



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 46 of 2007

**KAMBI MWADULUNGO EDWARD APPELLANT
VERSUS
REPUBLIC RESPONDENT**

JUDGEMENT

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The Appellant herein KAMBI MWADULUNGO EDWARD, has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts. The Appellant was arraigned in court on 20th February 2006 and charged with three (3) counts of the offence of ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE. The Appellant denied all three counts and the trial commenced on 31st May 2006. The prosecution called a total of seven (7) witnesses in support of their case. The case revolved around a string of robberies which took place on the night of 10th October 2005 at Meli Kubwa Trading Centre, Macknon road, in Kwale District. A gang of robbers raided several homes in a spree of robberies in which the three complainants were robbed of a variety of items as listed in the three counts of the charge sheet.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied any involvement in the robberies. On 8th March 2007 the learned trial magistrate delivered her judgement. She acquitted the Appellant on the 2nd count but she convicted the Appellant on Count Nos. 1 and 3 of the charge. Thereafter the learned trial magistrate sentenced the Appellant to death. The Appellant being dissatisfied with both his convictions and sentences filed this present appeal.

The Appellant who was unrepresented at the hearing of this appeal chose to rely entirely upon his written submissions duly filed before the court. MR. MUTETI, learned State Counsel who appeared for the Respondent State, gave oral submissions in which he conceded the appeal.

We have ourselves carefully perused the written record from the lower court, bearing in mind our obligation as a court of first appeal to re-examine and re-evaluate the evidence [AJODE –VS- REPUBLIC [2004] 2 KLR 32. We have noted several contradictions and inconsistencies in the evidence adduced by the prosecution witnesses.

PW1 MARY DAVID, the complainant in Count No. 1, told the court in her evidence in chief that she was able to identify the Appellant as one of the robbers who attacked her home on the material night. However under cross-examination by the Appellant at page 9 line 21 the same witness states:

“I did not give your name to the police but the following day I knew you were involved because the wife of the other robber who has since been convicted said that you are the one who collected her husband the previous evening”

By this PW1 seems to contradict her assertion that she was able to place the Appellant at the scene. It would appear that the reason she pinpointed the Appellant was as a result of what she was told “by the wife of the other robber” and not based on her own observation. This amounts to hearsay evidence which the court ought not to have received. Similarly PW2 JENIPHER MWACHOFI, the complainant in Count No. 2, also stated in her evidence-in-chief that she identified the Appellant as one of the men who robbed her. Yet under cross-examination at page 12 line 15 she contradicts her own evidence by saying,

“I did not tell the crowd that you were one of my attackers because I was not sure and I had serious injuries”

If this witness was not sure of what she saw, how then could she identify the Appellant with any degree of certainty?

PW5 MLONGO MEZA told the court in her evidence in chief that on the material night the Appellant came to her house, woke up her husband and the two rode off together on a bicycle. The husband of PW5 was later convicted for this same robbery in a different trial. However in her cross-examination at page 18 line 10 PW5 says

“You are the one who woke up my husband that night but my statement says it is Chale”

Once again here is a witness contradicting her own evidence. PW5 does not seem to be sure who it was, who came to their home that night – was it the Appellant or this Chale?

A bicycle allegedly used by the Appellant to escape from the scene of the robberies was recovered by the police and produced as an exhibit. This bicycle was used to link the Appellant to the crime. PW6 INSPECTOR BERNARD MUTUA of Mackinon road police post gave evidence that he chased Appellant who abandoned the bicycle and escaped on foot. Such a crucial exhibit must be clearly and positively identified in order to link it to the Appellant as bicycles are commonly found in many homes in this country and are the major form of transport especially in rural areas. PW6 like the other prosecution witnesses proceeds to contradict himself under cross-examination by the Appellant. At page 21 line 18 he states

“My statement does not say I recovered the bicycle exhibit 1, though I said this in my investigation report. The bicycle has a red painting and the witness said she identified the bicycle as yours from the paint. I did not say so in my statement”

It is noteworthy that PW6 has only mentioned the red paint on the bicycle under cross-examination. He made no mention of this in his evidence in chief.

With all the above inconsistencies we are indeed surprised that the learned trial magistrate proceeded to convict the Appellant. The contradictions in the evidence of these witnesses placed grave doubt on the identification of the Appellant as one of the robbers. The identification of these witnesses is unreliable and cannot form the basis for a conviction. The conviction of the Appellant based on this unreliable evidence of identification is unsafe and cannot be allowed to stand.

Apart from these anomalies, the Appellant did bring to our attention the decision of the Court of Appeal in the case of MUGANDI MWANGOMBE –VS- REPUBLIC CRIMINAL APPEAL NO. 332 of 2008. This was an appeal from the judgement of Hon. Justice Njagi and Hon. Justice Serگون sitting as a two-judge Bench. Mwang’ombe the Appellant in that case had been convicted of the same offence as this Appellant. He was the Appellant’s co-accused but for some reason was tried separately. The High Court upheld his conviction. However the Court of Appeal held that the Appellant was entitled to reasonable doubt and acquitted him. This judgement being a Court of Appeal decision, and being based on the same facts as this present appeal binds us as a court. Therefore, going by our own re-evaluation of the evidence and relying on this Court of Appeal decision, we do hereby allow this appeal. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 22nd day of July 2010.

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F. AZANGALALA
JUDGE

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M. ODERO
JUDGE