

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL 76 AND 77 OF 2003

TSUMA MKONDO1ST APPELLANT

MUNGELE JEFWA.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

**(From the original conviction and sentence in Criminal Case no. 4036 of 2001 of the
Chief Magistrate's Court at Mombasa)**

J U D G M E N T

Tsuma Mkondo and Mungele Jefwa, the 1st and 2nd Appellants respectively were tried and convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code. Each appellant was sentenced to suffer death and being aggrieved they each filed an appeal. The appeals were subsequently ordered consolidated. The particulars of the charge are that on the night of 31st May 2001, at Mwema Farm, Kiwengu sub-location Vanga Location in Kwale District within Coast Province jointly armed with dangerous or offensive weapons namely pangas, axes and rungu robbed Ngome Mbesa Nyawa of 50 iron sheets, 9 mattresses, 9 bed sheets one wall clock, blankets. Assorted house hold utensils and 4 pillow cases valued at Kshs.28,430/- the property of Mwema Farm and at or immediately before or immediately after the time of such robbery wounded the said Ngome Mbesa Nyawa.

On appeal, the appellants put forward a total of 6 grounds of appeal. However, when the appeal came up for hearing before us the appellant only argued two grounds of appeal. The case before the trial court appear to be short and straightforward. The complainant herein, Ngome Nyawa (P.W.1) was a night watchman at Mwema Farm, Kwale on 31.5.2001. At 10.00 p.m. a group of 7 thugs who were armed with pangas, axes and rungu arrived. They pounced at P.w.1 hitting him with a rungu with threats to kill if he resisted. P.W.1 said he flashed a torch he had and managed to recognize two of the attackers whom he claimed were people well known to him. P.W.1 said one of them Tsuma Mkondo (1st Appellant) was a son to his colleague Mkondo Tsuma. P.W. 1 was viciously attacked prompting him to scream for help which was not forthcoming. He reported the attacks to the village elder Masudi Mwenda (P.W.2) who in turn housed him until 5.00 a.m. when he reported to the police. At the police station the complainant (P.W.1) mentioned the names of his attackers. On the basis of that report the assailants were apprehended. The appellants were identified at an identification parade.

In his defence, the 1st accused (1st Appellant) gave an unsworn statement in which he said that he was arrested on 10.9.2001. Upon interrogation, he said he admitted telling the police that he knew that the complainant (P.W.1) worked as watchman with his father. He denied that an identification parade was conducted to pick up.

On his part, the 2nd accused (2nd Appellant) also gave an unsworn statement in his defence. He said he was arrested on 18.12.2001 and transported by a waiting Nissan vehicle where he spotted the complainant. He said he was arrested on suspicion that he stole a motor vehicle and not on a charge of robbery. He said the complainant had seen him while under arrest but despite that P.W.1 was allowed to identify him at an identification parade

In the end the trial magistrate came to the conclusion that the appellants were seen by the complainant with the assistance of a torch which he flashed at them. He also found that since the appellants were people known to him to recognize them. The trial magistrate proceeded to warn himself before convicting the appellants on the basis of the evidence of a single identifying witness.

The first ground argued on appeal is that the appellants were not properly identified. We have re-evaluated the evidence presented before the trial court on this aspect. It is not denied that the robbery took place at night. The complainant (P.W.1) stated that he used a torch to see two of his attackers, the appellants herein. He said he reported the incident to the village elder that night and the next day he booked a report at the police station. P.W.1 also said he attended an identification parade where he picked the 2nd appellant. The evidence of P.W.2, Masudi Mwenda indicate that the complainant mentioned to him the names of the appellants as his assailants. P.W.5, P.C. Willis Otieno said he booked the complaint from P.W.1. He said the complainant mentioned the name of Tsuma Mkondo (1st Appellant) but said he did not know the name of the other robber. P.w.5 received the report from P.W.1 on 1.6.01 at about 11.50 a.m. It is imperative to note that P.W. 1 sought refuge in the house of the village elder known as Masudi Mwenda (P.W.2) on the night of 31.05.01, that is immediately after the attack. P.W.2 said the complainant (P.W.1) gave him the names of two robbers i.e. Tsuma Mkondo and Mungele Jefwa (1st and 2nd appellants respectively). We do not understand why P.w.1 could not remember the name of the 2nd appellant when he appeared before P.W. 5 to book the report. If indeed, the complainant knew the appellants, then what was the need of an identification parade. Some doubt has been created in our minds which we will give to the benefit of the appellants.

The second ground argued by the two appellants is that the learned Senior Principal Magistrate did not consider their defence. We have perused the record and we concur with those submissions that the learned Senior Principle Magistrate did not consider the appellants' defence in his judgment. This is a great misdirection on the part of the trial magistrate which obviously caused grave prejudice to the appellants.

For the above reasons we allow the appeal by quashing the conviction and setting aside the sentences. The appellants are hereby ordered set free unless lawfully held.

Dated and delivered at Mombasa this ...7th.....day of ...March.....2008.

J.K. SERGON

J U D G E