REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 223 of 2002

EUTICUS MWANGI MUTURI

VERSUS

REPUBLIC

JUDGMENT

1. The Appellant herein, Euticus Mwangi was the accused person in Machakos CM's Court Criminal Case No. 2462/2001. He was facing six counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code.

2. The charges arose from a robbery that allegedly took place in the following circumstances;

3. According to PW1, Gerald Mutuku Kimeu, PW2, Benard Kioko, PW3, John Muli Kamene, PW8,Joseph Kioko Mutinda and, PW10, Martin Kimundio Waigwa, on 9.11.2001, they were all passengers in motor vehicle registration number KAN 168 T, Toyota White Matatu and were traveling to Kitui from Machakos. Along the way and at about 6.30 p.m, some of the passengers turned out to be robbers and they took control of the vehicle, forcefully, using pistols and threatened to shoot anyone who failed to comply with their demands. Having subdued the passengers, they robbed them of cash, mobile phones, wallets and wrist watches. Apparently, one of the robbers had taken the place of the matatu driver but in the course of driving the vehicle, lost control of it and it rolled. The robbers escaped and PW5 P.C Paul Cheptirim, a dog handler with the dog unit of the Kenya Police used a tracker dog to track the robbers but the dog lost their scent after three hours of tracking the same.

4. PW7, I.P. Charles Kamunde is the one who received the initial report of the robbery at Machakos Police Station and he mobilized the dog handler and other police officers and alerted all police road blocks to look out for the escaped robbers. He handed the investigations to CID officers and later requested PW9 I.P Lawrence Riungu to conduct an investigation parade involving the Appellant.

5. PW9 was unable to conduct the parade for reasons that " ***the witnesses were not willing to attend the parade because they said that they could not identity the robbers"***

6. In their evidence before the court, all the passengers and victims of the violent robbery repeated the same assertion; that they could not identify the robbers and did not know the Appellant.

7. When the Appellant was put on his defence, he stated that on 10.10.2001, he woke up in the morning and proceeded to Machakos Town from Nairobi to sell "***akala"*** shoes. At 3p.m he was arrested and told that he was a "***Kikuyu"*** and one of those involved in the robbery. He was later charged.

8. In his judgment, the learned trial magistrate having set out the evidence on record, found that indeed a capital offence contrary to section 296(2) of the Penal Code had been committed and that the Appellant having been arrested for looking suspicious, then he was guilty of the offence and he convicted him accordingly and proceeded to sentence him to death. The Appellant filed the present Appeal which is conceded by the learned Principal State Counsel principally because the conviction was based on suspicion only.

9. We shall spend very little time on this matter because from the evidence on record, it is indeed true that the robbery as alleged took place but not one witness could identify the Appellant as one of the robbers and that is why they all refused to participate in the identification parade. Save for the evidence of the Appellant as to how and where he was arrested, none of the witnesses for the Prosecution said why and where he was arrested. PW4 Paul Mwangangi Kivuva, Chief Katangi Location merely said as follows;-

"***I had alerted everybody within my location to report any suspicious person following information I sent one of my officers to join the mob and arrest that person. Unfortunately they found the said person had boarded a matatu. Later in the day my officers arrested another person and handed him over to police."***

10. It is unclear from the above evidence whether in fact the person arrested was the Appellant and on what basis he was arrested. No arresting officer testified and the investigating officer was also not called to testify.

11. In the end, the only reason on record as to why the Appellant was arrested was that he looked suspicious. As we know it, suspicion, however strong can never be the basis for a proper conviction. As was stated in John Gitau& another vs Republic Cr. Appeal no. 28/1997.

"***Although there may be suspicion against the appellants, we are not satisfied that their guilt has been proved beyond reasonable doubt. Suspicion, however strong cannot supply a basis for inferring guilt when proof of guilt cannot be inferred beyond reasonable doubt on all evidence."***

12. Similarly in the present case, that the Appellant appeared suspicious and yet no other evidence was brought forth to prove his guilt, then no court properly applying its mind to the law and the evidence can infer guilt on his part.

13. The Appeal has merit, is allowed as prayed and the Appellant's conviction is quashed, the sentence set aside and he may be released unless he is otherwise lawfully held.

14. Orders accordingly.

Dated and delivered at **Machakos** this 20th day of July 200**9**.

ISAAC LENAOLA

JUDGE

M. WARSAME

JUDGE