REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 3 of 2005

MOCAH OTWALE MAINA ……..…… APPELLANT

V E R S U S

REPUBLIC ……..…… RESPONDENT

J U D G E M E N T

The appellant, **MOCAH OTWALE MAINA** and **JOSHUA MUKUNA MUKAMA** were charged with the offence of Robbery with Violence contrary to ***section 296 (2)*** of the Penal Code in the first count while in the second they both faced the offence of Assault causing actual bodily harm contrary to ***section 251*** of the same code.

After a full trial the appellants were convicted of both offences whereby each was sentenced to death in respect of the robbery charge and 6 months imprisonment in respect of the assault charge.

Aggrieved by the said conviction and sentence, both lodged appeals the subject of this judgment.

At the hearing of these appeals the learned state counsel conceded the same but as the first appellate court, it is our duty to look at the evidence afresh, evaluate the same and come to independent conclusions. We consider it necessary therefore to give a brief recap of the evidence adduced before the learned trial magistrate.

The two complainants who are brothers alighted fro a bus when soon thereafter they were attacked by a group of people. The time was about 5.30 a.m. These people were armed with clubs, axes and metal rods. The two complainants were robbed of money and personal effects. In the process both were injured.

One of the complainants had allegedly identified two of the attackers at the scene. His brother is also said to have known one of the. Police were led to the house of the two and upon arrest and search, weapons allegedly used in the attack were recovered. The present charges were then preferred.

In their respective defences the two appellants denied the offences and said they did not know why they were arrested.

The alleged offences were committed about 5.30 a.m. when it was a bit bright. PW1 was categorical that he had never seen these people before. There were several attackers and according to PW2 some had black clothes with hoods on all over their heads.

The foregoing notwithstanding, the learned trial magistrate concluded that the complainants positively

identified the appellants.

On our part we believe that an identification parade ought to have been conducted to remove any doubt as to the identity of the assailants. A general description of a suspect to the police followed by dock identification in court is most unreliable more so in capital offences such as charge the appellants faced.

In addition to the foregoing PW1, the police officer who arrested the appellants talked of recovery of weapons from their respective homes. He was in company of PW2. It is significant that PW2 never mentioned anything in his evidence about the recovery of those weapons. Also, if the said weapons were the same ones used in the attack, the two complainants should have been led to identify them in court. This omission further clouded the prosecution case.

Two other telling shortcomings are also evident in the proceedings. When the appellants first appeared in court for plea, the court prosecutor was one Sgt. Sifuna. This officer was not qualified to be a prosecutor by virtue of the provisions of ***section 852*** of the Criminal Procedure Code. The Court of Appeal has addressed this matter at length in the case of **ELIREMA & ANOTHER V. REPUBLIC [2003] KLR 537** and we say no more.

The other concern is the language used in the proceedings. When the appellants first appeared in court on 28th January, 2004 the interpretation was from English to Kiswahili. During the trial there is no indication whatsoever what language was used. Both appellants then appear to have given their respective defences in Luhya which they now say was strange and foreign to their dilect Kimarama. That is worrying considering the very clear provisions of ***section 198 (1)*** of the Criminal Procedure Code which require that interpretation be in a language understood by the accused.

And so considering the nullity of the proceedings in view of the rank of the alleged prosecutor and the deficiency of the evidence as a whole, these convictions cannot stand.

It follows that these appeals must succeed.

Accordingly these appeals are allowed, convictions quashed and sentences set aside.

The two appellants shall each be set free forthwith unless otherwise lawfully held.

Orders accordingly.

18th June, 2008

A. MBOGHOLI MASAGHA

J U D G E

FRED A. OCHIENG

J U D G E