



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 288 OF 2010

(From the original Conviction and Sentence in the Criminal Case No. 1792 of 2008 of the Principal Magistrate's Court

at Kwale: Ogembo D.O. - P.M.)

KENNEDY NJUGUNA MBURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant **KENNEDY NJUGUNA MBURU** has challenged his conviction and sentence by the learned Principal Magistrate sitting at Kwale Law Courts for the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge are that:

“On the 3rd day of December, 2008 at Tukutane area Diani Location within Msambweni District of the Coast Province jointly with others not before court while armed with dangerous weapons namely a pistol robbed THOMAS MBINDYO MUSYOKA of motor-vehicle registration Number KBE 302M Toyota Caldina station wagon white in colour valued at Kshs.729,000/- a wallet containing Kshs.450/- and National Identity Card and at or immediately before or immediately after the time of such robbery wounded the said THOMAS MBINDYO MUSYOKA.”

The appellant was arraigned in court on 9th December 2008 and the charges were read out to him. He entered a plea of “not guilty” and his trial commenced on 19th May 2009 at which trial the prosecution led by **INSPECTOR GITONGA**, called a total of eight (8) witnesses in support of their case. The complainant ‘Thomas Mbindyo Musyoka’ told the court that he is a taxi driver of a vehicle Registration No. KBE 302M Toyota Caldina based at Hondulu in Diani Corner. He told the court that on 3rd December 2008 at about 6.30 p.m. the appellant came to him as a customer to be taken to Petro. They agreed on a fare of Kshs.500/-. The appellant then called his companion from Hondulu Club and the two left in the taxi. On the way appellant asked the complainant to stop at the Barclays Bank ATM. Appellant then went to the ATM and returned. The men then instructed the appellant to drive to Ukunda to the Caltex Petrol Station. Then appellant asked to use the complainant’s mobile phone but was unable to communicate with the person he was calling. He then told the complainant to switch off the ignition and wait for five minutes. The other man who was seated on the back seat then held the complainant by the neck and ordered the complainant to pull up the windows. The appellant then took over the vehicle and drove off towards Msambweni. Near Chepe Chepe the man at the back began to tie up the complainant’s hands with cellotape. The complainant seized an opportunity when the cellotape fell down and the man

bent down to pick it up and he opened the door of the moving vehicle and put out his head. The man seated in the back threatened to shoot him. The appellant who was driving the vehicle began to drive faster and the complainant was then thrown out of the moving vehicle. He sustained injuries on both hands and on his left leg. The complainant went and reported the theft at Diani Police Station. He was later informed by police that the vehicle had been recovered and a suspect who was the appellant arrested. Upon completion of police investigations the appellant was arraigned in court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He opted to give a sworn defence in which he denied any involvement in the robbery incident. On 8th June 2010 the learned trial magistrate delivered his judgement in which he convicted the appellant on the charge of Robbery with Violence and sentenced him to death. It is against this conviction and sentence that the appellant now appeals.

MR. GIKANDI Advocate argued this appeal on behalf of the appellant whilst **MR. ONSERIO** learned State counsel who appeared for the respondent State opposed the appeal and urged us to uphold both the conviction and sentence rendered by the trial court. As a court of first appeal we are obliged to reconsider and re-evaluate the evidence adduced in the lower court and to draw our own independent conclusions on the same [see **AJODE –VS- REPUBLIC 2004 KLR 81**].

We have carefully considered the grounds of appeal raised by Mr. Gikandi and have also taken into account the submissions of Mr. Onserio. It is an important principle of law that he who alleges must prove. More importantly the law places the onus on the prosecution to prove each element of a charge beyond a reasonable doubt. The charge sheet states that **PW1** was robbed of a motor vehicle Registration No. KBE 302M Toyota Caldina which he claims belonged to his employer. **PW6 HENRY MOSOMI NYANTINO** testified that the said vehicle did belong to him and that he had employed the complainant to use the said vehicle to carry out a taxi business. The evidence from the prosecution witnesses and from the police is that this vehicle was recovered later that same day. Quite surprisingly the said vehicle was not produced as an exhibit in this case. **PW6** was also unable to produce the log-book to prove his ownership of the vehicle. Even if as **PW6** told the court the log-book was held by his financier, there is no reason why the investigating officer failed to secure at the very least a certified copy of that log-book. No reason was advanced why the vehicle was not brought to court to be viewed by the trial court. Once again at the very least the investigating officer ought to have ensured that photographs taken of the vehicle were available for production in the trial court. These omissions serve to weaken the prosecution case and suggest that the prosecution of this case was not professionally conducted.

The charge sheet states that **PW1** was also robbed of a wallet containing cash Kshs.450/- and his National Identity Card. However in his evidence before the court, **PW1** stated categorically at page 7 line 30:

“I did not loose anything during this incident.”

If **PW1** insists he did not lose any of his personal items during the incident, then where did the police get the notion that he lost a wallet containing cash? The evidence of **PW1** directly contradicts the particulars as stated in the charge sheet.

In any incident of this kind, the question of identification is crucial. The incident occurred at 6.00 p.m. and **PW1** was the only eye-witness to the robbery. Despite this the police failed and/or neglected to conduct an identification parade at which the complainant’s identification of the appellant could be tested. In the absence of such a parade the court was left to rely only on ‘*dock identification*’. In the case of **OLUOCH –VS- REPUBLIC [1985] KLR 550** the Court of Appeal held that:

“A dock identification of an accused person by a witness where there has been no identification parade conducted earlier, and at which the witness is present is almost worthless”

No concrete reason is given why the police did not bother to conduct such a parade.

As counsel for the appellant has pointed out, the charge of Robbery with Violence is a serious charge, one

which attracts the death penalty upon conviction. A court ought not render a conviction unless the evidence is more or less water-tight and all bases are covered. This was certainly not achieved here. The prosecution of this case was lacksadaisical at best. The police did not bother to present a cogent and well investigated case. In our view the above cited anomalies cannot merely be ignored or glossed over as they go directly to the facts in issue. We find that the case cannot be said to have been proved beyond a reasonable doubt. The conviction of the appellant cannot be said to have been sound. We allow the appellant the benefit of these doubts and allow his appeal. His conviction is quashed and the subsequent death sentence is also set aside. The appellant is to be set at liberty unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 14th day of July 2011.

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J.B. OJWANG

JUDGE

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M.A. ODERO

JUDGE

In the presence of: