REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 153 of 2008

MUSAU MUTIKU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from Conviction and Sentence of the Senior Resident Magistrate's Court at Siakago

in Criminal Case No. 911 of 2006 dated 30th July 2008 by Mr. S. M. Mokua – Ag. S.R.M.)

J U D G M E N T

The appellant was among the ten persons charged before the Senior Resident Magistrate's Court, Siakago with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 26th May 2006 a Kakindu village within Mbeere District in Eastern Province, the appellant together with the co-accused jointly

with others not before court while armed with dangerous weapons namely pangas, rungus, bows and arrows robbed **Theophilus Nzivo Kavevia** the items set out in the charge sheet and in the process injured him. The appellant together with the nine co-accused pleaded not guilty to the charge.

In support of the charge, the prosecution called a total of 6 witnesses who gave evidence concerning the incident herein. At the close of the prosecution case, the trial court found no evidence linking the appellant's 2nd, 3rd, 4th, 5th, 6th and 7th co-accused with the crime. Accordingly the court acquitted them. However the court found that the appellant's 1st, 9th and 10th co-accused had a case to answer and put them on their defence. They all denied committing the offence herein.

Their trial was apparently conducted by **Hon. Omenta P.M.** who retired before writing the judgment. In compliance with section 200 of the criminal Procedure Code, Hon **S. M. Mokua** wrote and delivered the judgment in which he acquitted the appellant's co-accused aforesaid pursuant to section 2.5 of the criminal procedure code but proceeded to convict the appellant, whereupon he sentenced him to death as required by the law.

Prosecution case simply stated was that on 26th May 2006 at 1.00 a.m. the complainant was asleep in his house within Gategi market when he heard a loud bang on his door. He woke up only to find 4 thugs already inside the house. They had masked their faces and were putting on jackets. He could therefore not identify or recognise any of them. They were armed with pangas and clubs. They demanded for money. He gave out Kshs.3,800/= and Nokia 1100 phone valued at Kshs.5,000/=. Those thugs then took a radio speaker valued at Kshs.280/=. They then proceeded with him to the shop where he gave them an extra Kshs.2,900/=. Therein they also took the following items:

10 loaves of bread

5 sodas

6 pairs of batteries

5 sportsman cigarettes – all valued at Kshs.12,745/= and left. After they had left, the complainant screamed and neighbours responded. The attackers had cut him on the face and he went to Gategi health centre for treatment. The injuries sustained were assessed as harm by PW6 who tendered in evidence his P3 form.

PW2 was among the neighbours who responded to the screams from the homestead of the complainant. At the home, they divided themselves into two groups in a bid to track down the culprits. On the process the came across a shirt and was recognised as belonging to the appellant. They traced the appellant to his home and found him in possession of a bow and arrows which the complainant identified as his. Upon interrogation by the villagers under threat of being lynched, the appellant volunteered information and gave the names of those who were allegedly in his company at the time they committed the offence herein. The appellant and his accomplices were later rounded up and handed over to Administration Police officers at Gitugi, AP camp. PW4, a police officer based at Karaba police post, where the incident had been reported went to the AP camp and re-arrested the suspects. He also collected some items which had been recovered from them. Later the appellant together with his accomplices were charged.

Put on his defence, the appellant gave an unsworn statement of defence and stated that he was at his residence on the fateful night when several people went there and alleged that he had committed a robbery. He was then arrested and subsequently charged. He categorically denied having committed the said offence.

As already stated, the appellant was upon full trial found guilty, convicted and sentenced. Aggrieved by the conviction and sentence he lodged the instant appeal. In his petition of appeal the appellant laments that he was convicted on insufficient evidence of identification, crucial witnesses were not called to testify and finally that his defence was not properly considered.

The appeal was however conceded to by the state. **Mr. Omwenga**, learned Senior State Counsel in conceding to the appeal submitted that the evidence of identification of the appellant was doubtful.

We wholly agree with the stand taken by the learned state counsel in this appeal. It is quite apparent that the complainant did not identify any of the robbers at the scene for they were all disguised with masks.

Six prosecution witnesses testified in support of the prosecution case. The case for the prosecution hinges on the mode of arrest of the appellant and the alleged recovery of some exhibits. Appellant's conviction was arrived at by the trial magistrate on the basis of PW2's evidence of having heard the villagers say that the shirt belonged to the appellant. He testified thus: "**I shouted to the effect those were thieves and on hearing this they ran away to the bush. I had not known them. Before running away they dropped bread, soap, soda, cigarettes and recovered them. This is the bottle of soda MFI-3, Omo sachets MFI-4, 2 pieces of loaves, MFI-1 Ex.1. This is the shirt (checked) – MFI-6. The shirt was the one used to keep things more organised-wrapped (sic) the bread in it. Rooster cigarettes. We discovered the blue checked shirt and identified as belonging to Mutiku accused 8 identified. We recovered the items and rushed to the home of accused 8. We were more than fifty people.** PW-2's evidence was not corroborated at all as regards the fact that there were 4 people who saw the thugs drop the recovered items and also the shirt. There was need therefore for the prosecution to summon either or any of those neighbours. In the case of **Muchiri v/s Republic (1952) EACA Volume 10** it was held that it is dangerous to convict an accused on single evidence of identification without corroboration in material particulars. Further PW-2's evidence cannot be relied upon to sustain a conviction in the instant case. Under cross-examination by the appellant he stated "**..... You met me by the road and I identified you by your shirt. It was said by all in the village that the shirt belonged**

to you. I believe it was your shirt. Had it not been for this shirt I could not have identified you. I do not know if they are witnesses. It is John and Kavivia who identified the shirt. They did not show me any special mark. I came to your home with the shirt and your wife and another said the shirt had been eaten by the cows."

The prosecution omitted to summon these two essential witnesses; **John** and **Kavivia** who had told PW2 that the alleged shirt belonged to the appellant. These witnesses having not been summoned, PW2-s evidence with regard to the shirt was essentially hearsay and ought not have been acted upon by the learned magistrate. PW-2's evidence should have been disregarded further when one considers what he subsequently said. He stated "**..... Accused 8 denied the shirt did not belong to him. I asked him if he knew the shirt. He said the shirt was not his as his had been eaten by the cow....."** Secondly it is also evident that "**.... After they packed these items in the paper bags they ordered me to open the gate for them."** From the above piece of evidence by PW1, it is clear that the items were wrapped in paper bags but not as

alleged by PW2 that they were so wrapped in the shirt. PW2's evidence of mode of arrest of the appellant was also problematic. He testified thus: "**We discovered the blue checked shirt and identified it as belonging to Mutiku. Accused 8 identified. We recovered the items and rushed to the home of accused 8, we were more than fifty people. While in the homestead of accused 8, my nephew told me that there was a man walking in the maize plantation."** That man as it turned out was the appellant. This evidence shows clearly that PW2 could easily have been among the fifty or so people

that congregated in the compound. Why was any of those fifty people summoned to come to court and corroborate PW2's evidence on the mode of arrest of the appellant. Failure by the prosecution to avail these witnesses who participated in the appellant's arrest, leaves a lot to be desired. Indeed the instant case was not investigated as required in a capital offences.

Further PW5's evidence contradicted PW2's evidence with regard to the items allegedly recovered.

Under cross-examination by the appellant PW5 stated that**: "..... There is nothing of the complainant that was recovered from you. During investigations it was revealed you were involved as many people named you. I cannot recall the date but I know I was in Karaba on 26th May 2006..."** From the above piece of evidence by PW5 it shows clearly that the appellant

was not arrested with anything belonging to the complainant as was alleged by PW2.

Cross-examined by **Mr. Momanyi**, learned counsel for the appellant, PW1 had earlier on stated that**: "..... Accused 8 had a bow and two arrows, 5 packets of omo, 2 bottles of soda. These are the items I identified at the police station 2 bottles of soda. One was full but one was half full. This can be found in any other shop. The sachets of omo could be got (sic) from any other shop. There were no special marks. My bow has a special mark. It had a crack in the centre. I had made the mark. It is possible there could be another with similar crack ..... My arrows had special marks but not my special (sic) though. I am not the only one with arrows. There are other people with arrows including accused persons...."**

Now if this was the case its clear that the arrows did not solely belong to the complainant PW1, nor the items allegedly recovered which PW1 claimed belonged to his shop.

Upon the close of the prosecution case, the appellant put forth a defence. That defence was not discounted at all by the prosecution. The appellant was not found in possession of anything that would have linked him to the crime in question yet he was arrested shortly after the crime. The appellant too was not identified at the scene of crime save for PW2's allegation regarding mode of arrest of the appellant which in any event was not corroborated at all though it was alleged that there were more than fifty people present when he was arrested. Had that defence been carefully scrutinised, we think that it was capable of securing the appellant an acquittal.

It is for the foregoing reasons that we are in agreement with the position taken by the learned senior state counsel in this appeal. Accordingly we allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Embu this 27th day of October 2009

M. S. A. MAKHANDIA

JUDGE

WANJIRU KARANJA

JUDGE