REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 91 of 2007

QUERESH MULI MUTINDA……..……..……..1ST APPELLANT

ANTONY MUSANGO NDUNGA…….....2ND APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1742 of 2006 of the Chief Magistrate's Court at Machakos by S.A. OKATO - Senior Resident Magistrate)

J U D G M E N T

QURESHI MULI MUTINDA and **ANTONY MUSANGO NDUNGA** were the 2nd and 3rd accused during their trial. These two appellants were convicted alongside their co-accused, **JULIUS MULI NDALI,** for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

Although all the 3 persons lodged appeals to the High Court, Julius Muli Ndali passed away before his appeal was heard.

Mr. Kanya, the learned advocate for the appellants, argued five grounds of appeal.

First he submitted that the evidence adduced by the prosecution was not only insufficient but also inconsistent. The incident took place at about 8.00p.m. Therefore, the appellants say that the incident took place in darkness, because the complainant told the trial court that the robbers disappeared into the darkness.

In any event, the prosecution did not lead any evidence to corroborate **PW 1' S** contention, that there was moonlight.

Meanwhile, as regards the items allegedly stolen from **PW 1,** the appellants pointed out that both **PW 2** and **PW 5** only talked about money. We presume that that implies that the evidence adduced did not tally with the particulars of the charge. We also presume that that submission was intended to demonstrate inconsistency as between the evidence of **PW 1, PW 2** and **PW 5**, regarding the items which **PW 1** lost to the robbers.

The second issue raised by the appellants was that the judgment was flawed, because the learned trial magistrate did not state why he believed the prosecution, or why he doubted the appellants' testimony.

Thirdly, the trial court was faulted for shifting the burden of proof to the appellants. That is said to have taken place when the trial court held that the appellants had failed to account for their movements on the material days.

The fourth issue raised by the appellants was the trial magistrate was not impartial, as he would otherwise have acquitted the appellants as soon as he came to the conclusion that the evidence of the complainant was not corroborated.

In conclusion, the appellants' submitted that if the trial court had taken into account the aforegoing issues, it would have acquitted them.

In answer to the appeal, the learned state counsel submitted that the conviction of the appellants was based on overwhelming evidence. He said so because in his view, the offence of robbery with violence had been proved against the appellants.

In that regard, it is noteworthy that in the charge sheet, the items which were stolen from the complainant herein were KShs.6,700/- cash, and a pair of brown "Safari Boots" valued at KShs.1,800/-

The charge sheet also indicates that the robbers, who were three in number, used actual violence on the complainant.

As the robbers were more than one in number, and as they were armed with dangerous weapons, namely a panga, a knife and a club; and because they assaulted the complainant, the offence of robbery with violence was proved. In saying that, we must not be misunderstood to imply that the offence was only proved because of all those factors, as it was sufficient to prove any one of the three factors spelt out in section 296 (2) of the Penal Code.

Being the first appellate court, we are obliged to re-evaluate all the evidence on record, and to draw therefrom our own conclusions, whilst bearing in mind the fact that we did not have the benefit of observing the witnesses as they testified.

PW 1, RICHARD MUTINDA NZIOKA, is a mason. On 12th September 2006, he sold some bricks to a customer, for KShs 7,000/-He then helped the customer to transport the bricks, but on the second trip, the tractor they were using had a puncture. The tractor had no spare tyre, therefore they had to get a pump to increase the pressure on the punctured tyre. The process lasted a long time, resulting in **PW 1** and his customer reaching Thwangu Market at about 10.00p.m.

PW 1 and the said customer entered a bar and started drinking beer. Shortly thereafter, the 3 accused persons entered the bar.

According to **PW 1**, all the three accused persons were known to him.

The accused complained loudly, to the driver of the tractor, about his having gone to work in that area. As he felt harassed, the driver left. Thereafter, **PW 1** left too.

However, before **PW 1** reached Kakata River, the three accused caught up with him. They assaulted him. The first appellant pushed him, whilst the second appellant hit him with a club. They then threw him though a barbed wire.

The 1st appellant then cut the complainant on the right leg, near his knee. He used a panga to cut him. Thereafter, the 1st appellant demanded money from **PW 1**, prompting **PW 1** to tell them that the money was in his rear right pocket.

The 1st accused (now deceased) reached for **PW 1's** wallet, which contained KShs.6,700/-. The 1st accused then asked the other two accomplices to leave **PW 1**, but the 1st appellant suggested that they

check **PW 1's** shoes. The appellants removed the "Safari Boots" which **PW 1** was wearing, and the robbers went away with them.

At that point, the 1st appellant shouted that **PW 1** had robbed him of his mobile phone. **PW 1** called the 1st accused by his name, Muli, and asked him if he could do that to him. The 1st appellant said to PW 1 that he could even kill him.

Later, **PW 1** went home and slept. On the next day, he went to the office of the Assistant Chief but did not find him. However, as **PW 1** was reporting about the incident, to the Administration Police who were at the Assistant Chief's office, the 1st appellant emerged.

According to **PW 1**, he told the APs that the 1st appellant was one of the persons who had robbed him. But when the 1st appellant told the APs that he had not seen **PW 1** on the previous day, the APs asked **PW 1** to leave. **PW 1** left, but returned to the Assistant chief's office at about midday, only to find the AP drunk.

PW 1 went to the chief who referred him to the Assistant chief. But the Assistant Chief declined to arrest the accused persons.

PW 1 went back to the chief, who then provided him with police officers, who went with **PW 1** to arrest all the 3 accused persons.

Although the money was not recovered, the "Safari Boots" were recovered at the house of the 1st accused.

Later, **PW 1** was treated at the Machakos General Hospital, and a P3 form was filled.

During cross-examination **PW 1** said that there was no electricity at Thwangu Market. But he reiterated that there was moonlight. He said that there was full moonlight. He added that he saw the appellants clearly.

PW 2, SABASTIAN KIILU NDUNGI is the Assistant chief of Mukaa Sub-location. He testified that the chief informed him that PW 1 had been beaten and robbed of KShs.6,700/-, by a group of 3 people.

PW 2 confirmed that **PW 1** led him to the homes of the appellants herein, where **PW 2** effected their arrest. **PW 2** also testified that he recovered the complainant's shoes from the house of the 1st accused.

PW 3, DR. STEPHEN MATHEKA, was a Medical Officer at the Machakos General Hospital. He filled in the complainant's P3 form, after examining the complainant. He assessed the degree of the injury which PW 1 suffered during the robbery, as harm.

PW 4, APC RAPHAEL MUTUNE, was an Administration police officer attached to the Kibauni Chief's Camp at the material time. He confirmed that **PW 1** reported to him that the 3 accused persons had waylaid him, assaulted him and then robbed him of KShs 6,700/- and a pair of shoes. **PW 4** also confirmed that **PW 1** had injuries on his head and face.

PW 1 led **PW 4** and **PW 2** to the home of the appellants, where the appellants were arrested. However, **PW 4** said that the shoes belonging to the complainant were recovered from the home of the 2nd appellant.

PW 5, CPL MURICE OTIENO, was on patrol duties on 15th September 2006, when **PW 1** reported to him that he had been robbed of money (KShs.6,700/-), a pair of shoes, a national identity card, and a voters card.

During cross-examination, **PW 5** said that **PW 1** told him that he had been attacked by the appellants.

When the 1st appellant was put on his defence, he confirmed that he was arrested by **PW 2**. However, he denied having robbed the complainant.

When he was cross-examined, the 1st appellant said that he could not recall what happened at the time when the robbery took place. He alleged that he was too drunk to recall what had happened.

Thereafter, the 2nd appellant also said that he knew nothing about the charge facing him.

Having given due consideration to the evidence on record we find that it is not simply circumstantial, as was suggested by the appellants. The evidence is very direct indeed.

The complainant had known the three accused persons from before the incident. And although the incident took place after 10.00p.m, there was lighting from the full moon. Not only was the lighting sufficient for purposes of enabling **PW 1** to clearly see the persons who robbed him, but **PW 1** was in very close proximity to the appellants, as they attacked and robbed him.

We are satisfied that **PW 1** had a good opportunity to recognize the robbers. He then went home to sleep as it was late. But at the earliest opportunity thereafter, **PW 1** reported the incident and named his attackers.

When the Administration Police officers did not originally assist him, **PW 1** remained persistent in pursuing the arrest of the 3 accused persons and even though **PW 2** was not enthusiastic about arresting the appellants, in the first instance, he did confirm to the trial court that **PW 1** had given him the names of the appellants and also the names of the 1st accused.

Of course, there was only one identifying witness in this case. It was therefore incumbent upon us to satisfy ourselves that the recognition of the appellants were free from any doubt. In this case we are satisfied that the evidence pointing to the guilt of the appellants, although based on the testimony of a single identifying witness can be safely accepted as free from the possibility of any error.

Having come to the conclusion that the appellants were positively recognized by the complainant, who went on to describe the exact role played by each of them, it does follow that the defences of the appellants cannot be true because the appellants cannot have been in two places at the same time. In effect, the defences did not cast any shadow of doubt on the case put forward by the prosecution.

In the result, we conclude that the conviction of both appellants was sound. We find no basis, either in law or in fact, for interfering with it. It is thus upheld.

We also uphold the death sentences.

The appeal is therefore dismissed in its entirety.

Dated, Signed and Delivered at Machakos, this 23rd day of September 2009.

…….. ……

ISAAC LENAOLA **FRED A. OCHIENG**

JUDGE **JUDGE**