



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**Criminal Appeal 21 of 2006**

**ELIJAH KIOKO MUTINDA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From the original conviction and sentence in Criminal Case No. 400 of 2004 of the  
Chief Magistrate's Court at Machakos by H. A. Omondi – Chief Magistrate)**

**JUDGEMENT**

The appellant was charged and convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code. the particulars are that on the night of 15<sup>th</sup> and 16<sup>th</sup> November 2003 at club village, Uaman sub-location, Kyanzavi location, in Machakos District within the Eastern Province, with others not before the court being armed with a dangerous and offensive weapons namely *rungus*, pangas and bow and arrows robbed Bernard Munyao Musyoka of one mobile make sumsang, one mobile make Nokia, one radio cassette make Sony, one wrist watch make Seiko, one iron box and cash.4,000/= all valued Ksh.77,000/=. And at or immediately before or immediately after the time of such robbery used actual violence to the said Bernard Munyao Musyoka.

PW1 Bernard Musyoka Munyao (the complainant herein) testified that he was attacked on the night of 15<sup>th</sup> and 16<sup>th</sup> November 2003 by a group of robbers who were more than 10. They gained entry to his house after overpowering his two watchmen and after breaking into his house through the window. He then contacted Sgt. Njeru from 14 Falls Patrol Base since Donyo Sabuk Patrol Base did not have proper network. He informed Sgt. Njeru that he was being attacked and requested for help since the thugs were making every effort into his house. Before the police officers came robbers entered into his house and went away with the items stated in the charge sheet.

On 6<sup>th</sup> March 2004 at about 11.30 p.m. Vitalis Kimuyu Mativo PW2 was at Ruth Wines and Spirits in Donyo Sabuk market when he was allegedly informed that the appellant was saying that he is the one who had attacked and robbed PW1 about one year ago. PW2 then encouraged the appellant to talk more so that he could know what he had done to PW1 and the nature of activities he had carried out for some time. PW2 then alerted another friend of his by the name Joseph who was sitting the same table with him and the appellant so that he could hear the bragging and information that was being volunteered by the appellant. It is alleged that the appellant again repeated the words that he had attacked PW1 in the presence of PW2 and his other friend who was by now attentive and who was also a close friend to PW1. The friend to PW1 then called police as the appellant and PW2 were drinking at the said bar. Police came and arrested the appellant

and he was charged with robbery that occurred about a year before his arrest.

PW3 PC Julius Gikunda stated that on 7<sup>th</sup> March 2004 he was informed that there was a report that a person who had earlier attacked PW1 was having a drink at Ruth & Wines Spirits. In the company of other police officers he proceeded to the said bar and arrested the appellant who was drinking together with PW2 and other friends who were not arrested.

After the close of the prosecution case the appellant gave a sworn testimony and denied that he committed any crime or robbery as alleged by the prosecution. He stated that he was framed by PW2 and that he had nothing to do with the robbery that was committed against PW1.

In this case PW1 did not make any description fitting the appellant as one of the persons who attacked him on the night of 15<sup>th</sup>/16<sup>th</sup> November 2003 in his first report to the police. PW1 also did not say that he recognized or that he was able to identify any of his attackers when he made his first report. Again even after the arrest of the appellant on information given by PW2 there was no identification parade in which PW1 participated and pointed out the appellant as one of his attackers. The basis of the appellant's arrest is that in a drinking place he was bragging that he had attacked PW1 and that he had committed several crimes. That information was given by PW2 and in essence it is like a confession made by the appellant. We do not think that a robber would inform strangers that he had committed an offence in a public place. The evidence by PW2 that the appellant had boasted or bragged that he is the one who had attacked and robbed PW1 is highly suspicious. We doubt whether a serious robber or any robber for that matter would make confession about his criminal activities to strangers in a drinking bar. We therefore think that there is something that is amiss in the evidence given by PW2 and we do not think it is right and proper to convict somebody for an offence carrying death sentence on information which was not verified or which cannot be verified. We therefore think that it was an error on the part of the trial court to convict the appellant on the mere allegations made by PW2.

As stated there was no proper identification of the robbers and there was no description given by PW1 showing that the appellant was one of the attackers who robbed PW1 on the material night. Again after the arrest of the appellant there was no identification parade which was held to show that the appellant was one of the attackers who attacked PW1 and that he was identified by PW1. The possibility that PW2 would frame the appellant was not eliminated by the prosecution. And in the absence of cogent and credible evidence, we think it was an error on the part of the trial court to convict the appellant on such serious offence and on mere allegations put forward by a suspicious witness.

Having reevaluated the whole evidence afresh, we sincerely think that the appellant was not given the benefit of doubt and that the evidence on record is insufficient to sustain his conviction. We allow the appellant's appeal, quash his conviction and set aside the death sentence imposed by the trial court. We order for his immediate release unless lawfully held.

Dated, signed and delivered at Machakos this 21<sup>st</sup> day of October 2009.

**ISAAC LENAOLA**

**JUDGE**

**M. WARSAME**

**JUDGE**