



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Criminal Appeal 140 & 141 of 2006**

**PETER MUTHUI MUTIA .....1<sup>ST</sup> APPELLANT**

**JOSEPH MUSYOKI KAMILI .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From the original conviction and sentence in Criminal Case No. 637 of 2003 of the Senior Resident Magistrate's Court at Mwingi by R. O. Ondenyo – Senior Resident Magistrate)**

**JUDGEMENT**

The two appellants were charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars in count 1 are that on 6<sup>th</sup> day of June 2003 at Kanzinwa village, Mbarani sub-location, Katse location in Mwingi district within Eastern province, jointly with others not before court robbed one Daniel Malusi of cash Kshs.1.40, one identity card No.8670839 and a bicycle make Eagle size 24 valued at Kshs.4,900/= and at or immediately before or immediately after the time of such robbery wounded the said Daniel Malusi Nyaga. In count 2 the particulars are that on the 6<sup>th</sup> day of June 2003 at Kanzinwa village, Mbarani sub-location jointly with others not before court, robbed one Stephen Musyimi Muthangya of his cash Kshs.16,400/=, one carton of biscuits valued at Kshs.170/= and onions valued at Ksh.100/= and at or immediately before or immediately after the time of such robbery, wounded the said Stephen Musyimi Muthangya. The particulars in count 3 are that on the 6<sup>th</sup> day of June 2003 at Kanzinwa village, Mbarani sub-location, Katse location in Mwingi district within Eastern Province, jointly with others not before court, robbed one Munyithya Kimwele of his cash Kshs.1,005/= and at or immediately before or immediately after the time of such robbery, wounded the said Munyithya Kimwele.

After full trial they were convicted in counts 2 and 3 and sentenced to suffer death as prescribed by the law. They have now appealed against the conviction and sentence imposed by the trial court.

PW1 Musyimi Muthangya from Kanziwa village stated that on 6<sup>th</sup> June 2003 around 6 p.m. he had gone for shopping to Ukisa market and bought 4 bundles of maize flour, one box of cooking fat and one box of biscuits. On the

way back while riding his bicycle he was confronted by a gang of four people who attacked him and demanded Kshs.16,400/=. They then robbed him and left him at the scene and he proceeded to the area chief to report the incident. He says that later the two appellants who were from his area were arrested and charged with robbery with violence against him and two others. He did not say why the two appellants were arrested and whether he made any report to the relevant authorities before the arrest that they were the ones who had attacked and robbed him.

PW2 the complainant in respect of count 3 stated that on the material day at around 9.00 a.m. He took his wife to hospital but on the way he was attacked by four men who robbed him of Kshs.1,005/= and his ID card and other personal items. He then reported the matter to his area chief and proceeded to Katse dispensary where he was treated. He stated that he recognized the 1<sup>st</sup> appellant as one of his attackers but he never recognized the others. Later he found the 1<sup>st</sup> appellant at the chief's camp with many other people and he stated that he was one of the attackers who had earlier robbed him.

PW3 Timothy Mulyungi is the chief of Katse location and stated that on 7<sup>th</sup> June 2003 while in his office members of the public came with a person who had wounds or cuts all over his body. When he asked members of the public what had happened to the prisoners he was informed that he had attacked people the previous night. He was also informed by administrative officers that they had arrested another man and who was in the cells. The two appellants were the ones who were arrested by members of the public and later handed over to the area O.C.S. who proceeded and charged them with 3 counts of robbery with violence.

PW4 Elizabeth Muthangya stated that on the material day while at Katse she met the 2<sup>nd</sup> appellant who attacked her but she did not report the incident to the relevant authorities but proceeded with her journey back home. She later heard that the appellant and another had been arrested for having committed a series of robberies within her area. She then made a statement with the police that she had been attacked by the 2<sup>nd</sup> appellant.

PW5 APC Mwinzi attached to the D.O.'s office at Katse stated that on 6<sup>th</sup> June 2003 he received a suspect from the members of the public who alleged that he had committed robberies within the area. The person who was brought by the members of the public was the 1<sup>st</sup> appellant and he put him in the cells. He states that the 1<sup>st</sup> appellant informed him that he was with the 2<sup>nd</sup> appellant and he proceeded to arrest him so that he could be charged together with the 1<sup>st</sup> appellant. When he found the 2<sup>nd</sup> appellant he found his fingers had been cut and that he was lying outside his home in serious pains. He stated that he did not know who exactly injured the 2<sup>nd</sup> appellant but believes that he was beaten by the members of the public.

PW6 Sgt. Timothy Mwangi stated that while at Kyuso Police Station he received two suspects who had been beaten by members of public for allegedly robbing them. He then took the suspects to Mwingi hospital where they were treated and later discharged. He stated that the persons he received were the appellants herein.

The 1<sup>st</sup> appellant did not give any evidence while the 2<sup>nd</sup> appellant gave un-sworn testimony denying that he was involved in any of the offences or charges that were leveled against him.

As is required of this first appellate court, we have reviewed all the evidence and found that we are unable to agree with the decision reached by the trial court. No doubt a series of robberies occurred on 6<sup>th</sup> June 2003 within Katse area but the question is whether the appellants were the ones responsible or were the ones who committed the said robberies. There is no direct or circumstantial evidence to show that the two appellants were the ones who committed the robberies in counts 2 and 3 in which they were convicted for. None of the complainants in counts 2 and count 3 made a report to the relevant authorities that they were able to recognize their assailants and that the two appellants were part of the robbers who had attacked them and robbed them their belongings. That was a fundamental issue which would have ensured that the evidence of the prosecution is watertight and without any doubt. As stated there is no evidence to show that the complainants did mention the names of the appellants or stated the description of the appellants as the ones who had attacked them to the relevant authorities. We do not understand why the trial court stated that the appellants were recognized by PW1 and PW2 since the said witnesses did not mention the names and description of the appellants. The evidence of PW3 and PW5 is that they received the two appellants from the members of the public and none of the persons who arrested the appellants were called as prosecution witnesses. We therefore think that the evidence on record is insufficient to sustain the conviction of the appellants. It was an error to say that the two appellants were recognized by PW1, PW2 and PW4 when the said witnesses did not make a prior report to the relevant authorities and when no identification parade was conducted by the police. In our humble view the evidence tendered by prosecution was woefully and miserably inadequate to sustain the conviction of the appellant. We hold that the prosecution proved its case against the two appellants beyond reasonable doubt and that the conviction entered by the trial courts was in error. Accordingly we allow the appeal, quash the conviction of the appellants and set aside the sentence imposed by the trial court and order the two appellants be released forthwith unless lawfully held.

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

**ISAAC LENAOLA**

**JUDGE**

**M. WARSAME**

**JUDGE**