviction and sentence that the appellant now appeals.

MR. MAGOLO learned counsel appeared before us and argued the appeal on behalf of the appellant whilst **MR. ONSERIO**, learned stated counsel appeared for the Respondent state and informed us that he wished to concede this appeal.

Having carefully perused the proceedings of the lower court we are inclined to agree with Mr. Onserio’s concession of this present appeal. The crucial issue of identification was not conclusively proved by the evidence adduced in court. **PW.1 MIRITI MURIUKI SALESIO**, was the complainant, who was the victim of the robbery. He gave evidence that he was walking from the Brook side Depot in Shimanzi at about 3.00 am. On the way five men accosted him and robbed him of his watch, mobile phone and cash Kshs.10,500/=. **PW.1** is unable to identify the appellant as one of the men who robbed him. At page 16 line 2 he is candid enough to say

“It was dark during the ordeal. I could not identify any of the thugs”

PW.2 P.C. GERALD KANYITHIA, tells the court that he and other officers were on mobile patrol on the material date at 3.30 am. They came across **PW.1** who told them that he had just been robbed. They saw the thugs who ran off indifferent directions. The police gave chase and caught the appellant. At page 17 line 10 **PW.2** states

“Upon arrest the complainant said it was the accused who had held him by the neck and ordering others to cut him up with a knife”

This is surprising evidence from **PW.2** since **PW.1** had already informed the court that he could not identify any of the thugs because it was too dark. How then was **PW.1** able to tell **PW.2** what role the appellant played in the robbery? This is a major contradiction in the prosecution case. Nothing at all was recovered on the appellant. The police did not bother to conduct an identification parade.

The learned trial magistrate seems to have based her conviction of the appellant on circumstantial evidence i.e. that he was arrested close to the scene of a robbery. However she too concede that the complainant was not able to positively identify the appellant as one of those who robbed him. At page 26 line 11 of her judgment she states

“On the issue of identification it is evident that the complainant said it was dark and hence he could not have identified the accused person as one of those who robbed him while at the scene. There was however a lot of circumstantial evidence linking accused person with the offence”

For circumstantial evidence to suffice it must provide the only possible explanation of events. As Mr. Magolo counsel for the appellant has rightly pointed out, the possibility that the appellant was merely an innocent passer-by cannot be ruled out especially in view of the lack of positive identification by **PW.1**. On the same page line 15 the learned trial magistrate goes on to express her misgiving about the fact that no identification parade was conducted, thus

“Before saying anything more on this, let me point out here that it is well within the knowledge of this court that the best mode of identification is through an identification parade ...”

Surprisingly despite these misgivings she goes ahead to convict the appellant. In our opinion the appellant was not clearly and positively identified as one of the perpetrators of the offence. His conviction was in our view unsafe. The prosecution did not

meet the required standard of proof. As such we do allow this appeal and quash the conviction of the appellant on the charge of Robbery with Violence contrary to Section 296 (2) Penal Code. The attendant death sentence is likewise set aside. The appellant to be released forthwith unless otherwise lawfully held.

Dated and Delivered at Mombasa this 20th day of April 2010.

F. AZANGALALA

JUDGE

M. ODERO

JUDGE