



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 77 of 2007

MUTISO MUNYAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1339 of 2006 of the

Chief Magistrate's Court at Machakos by H. A. Omondi – Chief Magistrate)

JUDGMENT

The complainant, MUTINDA MUASYA, was robbed of money and two mobile phones. The robbery occurred at about 9.00 p.m on 24th October 2005, at Katelembo area, Machakos.

At the time of the robbery, the complainant (PW 1) had just arrived at his home, in the company of his wife. After PW 1 had parked his car, he remained outside the house, feeding his cattle. Meanwhile, his wife went into the house.

Within the span of about 5 minutes, PW 1 noticed torches being flashed at his gate, which he had not yet locked. When PW 1 asked who the people at the gate were, they told him not to let the dogs loose, as they were not bad people. PW 1 therefore called back his 8 dogs, which proceeded to have their food.

The intruders, who were four in number entered the compound. PW 1 noted that one was armed with a rungu, whilst another had a pistol. The one with the rungu hit PW 1 on his back and on his left hand. The one with the pistol also hit him with it.

The intruders then led PW 1 into his house, demanding money and mobile phones.

According to PW 1, he did see the intruders clearly, as the lantern was on, and the light from it was very bright.

At first, PW 1 gave out KShs 6,200/= but the intruders demanded more money. They then broke into PW 1's bedroom where they took away another sum of KShs 24,3000/=, after ransacking the bedroom.

PW 1 was then led to his sitting room, where he and his wife were ordered to remove their shoes.

Later, the robbers walked away with both PW 1 and his wife, for about 2 kilometres: the couple was

then set free. On their return home, they found that their children had been locked up inside the house. The house was locked from outside.

After breaking the padlock and setting the children free, PW1 went with his son, JOSEPH MUASYA MUTINDA (PW2), to report at the Machakos Police Station. They were accompanied by two police officers, back to the house, where the officers collected a stone and a broken piece of a rungu.

According to PW 1, he did recognize two of the robbers, namely Kioko and Katiso.

However, although PW 1 did mention Kioko in the statement he recorded, he did not name the appellant herein.

It was the testimony of PW 1 that his children did give to him, the appellant's name, after the robbers had left.

PW 1 said that the appellant was arrested when he had gone to court to listen to the case against his cousin Kioko. The said Kioko had been arrested and charged earlier, although it is PW 1 who was the complainant in that other case, as well.

PW 1 explained that when he saw the appellant in court, he alerted the police, who then arrested him.

PW 2, JOSEPH MUASYA MUTINDA, was eleven years old as at the date when he testified in court. He gave sworn testimony after the learned trial magistrate duly conducted a *voire dire* examination.

It was his evidence that when PW 1 arrived home, with his, (PW 2's), mother, PW 2 joined his father in feeding the cattle. Whilst they were doing so, PW 2 says that he saw 2 torches being flashed at their gate.

PW 2 then saw 4 people hit his father on his shoulder, using a pistol. The people then ordered both PW 1 and PW 2 into the house, where they stole money and mobile phones.

PW 2 told the trial court that he recognized Mutiso and Kioko as being two amongst the 4 robbers.

PW 2 said that the thugs hit the lantern, when they saw that he was looking at them keenly.

Later, when PW 2 recorded his statement, he mentioned Kioko and Mutiso. However, it is noteworthy that it is only during re-examination that PW 2 said that he had mentioned Mutiso in his statement.

PW 3, PETER MUIA MUASYA, works as a herdsman at Syokimau, Mlolongo. He testified that on 30th June 2006, the appellant went to his, (PW 3's), place of work, and asked him about his colleague, Nzau Muli. PW 3 told the appellant that Nzau Muli was off-duty on that date.

The appellant then sat with PW 3, and the two of them discussed many things. In the course of the said discussion, the appellant told PW 3 that he had robbed PW 1.

PW 3 thereafter traveled to Machakos, where he informed the complainant about what he had been told by the appellant.

According to PW 3, it is after he told PW 1 about the discussions he had had with the appellant that PW 1 then alerted the police.

PW 3 also said that it is he who pointed out the appellant in court, whereupon the police arrested him.

PW 4, PC GEOFFREY KAILUTHA, is a police officer who was stationed at the Machakos Police Station, at the material time.

On 24th July 2006, PW 1 told PW 4 that he (PW 1) had seen one suspect in court No. 2. PW 4 therefore went and arrested the appellant, in that court.

Before the time when he arrested the appellant, PW 4 had not known him.

And during cross-examination PW 4 said that he had recorded the complainant's statement, in relation to Criminal Case No. 2829/05. And the person whom the complainant named as the suspect was Evans Mwangela.

As the case which the appellant and gone to listen to in court was Criminal Case No. 2829/05, in which the accused person was his cousin, Evens Kioko, we presume that the reference by PW 4, to one Evans Mwangela was an error.

That being the position, we believe that the complainant cannot have recorded two different statements for the two cases, yet the facts were the same.

It is PW 4 who recorded PW 1's statement. And it is his evidence that the complainant only gave the name of one suspect, Evans Mwangela (or Kioko). That fact was confirmed by PW 1 when he testified.

Therefore, it is obvious that the appellant herein was not named by PW 1 when he made his first report. That is somewhat curious when it is borne in mind that immediately after the robbers left, PW 1 was given the appellant's name by his, (PW 1's), sons. If PW 1 had positively identified the appellant alongside Kioko, there would have been no difficulty in giving his name to PW 4.

And whereas the light from the lantern was bright, so that the complainant was able to see the robbers before they hit the lantern, that does not deviate from the fact that the complainant only named one of the two robbers. To our minds, that suggests that he either did not recognize the appellant, or that he was in doubt about the alleged recognition.

PW 3 said that it is he who told PW 1 that the appellant was one of the robbers; and that it was thereafter that PW 1 informed the police about the appellant. That evidence was corroborated by PW 4, when he said:

"The complainant was informed of the accused participation by some people."

On the other hand, whilst PW 3 said that the appellant was arrested at his instance, PW 4 and PW 1 told the court that the appellant was arrested after PW 1 had alerted the police to the presence of the appellant in Court 2.

We are thus not even clear about the circumstances in which the appellant was arrested.

Because none of the items which were stolen from PW 1 was recovered, it became even more important to ascertain beyond any shadow of doubt, that the appellant had been positively identified, as that would be the only foundation upon which a solid conviction could be based.

In this case, the robbery took place on 24th October 2005. PW 1 recorded his statement a month later, on 22nd November 2005. Even as at that date, PW 1 did not name the appellant in his statement.

The appellant was arrested on 25th July 2006, which is the very day that PW 1 told PW 4 that the appellant was in Court 2.

As PW 3 had told the complainant (PW 1) about the appellant's "confession" after 30th June 2006, we are persuaded that it is PW 3 who prompted PW 1 to incriminate the appellant. And, indeed, PW 4 did confirm that PW 1 was only informed about the appellant's involvement by some people. In other words, even the police did not believe that PW 1 had become aware of the appellant's involvement, by way of

recognition at the scene of crime.

In the event, we find that the conviction lacks a firm foundation. It would be wrong of us to uphold it. We therefore hereby quash it and set aside the sentence. We also order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held. It is so ordered.

Dated, Signed and Delivered at Machakos, this 22nd day of September 2009.

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ISAAC LENAOLA

FRED A. OCHIENG

JUDGE

JUDGE