



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

Criminal Appeal Case 181 of 2007

ANTHONY MUGO MACHARIAAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED

JAMLICK BUNGU MUTHONI.....APPELLANT

VERSUS

PUBLIC..... RESPONDENT

JUDGMENT

These two appeals were consolidated for purposes of hearing.

The Appellants were charged with robbery with violence contrary to Section 296 (2). They were sentenced to death. They, therefore, filed these appeals. The Appellants relied on their written submission to support their grounds of appeal.

The State Counsel Mr. Omwega who was representing the Republic rose to address the Court and straight away informed the court that he conceded the appeals on the grounds that language used in the proceedings is not indicated. Also, that the issue of identification parade it was not necessary the witness knew the complainant.

The evidence of PW3 was hearsay. He met complainant who reported that he was assaulted by people he knew. PW3 knew 2nd Accused. He arrested him and took him to police station.

When PW 7 received a call that there was robbery at Beerland Bar, he proceeded to the scene but was informed that the complainant had gone to Kianyaga Health Centre for treatment. PW 7 traveled to the Health Centre and found the complainant injured and looking confused. He informed him that he could identify the 3 attackers as there was some light PW 7 received information through informer that 1st accused and 2nd accused were involved. In cross-examination, the officer said he was told the name of attacker by the complainant.

The appellant was arrested on this basis of the information by another police station. It was the complainant evidence that he did not know how the second appellant was arrested and he had no complaint against him.

There was evidence given by Clinical Officer PW 5 who on 05.12.06 examined Daniel Chomba. His clothes were bloodstained. He was unconscious when he was brought to the hospital. On cross-examination of PW 2 he said he did not talk to the complainant and that he was one of the people who took complainant to hospital. Witness evidence is not clear but on the whole it is clear that the complainant was not in a position to give names or description of the attackers as he was seriously wounded.

PW 4, David Kathee Moses. They were in a bar with the complainant when somebody called the complainant outside. The complainant went outside and came back injured. They did not talk. After taking the accused to hospital PW 4 went to police, he testified that he is the one who told the police the name of the accused. This evidence is not consistent and is unreliable.

Upon perusing the record we are of the view that the State Counsel was right in conceding this appeal. The evidence presented to court was insufficient to prove the charge beyond reasonable doubt.

We allow the appeal and quash conviction. The sentence of death imposed on the Appellant is hereby set aside.

We order the appellant to be set at liberty unless otherwise lawfully held.

DATED this 31st of July 2008

J. N. KHAMINWA J. MAKHANDIA

JUDGE JUDGE