



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL 116 OF 2005

(From Original Conviction and Sentence in Criminal Case No. 145 of 2005 of the Senior Resident Magistrate's Court at Kilifi: (C.O. OBULUTSA – S.R.M.)

STEPHEN NGANGA IRUNGU ::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

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JUDGMENT

STEPHEN NGANGA IRUNGU the Appellant was, with another, charged before the Senior Resident Magistrate at Kilifi with robbery with violence contrary to section 296 of the Penal Code. They were charged that on the 16<sup>th</sup> day of November 2004 at Atta (K) Ltd in Mtwapa Location in Mtwapa Township in Kilifi District of the Coast Province, jointly with others not before court, being armed with dangerous or offensive weapons namely pistols, robbed GARAMA KATANA KASHINDO of Ksh.250,000/- and a motorola mobile phone valued at Ksh.6,000/- and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said GARAMA KATANA KASHINDO. He pleaded not guilty but after trial he was convicted and sentenced to death. The co-accused was acquitted. He has appealed to this court against both that conviction and sentence on six grounds of appeal.

In his amended petition of appeal the Appellant asserts that the learned trial magistrate erred in law in convicting him of a fatally and incurably defective charge which fouled Section 137(iv) of the Criminal Procedure Code (CPC); that the learned trial magistrate erred in convicting him on a flawed identification; that his arrest was not linked to the offence charged; that the learned trial magistrate erred

in convicting him on contradictory evidence and that their defences were not taken into consideration.

In his written submissions, the Appellant argued that the failure to state in the charge sheet or even in the prosecution evidence the time of commission of the offence contravened Section 137(iv) of the CPC hence rendering the charge incurably defective. On identification he submitted that the alleged robbers having posed as customers and suddenly wheeled pistols they must have so terrified the complainant that given the short time the robbery took, he could not have positively identified any of them. He contended that the identification parade itself was flawed in that PW2 purported to identify him by voice when there was no evidence that he was familiar with the first Appellant's voice. Moreover, he further argued, PW2 had not told the police that he could identify any of his attackers by voice.

On his arrest the Appellant submitted that there was no evidence to show why he was arrested, the police informer having not been called to testify in the prosecution case.

Taking all these into account the Appellant concluded that the learned trial magistrate had no good reason for rejecting his defence. In the circumstances he urged us to allow this appeal.

For the State Mr. Monda, learned State Counsel, opposed the appeal arguing that the Appellant was clearly identified by PW2 as the one who among the robbers had no cap on. On his arrest Mr. Monda submitted that police went to Holiday Inn on information received and arrested the Appellant who had given his particulars at that Inn as a police officer.

Regarding the omission of Subsection (2) of Section 296 of the Penal Code from the charge sheet Mr. Monda submitted that that was a typographical error which is curable by Section 382 of the CPC. He said that the original charge sheets in which the Appellant and his co-accused in that case were separately charged had that subsection.

We have carefully perused the record. To start with, we find no merit in ground 1 of the petition of appeal. This court has stated umpteen times that failure to state the time of the alleged commission of the offence is not fatal and is curable by Section 382 of the CPC. But as regards the omission to state under what subsection of Section 296 of the Penal Code the Appellant was charged we do not agree with the learned State Counsel that that is also a minor omission curable by Section 382 of the CPC. The prosecution has got to know that that section is not a panacea for all defects in the charge sheets or proceedings. It only covers minor defects. An omission to state whether or not an accused is charged under subsection (1) of Section 296 of the Penal Code which carries a sentence of life imprisonment or subsection (2) which carries a mandatory death sentence cannot by any stretch of imagination be called a minor defect. The prosecution has to be especially careful when drawing the charges relating to capital offences. In this case we find and hold that failure to specify the subsection of Section 296 of the Penal Code under which the Appellant was charged was fatal to the prosecution case.

That in effect disposes this appeal. But we have something else to say. We agree with the Appellant that the investigation and prosecution of this case was perfunctory. PW1 and PW2 who purported to identify the Appellant had, other than the allegation that he had no cap on, not given his description to the police. They had not even been asked if they would be able to identify any of the robbers. Besides that PW1 was a loader and PW2 was a sweeper and both of them were outside the building when the robbers posed as customers and walked into the building. In that situation we find it hard to believe that they would have been keen to observe the faces of all customers who went into the shop. PW3 who was the one robbed of the Sh.250,000/- said the whole exercise was too fast for him to have recognized any of the robbers.

In his evidence PW1 did not say that the Appellant talked to him and yet he is said to have recognized him *inter alia* by voice after three attempts. In the circumstances the purported identification of the Appellant by PW1 and PW2 cannot be relied upon.

For these reasons we allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

**DATED and delivered this 18<sup>th</sup> day of December 2007.**

**J. SERGON**

JUDGE

**D.K. MARAGA**

JUDGE