



*(From original conviction and sentence in Criminal Case No. 512 of 2004 of the Senior Resident Magistrate's court at Kajiado – Sd. W. N. KABERIA SRM)*

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU  
CRIMINAL APPEAL 58 OF 2009  
JOSEPH MUSYOKA MUTUNGI.....APPELLANT  
VERSUS  
REPUBLIC.....RESPONDENT

**JUDGMENT**

The appellant was in Kajiado SRM Cr. Case No. 512 of 2006 charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge against him alleged that during the night of 22<sup>nd</sup>/23<sup>rd</sup> February 2006 jointly with another not before court, being armed with a Taurus pistol serial number 3424 he robbed Moses Kanyuira Muriuki of one cell phone make Panasonic, a driving licence and cash Kshs.800 all valued at Kshs.7,800/- at Kitengela township in Kajiado District within Rift Valley Province and at or immediately before or immediately after the time of that robbery used actual violence on the said Moses Kinyuira Muriuki. The particulars of count 2 were that during the same night he robbed Margaret Naivisia Ntinaiah of Kshs.200/- in cash at the same place. He pleaded not guilty to the charges but after trial he was convicted of count 1 and handed down the mandatory death sentence. He has appealed to this court against both that conviction and sentence on the grounds that the charge was defective; that his trial was a nullity; that his identification as one of PW1's robbers was mistaken and that there was no sufficient evidence to support his conviction.

On ground one the appellant submitted that the charge is defective for the reason that the particulars thereof omitted the phrase “being armed with offensive or dangerous weapons.” That phrase is of course an important element of the particulars of the charge of robbery with violence but it is an alternative element. It is imperative when the offence is committed by a single robber. See **Odhiambo Vs Republic, Cr. Appeal No. 5 of 2005 (CA (Mombasa))**. In a case where the offence is committed by two or more people the omission of that phrase does not make the charge defective. In this case the appellant is said to have been with another not before court. In the circumstances the omission of that phrase did not render the charge defective.

## We therefore dismiss this ground of appeal.

On the second ground the appellant submitted that his trial was a nullity because when the hearing started de novo a fresh plea was not taken. According to the appellant the charge should have once again, been read over to him to plead a fresh.

We also find no substance in this ground. This was not a substituted charge. The appellant had pleaded not guilty to the same charge. He is not saying he would have changed his plea to one of guilty if the charge was read over to him once again. We therefore dismiss this ground of appeal also.

On identification the appellant argued that PW1, the complainant, having been thrown into a trench with dirty water, he was not able to get out in good time to chase and catch up with him. Moreover he further argued, he was arrested one hour after the robbery and none of the members of the public who assisted the complainant to arrest him was called as a witness. He concluded his argument on this ground by contending that his was, in the circumstances, a mistaken identification.

We also find no merit in this ground of appeal. PW1 testified that the composite trench into which he was pushed was not deep. We concur with the learned trial magistrate that he was able to get out of it immediately and give the appellant chase, as he creamed, without losing sight of him. There was sufficient light from the nearby shops that enabled PW1 to keep him in his view. His fellow taxi drivers and members of the public assisted in chasing and arresting him. We therefore reject his contention that his conviction was based on mistaken identification.

The last ground of appeal is that there was no sufficient evidence to support the Appellant's conviction. Part of the Appellant's argument on this ground was also in support of the preceding ground. He contended that none of the members of the public especially the complainant's fellow drivers and Margaret, the lady the Appellant was escorting home, testified in this case. He further argued that the trial court erred in rejecting his application to visit the scene so that he could disprove PW1's testimony that there was a composite trench near a pharmacy opposite Kobil Petrol Station.

On this ground we wish to start with this last point. The Appellant's application to the court to visit the scene of robbery was rejected by the magistrate who conducted the original trial that was declared a nullity. The Appellant did not renew his application in the de novo hearing. In the circumstances, his complaint in that regard has no substance.

Although the appellant had no burden of proving his innocence, we find that if anything, his defence supported the prosecution case against him. That he got out at 3.00 am to check on the engine oil/water and the tyre pressure of the lorry he was assigned to work on as a turn boy when he was arrested was simply incredible.

**The complainant did not know the Appellant. He had therefore nothing against him. As we have said he never lost sight of him. As regards the minor discrepancies as to the time of his arrest, the record is clear that the witnesses said it was about 2.00 a.m. or 2.30 a.m.**

There is no contradiction as the Appellant contended on who picked the pistol he dropped. PW1 said he was the one who picked it and handed it to a prison warder who, like the members of the public had responded to his screams. That prison officer in turn handed it to police.

Having re-evaluated the evidence on record as we are obligated to do in a first appeal like this (See **Okeno Vs Republic [1972] EA 32** and **Mwangi Vs Republic [2000] 2 KLR 28**), we are satisfied and agree with the learned state counsel that the Appellant was convicted on sound evidence. We accordingly dismiss his appeal against conviction.

There is only one sentence prescribed for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**:

death. That is the sentence the trial court meted out to the Appellant. In the circumstances the appeal against sentence is also hereby dismissed. In the result we dismiss this appeal in its entirety.

**DATED and DELIVERED this 21<sup>st</sup> day of July, 2010.**

**D. K. MARAGA**

**JUDGE.**

**J. A. EMUKULE**

**JUDGE.**