



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 172 of 2007**

**GIFT MORRIS JUMUAPPELLANT
VERSUS
REPUBLICRESPONDENT
J U D G M E N T**

This is an appeal against conviction and sentence of the appellant in Criminal Case No. 2475 of 2004 in the Chief Magistrate's Court at Mombasa.

The Appellant was arraigned in court on 23rd August, 2004 and charged with the offence of robbery with violence contrary to Section 296(2) of the Penal code. There were two counts in the charge sheet.

The Appellant was on 20.11.06 found guilty and convicted under Section 215 of the Criminal Procedure Code. He was then sentenced to death on the first count as prescribed mandatorily by the law. The sentence on the second count was held in abeyance.

Being aggrieved with the conviction and sentence, he lodged this appeal. He had been granted leave to file the appeal out of time on 31/07/2007 and the appeal deemed filed on the same date.

At the hearing of the appellant's the Attorney General through the State Counsel conceded to the appeal. The appellant had filed written submission.

Mr. Monda for the state gave the following reasons for the concession:-

- That P.W.1 and P.W.2 on the same day they were attacked did not identify their attackers
- The Appellant was subsequently arrested because on the material day, P.w.4 a Police Officer responded to an alarm raised by the complainants. He met a man running from the scene and shot at him. That two jackets were recovered at the scene, a white cap and a panga. However, the appellant was arrested three weeks later. He was found in a house and his right hand was bandaged.
- That although P.w.5 the government analyst stated that the appellant's blood group matched blood found on the jacket at the scene, there was in fact no medical assessment of the injury on the appellant's right hand.
- That the conclusion that the appellant's injury was a bullet wound was inconclusive.
- That it was a mere presumption.
- That doubt is created as to whether it was actually the Appellant who was at the scene of the crime.
- That the evidence was based on a mere suspicion which cannot take the place of evidentiary proof.
- That suspicion is not sufficient basis for the conviction.

Mr. Monda urged the court to quash the conviction and set aside the sentence.

We have considered the appeal the proceedings, judgment, and submissions. It is clear that the complainants, P.W.1 and P.W.2 did not identify their attackers. P.W.1 said that all of the 10 attackers were masked.

P.W.4, the police Officer rushed to the scene. He heard screams coming from the directions of the scene. He saw people running. That he shot in the air. When they did not stop, he shot at those who were running. He made no arrest. He did not see the Appellant at the scene. However, upon combing the area the police found two jackets, a cap and a panga. It was not found in the possession of anybody. It is said that one of the jackets had a bullet mark.

The Appellant was arrested much later. There was no direct evidence connecting him with the robbery. The only reason for the arrest of the Appellant was because he had a wound which the police suspected or thought was a bullet wound.

The Appellant was not examined to ascertain the type of injury and what caused it. There was no medical examination carried out on him. The blood test to show that the blood on the jacket and the Appellants' blood were in the same group is not conclusive evidence the basis upon which he could be convicted.

We therefore agree with Mr. Monda and accept his concession to the appeal. We therefore do hereby quash the conviction and set aside the sentence. The Appellant shall be released forthwith from prison custody and set free unless otherwise lawfully held.

DATED and DELIVERED at MOMBASA on this 22nd day of JUNE 2010.

MOHAMMED IBRAHIM

MAUREEN ODERO

JUDGE

JUDGE