**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Criminal Appeal 63 of 2005**

**BORA SALIM MATEMBO…….....APPLICANT**

**VERSUS**

**REPUBLIC……...…….RESPONDENT**

**JUDGMENT**

Bora Salim Matembo together with three others were charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code, one count of being in possession of an imitation firearm contrary to section 34 (1) of the Penal Code and one count of being in possession of Government stores contrary to section 324 (3) of the Penal Code. Two of the appellants' co-accuseds were acquitted of all the offences under section 210 of the Criminal Procedure Code and one co-accused was acquitted of the counts of robbery with violence under section 215 of the Criminal Procedure Code but convicted on the 3rd and 4th counts. The appellant was however convicted on all the four counts.

The particulars of count one were that the appellant together with his co-accused on the 11th day of November 2003, at about 7.30 p.m., at K.T.D.A. stage, along Miritini road in Mombasa district in Coast Province, jointly, with others not before court, while armed with dangerous weapons, namely, an AK 47 rifle and a pistol, robbed Clement Chinaya Kamanza of a Nissan Matatu Registration number KAG 640S valued at 600,000/= and at or immediately before or immediately after such robbery fatally shot the said Clement Chinaya Kamanza.

Particulars of count two were that the same quartet on the same date, at the same place, jointly with others not before the court, while armed with dangerous weapons namely an AK 47 rifle and a pistol, robbed Mwatela Kamanza of cash Kshs. 3,200/= and at or immediately before or immediately after the time of robbery threatened to use actual violence to the said Mwatela Kamanza.

Count three carried the following particulars: that the appellant and the 2nd accused, on 30th day of November 2003, at Miritini estate in Mombasa district within the Coast Province, jointly were found in possession of an imitation firearm without a firearm certificate.

Count four had the following particulars: that the appellant and the 2nd accused, on the 30th day of November 2003 at Miritini estate in Mombasa District within Coast Province, jointly were found in possession of a pair of boots and jungle jacket, the property of a disciplined force namely Kenya Police, such property being reasonably suspected of having been stolen or unlawfully obtained.

It was the prosecution case that the complainant in count number two, Mwatela Kamanza Batoye, PW 1, and Clement Chinaya Kamanza (hereinafter "the deceased") the matatu driver, on 11th November 2003, at about 7.30 p.m. were driving to where they used to park their vehicle for the night when, on their way, they picked five persons whom they thought were passengers. Shortly afterwards the "passengers" demanded money from PW 1. He initially refused to give them money but when one of them drew a pistol PW 1 gave him Kshs. 3,000/=. One of the passengers told the deceased to stop the vehicle but when he did not obey the command, he shot the deceased on the head. The vehicle stopped and the person who had shot the driver pulled out the deceased and took control of the vehicle. PW 1 was ordered to lie down on the seat. At Mikindani, PW 1 was told to alight. He did so and reported the incident to Changamwe Police Station.

Investigations were commenced and following a tip-off, the police subsequently arrested the appellant and his co-accused. At the time of arrest, the appellant and the 2nd accused were together and a pair of boots, a jungle jacket and an imitation pistol were recovered in the room where they had been sleeping.

An identification parade was mounted and PW 1 identified the appellant as one of the robbers who had attacked them. The prosecution called six other witnesses apart from PW 1. Said Mwagwaru Nguvi was the appellant's Landlord and testified as PW 2. He testified that he witnessed the police carry out a search in the appellant's room and make the recoveries aforesaid. Bakari Ali Nyundo, PW 3, is the village elder who was called to the scene when the appellant and the 2nd accused were arrested and testified that he knew them as his neighbours.

PW 4, IP Joseph Matiku mounted the identification parade in which PW 1 identified the appellant and PW 5 is the brother of the deceased, who collected the deceased's personal items. PW 6, PC Juma Ali and PW 7, Cpl. Julius Mgenyi were in the team of police officers who laid an ambush and arrested the appellant and the 2nd accused following a tip-off. They also recovered the items mentioned in counts 3 and 4 of the charge sheet.

In his unsworn statement, the appellant testified that as he slept in his house on 30th November 2003, he was awakened by police officers at 6.00 a.m. who took him outside the house. One of the police officers entered his house with a paper bag. They asked for the landlord who confirmed that the house had been let to the appellant. The Landlord checked the contents of the paper bag. He was then escorted to a waiting police vehicle and taken to the police station. Later, an Identification parade was mounted where he was identified by one witness. The appellant denied knowledge of the offence.

However, the Learned Principal Magistrate (B. T. Jaden) in a reserved judgment held as follows:-

"**The conductor's evidence is that he was able to make out the 1st accused from an identification parade. He also identified the imitation pistol (Exhibit 2) and the jungle jacket (Exhibit 1) as similar to what he saw at the material time.**

**During cross examination, the conductor followed his evidence…….**

**The evidence of the conductor relating to the identification parade is corroborated by the evidence of PW 4 who carried out the identification parade……..**

**There are discrepancies in that evidence of the police officers on whether the 1st and 2nd accused were sleeping on a mat or a mattress where the imitation pistol was found and whether all the items were recovered from under the mat or mattress or whether the pair of boots and jungle jacket were in a paper bag near where the accused 1 and 2 were sleeping.**

**I do find the discrepancies to be material (sic) as it is clear from the evidence of the police officers that the above items were all recovered from the room and the room was occupied by the 1st and 2nd accused only at the time."**

She then found the appellant guilty as charged and sentenced him to death on counts 1 and 2 as provided by Law and two years imprisonment each on counts 3 and 4. The sentences on counts 3 and 4 were to run concurrently.

The appellant was dissatisfied and appealed to this court on six grounds which mainly challenge the trial magistrate's findings on identification and sufficiency of the evidence. The appellant further complains that there were contradictions in that evidence and that, his defence was not taken into account.

When the appeal was called to hearing, Mr. Onserio, Learned State Counsel informed us that the state conceded the appeal on the appellant's conviction on the counts of robbery with violence on the ground that the evidence adduced before the Learned Principal Magistrate did not support those counts. The Learned State Counsel however supported the conviction and sentences imposed on counts 3 and 4.

With respect, we would concur. In count 1, the deceased is alleged to have been fatally shot. Yet there was no medical evidence of the death as no post mortem report was produced at the trial. Both counts of robbery with violence mentioned an AK 47 rifle. Yet no witness testified that an AK 47 rifle was involved. The appellant was the only suspect allegedly identified by PW 1 at the Identification Parade mounted by PW 4, IP Joseph Matiku. In the latter's evidence at the trial, the robber who attacked him had a jungle jacket and PW 1 described how the robber was dressed. Yet the Identification Parade comprised members who were drawn from the police cells and whose manner of dress was not given. PW 1 admitted that the eight members of the parade were of difference heights and complexions.

It is our view that the identification of the appellant by PW 1 was not free from doubt given that the robbery occurred at night for a combined period of fifteen (15) minutes part whereof PW 1 was forced to lie on the vehicle seat.

The conviction of the appellant on robbery with violence counts was therefore unsafe and must be set aside. With regard to counts 3 and 4, there was the testimony of PW 2, Said Mwagwaru Nguvi who stated as follows:-

"**The police officers called me. I found police officers at the door. They asked me who Salim Bora the 1st accused (identified) was. I said he was my tenant in one of the rooms in that house. The accused was at the door of his room on the ground. The police officers carried out a search of the room. I stood a the door……The police officers found a police jacket, police boots and a black pistol……."**

That evidence corroborated the evidence of PW 6, PC Juma Ali and PW 7, Cpl. Julius Mgenyi with respect to the recovery of the jungle jacket, the toy pistol and the police boots. The discrepancies in the evidence of the two police officers regarding the exact position where the items were found were found to be immaterial by the Learned trial Magistrate. With respect, we agree particularly in view of the testimony of PW 2 aforesaid. In the premises, we have come to the conclusion that there was credible evidence to convict the appellant on counts 3 and 4. His conviction on those counts was therefore safe.

In the end, the appellant's appeal against his conviction on counts 1 and 2 which carried the offence of robbery with violence under section 296 (2) of the Penal Code is allowed. The conviction is quashed and the death sentences are hereby set aside.

The appellant was convicted on 10th March 2005 and sentenced on counts 3 and 4 to two years imprisonment on each count. The sentences were to run concurrently. It is therefore clear that the appellant has served the entire term of imprisonment. He is in the premises entitled to his liberty forthwith unless he is otherwise lawfully held.

Before concluding this matter one other matter merits our attention. We note that the Learned Principal Magistrate on convicting the appellant on counts one and two, sentenced him to death. That would mean that the appellant would have had to serve the death sentence twice which is not possible. It is now settled that on conviction on more than one count carrying the death sentence, only one sentence of death

should be imposed. The logic is crystal clear as it is not possible to hang a person twice over. However, as we have allowed the appeal against the counts carrying the sentence of death, the matter is now merely academic.

The conclusion we have come to is that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

**DATED AND DELIVERED AT MOMBASA THIS…9th …..DAY OF JUNE 2009.**

**J. K. SERGON**

**JUDGE**

**F. AZANGALALA**

**JUDGE**