



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

Criminal Appeal 29 of 2007

MACDONALD KAHINDI WINJI.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

**(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO.929 OF 2006 AND
SENTENCE OF SENIOR RESIDENT MAGISTRATE COURT AT KILIFI BEFORE C O
OBULUTSA SRM)
JUDGEMENT**

The appellant (Macdonald Kahindi Winji) was convicted on a charge of robbery with violence contrary to section 296 (2) and sentenced to death. The charge against him was that on 18th day of August 1999 at Sabaki village in Sabaki Location, Malindi, jointly with others not before court, while armed with dangerous weapons, namely guns, robbed Bahati Chome Kitaku of cash Kshs.3300/-, weighing machine, 36 packets of cigarettes, 25 packets of Omo, 15 pieces of Domax soap, 6 pieces of Star soap and 10 bottles of soda, all to the total value of Kshs.15,000/- and at or immediately before or immediately after the time of such robbery, used actual violence to the said Bahati Chome Kitaku.

The appellant denied the charge. Evidence tendered before the trial court by Bahati Chome Kitalu (Pw 1) was that on 18/8/99 at 8.00Pm he closed his shop and retired behind the shop. At 10.30Pm, Harrison called him to open the door and upon doing so, a person of Somali origin entered armed with a rifle Bahati hid behind the door – a second person entered armed with a pistol, and Harrison was ordered to sit down. The two people took Bahati to the shop where Harrison was locked in. At the shop Bahati gave them Kshs.3000/- a weighing machine, and soda. They returned to the room behind the shop, and one of the robbers shot Harrison Bahati and Harrison ran away and a report was made to police. It was Bahati`s evidence that:-

“Of the group, I identified the accused, Macdonald.....I saw him in the shop from the torches as the items were being taken out of the shop. He was with the others who had guns. I know him. He comes from the area”

On cross-examination Bahati said, the appellant did not enter the room, but he saw him with the others outside the room and they went together to the shop and that it was the two Somali men who were directing the victims on what to do. It is the two who were given he money.

Lazima Kitsao Gona (Pw 2) as on duty at the shop with Bahati and he too retired to then room behind the shop after they had closed. He confirmed that Harrison came to the door and knocked and upon opening two people who were armed with guns walked in with Harrison. Further that Bahati and Lazima were taken to the shop, while Harrison was locked inside the room. His testimony was that among the items they gave out, was soap, which was given to the appellant and that

“I was able to see him when the one with a pistol was giving the items to the accused outside. They were using torches.....”

Harrison Dzombo (Pw 3) was at home on 28/8/99 when David Kahindi knocked at the door and upon opening he found him in the company of another man who was holding a rifle. They searched but found nothing and demanded for money. They ordered him to take them to those running the shop, and that is how they ended up in the room where Bahati and Lazima slept. Once they were outside, Harrison found two people talking - one of them was the appellant. He confirmed being locked inside the room used by Pw 1 and Pw 2 – he eventually escaped and found that David had been locked in his house. On cross-examination he stated that David said he had been abducted by gangsters and he (Pw 3) had been forced by the same gangsters to take them to those running the shop. Harrison did not know where the gangsters had come from with the appellant.

Corporal Meshack Ouma (Pw 4) who received a report about the incident confirmed finding Harrison bleeding in his room and that they recovered two torches. It was his evidence that the victims said of the three gangsters two were of Somali origin and one was known to them and the victims gave details about him. Pw 4 stated that upon arrest, appellant did not say he had been hijacked.

In his sworn defence, the appellant told the trial court that he was accosted by two armed people of Somali origin near Orchid farm on 18/8/99 as he was on his way from work – this was about 8.30Pm. The two people took away his fish and threatened to kill him and ordered him to take them to ADC farm. He took them there, then managed to flee and reported the matter to the assistant chief of Sabaki. He confirmed seeing Bahati Chome and Harrison on that night but denied stealing from them, saying he too was a victim – which is why he was not armed with any weapon nor did he use any force on Bahati. He explained that he was forced to go to the shop and that it was the two Somali men who were taking the items.

On cross-examination he stated that at the time, he was working with David Kahindi and was simply ordered by the gunmen to accompany them to the victims.

The Trial Magistrate noted in his judgement that the appellant was known to the complainant and Harrison and that appellant admitted being in the company of the other two gunmen that night and they went to the shop. The Trial Magistrate considered the sequence of events – that Harrison was the first one to see appellant talking to someone after Kahindi had knocked on his door.

Bahati and Lazima also saw him at the shop with the armed men and that appellant was not under guard, but was part of the gang as he was conversing with the robbers freely and even received the items which were being removed from the shop.

The Trial Magistrate considered appellants defence and found it to be inconsistent saying initially he said he led the armed men to ADC farm then fled, then he was later seen at the shop receiving goods and that appellant had not explained this part of his action – wondering that if appellant had fled from the robbers, then how was it that he was again at the shop. He was convinced that the appellant was part of the gang which robbed Bahati and his defence about having been hijacked was not convincing and had failed to cast doubt onto the prosecution case.

In his amended grounds of appeal, the appellant contested both conviction and sentence saying:-

1. The charge was defective.
2. He was left in custody beyond the period recognized by the Constitution.
3. Fresh evidence was introduced in the retrial and this was prejudicial to him
4. His defence was not considered

At the hearing of the appeal appellant filed written submissions in which he stated that the prosecution witnesses (Pw 1) mentioned handing over to the robber KShs.3000/-, a weighing machine and soda, yet the charge sheet made reference to cigarettes, detergent (Omo) and several pieces of soap. He argued that the evidence as tendered is at variance with the contents of the charge sheet. He sought to rely on the decided case of **Alexander Nyachiro Marure and Marure V R Cr App No.1590 of 1984** which held that there should be no material discrepancies

between the evidence given to the police and evidence given to court – and that in this instance the discrepancy rendered the charge fatally defective and the appeal should be allowed.

Mr Ogoti (the ADPP) submitted on behalf of the State, that there was no defect in the charge sheet and that if there was any defect, then that was curable under section 382 of the CPC – we find no variance because Pw 2 who was with Pw 1 referred to soap, as being among the items that they were robbed of – so that limb holds no water and there is no violation of the provisions of section 134 of the Criminal Code.

Appellant also submitted that new witnesses were introduced at the re-trial – in the earlier trial one Inspector Hilton Kombo had testified, yet in the re-trial, he was substituted with Corporal Meshack Ouma and that Corporal Ouma even lied in his evidence that he had previously testified in the case once, in Malindi.

Accused's view was that the introduction of Corporal Ouma in the retrial was a conspiracy by the prosecution hatched to defeat justice and he was prejudiced and there was a mistrial. Mr Ogoti was not able to respond comprehensively to this saying he had not got the benefit of perusing the other file but that in any event this was a totally fresh trial.

The re-trial, was a fresh trial, did the High Court give directions that additional evidence or witnesses should not be admitted at the retrial so as to restrict what or who could be called to testify in the retrial as envisaged section 354 (3) (c) of the Criminal Procedure Code? We find no such directions – so no prejudice was occasioned.

Appellant also challenged the investigation saying they were poorly done and that his defence was not adequately considered. He urged the court to consider the evidence of two other prosecution witnesses Godfrey Kinyua Mutia (Pw 5) and Julius Kabui Mutungi (Pw 7) who were also victims and confirmed that the mastermind of the robberies were two armed Somali men who invaded their rooms demanding for money, and that he was just a victim like the other prosecution witnesses.

Mr Ogoti's response to this is that the Trial Magistrate properly considered the defence and found it to be inconsistent and that appellant never raised the issue of being hijacked to Pw 4 who was carrying out investigations, and the court ought to find that line of defence as an afterthought.

What investigations did Corporal Ouma carry? He visited the scene, interviewed the victims and got appellant arrested. Appellant's defence is that he was a victim who had been forced by the gangsters to lead them to the places where the victims were – having met the gangsters on his way from work.

Was the appellant a victim or the villain? A pattern which emerged was that the armed gangsters would get a victim and force them to accompany them to gain access to the next victim as this is what demonstrated by the evidence of Harrison. In fact Harrison said even Kahindi (who went to get him to open the door) was himself a victim. Was the fact that appellant was seen talking to the gangsters outside enough to conclude that he was part of the gang?

No one heard the content of the conversation. We pose this question – suppose the gangster outside was asking him for the next place targeted? From Harrison's evidence it would seem that Kahindi entered into his house with one armed gangster and they (that is the gangster and Kahindi searched and found nothing) then ordered him to be taken to the people who ran the shop. That would then mean that the other gangster was the person who remained outside with the appellant. And if Kahindi was made to search Harrison's house what was there to stop them from forcing appellant to receive the shop goods which were being removed from the shop? We say none at all - it is the same pattern – there was a possibility that appellant was actually a victim like Kahindi and Harrison. He was not armed and he never used any violence – the sequence of events as narrated by prosecution witness created doubt and dented the prosecution case – it was not proved beyond reasonable doubt that he was the villain and not the victim and he ought to have been given the benefit of such doubt.

To that extent then, we find that the Trial Magistrate erred in fact by rejecting the appellant's defence and concluding that he was part of the gang.

As regards violation of his constitutional rights, appellant complained that he was arrested on 22/6/06 and arraigned in court on 7/9/06 against the provisions of section 72 (3) (b) of the constitution and the celebrated case of *Albanus Mwasia Mutua V R Cr Appeal No.120 of 2004.*

Mr. Ogoti`s response to this that appellant can find remedy under section 72 (6) of the Constitution. That is a rather casual manner of handling the issue – what explanation is there for such delay – since that burden rests squarely with prosecution? Here none has been proffered.

Unfortunately we were not able to determine this issue as the first file which was brought to court was not made available – the charge sheet showed date of arrest as 19/8/99 date of appearance in court was 7/9/06 – certainly there is a vacuum somewhere which we were unable to address comprehensively due to lack of the first file because despite directions to the Deputy Registrar requesting for file No.564/04 and 1108/99 Malindi, the same was not traced.

However from what we have stated, this appeal must succeed on the basis that prosecution did not prove its case beyond reasonable doubt and appellant is entitled to an acquittal. Consequently the conviction is quashed and sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 17th day of March 2009 at Malindi

H A OMONDI

JUDGE

M ODERO

JUDGE