REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 164 of 2006

STEPHEN MUOKA MUTUNE…………..………….1ST APPELLANT

PATRICK MUNYAO JONATHAN ………………....2ND APPELLANT

VERSUS

REPUBLIC ……………………………………..........RESPONDENT

(From the original conviction and sentence in Criminal Case No. 4314 of 2003 of the

Chief Magistrate's Court at Machakos by Mrs H. omondi – Chief Magistrate)

J U D G M E N T

The two appellants herein were convicted on two counts of robbery with violence contrary to section 296 (2) of the Penal Code. They were thereafter sentenced to suffer death as by law prescribed.

Being dissatisfied with both their conviction and the sentence the appellants filed appeals before the High Court. When the said appeals came up for hearing they were consolidated.

And the learned state counsel, Mr. Omirera, conceded the appeal. His reason for the concession was that the alleged identification of the appellants, by PW 1 and PW 2, was not free from error.

As far as the learned state counsel was concerned, even though the robbery in question took place during the day-time, the two alleged eye-witnesses did not give to the police the description of their assailants prior to the holding of an Identification Parade.

Being the first appellate court, we have given careful re-evaluation to all the evidence on record, and have drawn our own conclusions therefrom.

The first issue that is noteworthy is that whereas the charge sheet states that the motor vehicle which was stolen by the robbers was a MITSUBISHI CANTER REGISTRATION NO. KAQ 728Z, PW 2 gave its registration particulars as KAQ 778Z.

There is disparity between the particulars of the charge sheet and the evidence of PW 2. That disparity could possibly have been easily cleared up, by producing the vehicle in evidence. But the vehicle was not produced by the prosecution. Not even a photograph of the vehicle was produced in court.

Therefore, as at the close of the prosecution case, there was no clear evidence regarding the vehicle which the robbers stole.

PW 1 testified that he had identified the two robbers very well. He said that;

"*one had a cut on the upper lip. The other had a black dot on one of the ears – the right side. The one who had a dot at the right ear is the one who drove the vehicle. The one who had a cut-scar on the upper lip was on the other side near the salesman.*"

At an Identification Parade, PW 1 picked out the 1st accused as the person with a scar on his upper lip. That would imply that, as far as PW 1 was concerned, it is the 2nd accused who drove away the vehicle, which the robbers stole.

PW 1 testified that he gave to the police, the description of the robbers. He said that the description was in his statement. However, when he was asked to find out wherein in the statement, he had described the robbers, he was unable to do so.

In other words, it is not the description, if any, which was provided to the police that led them to arrest the appellants. In fact, the complainants readily admitted that they had no idea how the appellants were arrested.

And whereas both PW 1 and PW 2 were able to pick out the 1st appellant at different Identification parades, we hold the considered view that that, by itself, did not necessarily connote that they had identified him positively during the robbery. We say so because, as the 1st appellant has submitted, the police officer who conducted the Identification Parade did not demonstrate to the trial court that he had taken steps to ensure that the apparent disfigurement on the said appellant's face did not make him stand out amongst the other members of the parade.

An officer conducting an Identification Parade is required, pursuant to the Standing Orders, to ensure that, if an accused person or a suspect was suffering from a disfigurement, steps are taken so that the said disfigurement is not especially apparent.

As the 1st appellant was not described by the complainants, in the statement which they recorded prior to the Identification Parade, and because the police officer who conducted the parade did not take steps to ensure that the said appellant's disfigurement was not especially apparent, we have come to the conclusion that the identification of the 1st appellant was not necessarily without error.

Meanwhile, none of the complainants did identify the 2nd appellant at any Identification Parade, because no such parade was conducted. Therefore, there was no forum at which the alleged positive identification of the 2nd appellant was put to the test. We are thus unable to find that the said identification was free from error.

It is also very intriguing that whilst the charge sheet indicates that the robbery took place on 23rd September 2003; which date is supported by both PW 1 and PW 2; the Investigating Officer, Pc JOSHUA MAKANE, said that he had received a report about the robbery on 22nd September 2003! Surely, PW 4 cannot have received the report of a robbery which was yet to take place.

For all those reasons, we find that the learned state counsel was right to have conceded the appeal.

In the event, the appeal is allowed. The conviction of both appellants are quashed, and the sentences are set aside. We therefore order that unless the appellants or either of them is otherwise lawfully held they should be set at liberty forthwith.

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

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ISAAC LENAOLA **FRED A. OCHIENG**

JUDGE **JUDGE**