



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

**Criminal Appeal 180 of 2009**

**(From Original Conviction and Sentence in Criminal Case No.447 of 2008 of the Principal Magistrate's Court at Kwale:  
D.O. Ogembo – P.M.)**

**MWAZIME MUTEGO ..... APPELLANT  
VERSUS  
REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

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The Appellant **MWAZIME MUTEGO** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts. The Appellant was arraigned before the lower court on 3<sup>rd</sup> April 2008 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that

***“On the 24<sup>th</sup> March 2008 at Maringoni Village lunga lunga location in Msambweni District within Coast Province jointly with others not before court robbed LEBO LIMOMO five (5) heads of cattle valued at Kshs.100,000/- and at or immediately after the time of that robbery used actual violence to the said LEBO LIMOMO”***

The Appellant entered a plea of not guilty to the charge. His trial commenced on 6<sup>th</sup> October 2008 and the prosecution led by **INSPECTOR GITONGA** called a total of three (3) witnesses in support of their case. The complainant told the court that on 24<sup>th</sup> March 2008 he was out herding his cattle. At about 11.00 A.M. some four (4) men came to where he was. The Appellant who was one of the four men threw an arrow at him. The arrow missed the complainant who ran to hide inside the bushes. The men then picked out five cattle and drove them away. **PW1** went and reported the incident at Mwangulu Police Post. Later the same day the complainant identified the Appellant who was arrested. One of the stolen bulls was recovered. Appellant was then charged.

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 and denied the charges. On 24<sup>th</sup> September 2009, the learned trial magistrate delivered his judgement in which he convicted the Appellant on the charge of Robbery with Violence. After listening to the Appellant's mitigation the trial magistrate sentenced him to death. The Appellant being dissatisfied with both his conviction and sentence filed this appeal.

The Appellant who was unrepresented at the hearing of his appeal chose to rely on his written submissions which had been duly filed with the leave of the court. **MR. MUTETI** learned State Counsel who appeared on behalf of the Respondent State conceded the appeal. We have carefully perused the record of the trial from the lower court. The question of the recovery of the stolen bull is riddled with inconsistencies and does not appear clear from the evidence on record. Whilst **PW1** in his evidence at page 7 line 18 states

***“Only one bull was recovered near Mbuchi Village”***

**PW2** contradicts this evidence when he states at page 9 line ...

***“The police recovered the bull at the home of the accused”***

The evidence of **PW3** the police officer serves to only further confuse matters when he states at page 12 line 4

***“After about 5 days we recovered a bull in the bush alone”***

It is not clear exactly where this bull was recovered. Was it found in the homestead of the Appellant as alleged by **PW2** or was it recovered in the bushes near the home of the Appellant? If the latter then we fail to see any direct connection between the recovered bull and the Appellant as it cannot be said to have been found in the actual possession of the Appellant. In his judgement at page 4 line 11 the learned trial magistrate observes as follows –

***“On my part I find this recovery of the stolen bull in the bush just near the home of the accused just a couple of days after the incident is a pointer to the fact that the accused was indeed one of those who robbed the complainant on the material day”***

With respect we find that the learned trial magistrate misdirected himself in making such a finding. It is clear that the court intended to apply the **‘doctrine of recent possession’** although it is not stated in clear terms. For this doctrine to apply the suspect must be found in **actual possession** of the stolen item or items. For the bull to have been recovered **“just near the home of the accused”** cannot be said to amount to his physical possession of the bull. The Appellant cannot be held to have been in possession and control of livestock found **‘just near’** his home. It is a known fact that animals roam freely sometimes covering great distances. There is every possibility that this bull could have wandered from some other location. The learned trial magistrate therefore erred in basing his conviction on doctrine of recent possession as given the circumstances this doctrine did not apply.

Lastly we note from the evidence that the complainant was the only eye witness to this robbery. **PW2** who is the complainant’s brother did not witness the incident. He was only told about it by **PW1**. Where a conviction is based upon the evidence of a single witness the court is required to warn itself before proceeding to convict. In the case of **MAITANYI –VS- REPUBLIC [1986] KLR 198**, it was held by the Court of Appeal

***“(3) The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.***

***(4) Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction”***

We have anxiously perused the judgement of the trial court and find to our consternation that the learned trial magistrate failed to so warn himself. This omission casts doubt on the validity of this conviction.

Based on the above it is our view that the conviction of this Appellant was not sound. For that reason we do hereby quash the same. The subsequent death sentence is also set aside. This appeal succeeds. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 28<sup>th</sup> day of September 2010.**

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**M. IBRAHIM**  
**JUDGE**

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

Read in open court in the presence of:-

**M. ODERO**  
**JUDGE**  
**28/09/2010**