



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA

Criminal Appeal 90 of 2006

JOHN MAKAU MUTISYA.....APPELLANT  
VERSUS  
REPUBLIC .....RESPONDENT

*[From Original Conviction and Sentence in Criminal Case No. 2776 of 2004 of the  
Chief Magistrate's Court at Mombasa: T. Mwangi – S.R.M.]*

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JUDGEMENT

JOHN MAKAU MUTISYA (hereinafter referred to as ‘the appellant’) has filed this appeal challenging his conviction and sentence by HON. T. MWANGI Senior Resident Magistrate, Mombasa Law Courts. The Appellant was arraigned before the subordinate courts on 16<sup>th</sup> September 2004 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 5<sup>th</sup> day of September 2004 at Mgongeni Village in Mombasa District within Coast Province, jointly with others not before court while armed with panga robbed DAVID KYALO MUNEENI of cash Kshs.3,000/-, a coloured TV 14” make Sony, a DVD player make Fugipal, a radio cassette make sharp, 4 CD discs, a pair of sports shoes and a bag containing assorted clothes all valued at Kshs.38,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said DAVID KYALO MUNEENI”***

The Appellant pleaded ‘**Not Guilty**’ to the charge and the hearing commenced on 20<sup>th</sup> December 2004. In that hearing the prosecution led by INSPECTOR NYAMAI called a total of seven (7) witnesses in support of their case. The brief facts of the prosecution case were that on 5<sup>th</sup> September 2004 the complainant was inside his house at Kisimani watching TV. At about 2.00 A.M. his gate was hit and broken down. Three men entered one of whom was armed with a panga. They demanded money. One cut the complainant on the head. They stole a bag, a radio and Sony TV which the complainant told the court belonged to his brother. As a result of the cut to his head the complainant lost consciousness. His neighbour called **MUSILI** came to his rescue and took the complainant to hospital. The matter was reported at Nyali Police Station. Later on the appellant was arrested at Kongowea and a radio recovered. Upon completion of police investigations the appellant was taken to court and charged.

At the close of the prosecution case the learned trial magistrate ruled that the appellant had a case to answer and placed him on his defence. The appellant elected to give an unsworn defence in which he totally denied the charges. On 23<sup>rd</sup> February 2006 the learned trial magistrate delivered her judgement in which she convicted the appellant of the charge of Robbery with Violence contrary to Section 296(2) of the Penal Code. After listening to his mitigation the trial magistrate proceeded to sentence the appellant to death. The appellant was dissatisfied with both his conviction and sentence and filed this present appeal.

At the hearing of the appeal before us the appellant who was not represented by legal counsel chose to rely entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO**, learned State Counsel appeared for the Respondent State and indicated to us that he would be conceding the appeal.

This being the court of first appeal we will in making our decision be guided by the decision of the Court of Appeal in the case of **AJODE –VS- REPUBLIC [2004] 2 KLR 81** where it was held that:-

***“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that”***  
[See also **OKENO –VS- REPUBLIC [1972] E.A.L.R. 31**]

We fully understand the decision by Mr. Onserio to concede this appeal as having carefully examined the record of the trial, we too note serious anomalies and contradictions in the evidence.

The complainant told the court that the robbery occurred at 2.00 A.M. He was at the time inside his house watching TV. The complainant told the court that he was able to identify the appellant, who came from the same rural area as he did, as one of the robbers. However the Appellant omitted to tell the court what available source of light enabled him to see and identify the appellant. He makes no mention of his lights having been on at the time and no mention is made of a torch, lantern or any other source of light. In her judgement at page 43 line 17, the trial magistrate states

***“It would appear from the evidence that PW1 was all alone in the house when the incident occurred. He was watching television. It was 2.00 A.M. Though dark, court has cognizance of the fact that the TV was on. There was no evidence that it was switched off when the robbers attacked. There was thus some light in the room”***

Firstly the complainant himself makes no mention of the TV having been the source of light that he relied on to see his attackers. The trial magistrate misdirected herself in so finding. Secondly we too take cognizance that light from a TV is a mere *‘dim glow’*. It is certainly not adequate on its own to aid any proper and meaningful identification. Thirdly the complainant told court that he had been cut on the head on a panga which left him weak and eventually led to a loss of consciousness on his part. We find that given those circumstances it would have been highly unlikely that the complainant would have been in a position to positively identify any of the robbers.

The evidence of identification is further decimated by the evidence of **PW5 CHIEF INSPECTOR GABRIEL MBURU**, the OCS Nyali Police Station who on 15<sup>th</sup> September 2004 conducted the identification parade. **PW5** testified that he did invite the complainant to attend a parade involving eight (8) men of similar build and complexion with the appellant. When invited to identify the suspect the complainant proceeded to identify the wrong person. This failure to identify the appellant at a police parade puts to bed the earlier evidence given by the complainant that he was able to see and positively identify the Appellant.

That notwithstanding the learned trial magistrate did proceed to convict the appellant based on the doctrine of *“recent possession”*. It was alleged that the appellant was on 8<sup>th</sup> September 2004 found in possession of a radio stolen from the complainant’s house. The said radio was produced in court as an exhibit **Pexb.4**. It was alleged that the appellant took this stolen radio to the offices of Star Liner Bus Services and left it there for safe-keeping. There is no evidence by way of a ticket or baggage claim tag to prove that it was actually the appellant who left the radio in those offices. More importantly **PW4 MWANDORI MUNEENI KATAMA**, who is a brother to the complainant tells the court that the radio in question belongs to him. He produces in court a radio permit as proof of such ownership. The permit **Pexb1** indicated a serial number 400043 and indicates the cost of the radio to be Kshs.7,600/-. However as pointed out by Mr. Onserio for the State, the actual serial number seen on the radio was 20400043 and **PW4** gave the price as Kshs.7,900/-. Thus the exhibit and receipt do not tally leading to the conclusion that the receipt which **PW4** had was not for the radio exhibited in court. In order to rely on the doctrine of recent possession, the allegedly stolen item must be positively identified in court. This has not happened in this case. The Appellant cannot be held to have *‘recently’* possessed a radio which has not been proved to be the stolen radio. Due to these anomalies and contradictions, we find that a conviction based on such evidence cannot be said to be sound. As such we find that the appeal against conviction succeeds and we do hereby quash the conviction of the appellant by the lower court. In the absence of a conviction the sentence has no basis and must be set aside. This appeal therefore succeeds in its entirety. The appellant to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered at Mombasa this 18th day of May 2010.**

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**F. AZANGALALA**  
**JUDGE**

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**M. ODERO**  
**JUDGE**