



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

Criminal Appeal 363 of 2002

PETER NAKALE LUGULAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with attempted robbery with violence contrary to **Section 297(2) of the Penal Code**. It was alleged that on the 10th day of January, 2002 at Nakuru Town the accused, jointly with others not before court attempted to rob Evans Odera Okello of his luggage and at or immediately before or immediately after the time of such attempted robbery wounded the said Evans Odera Okello. The appellant was tried convicted and sentenced to death. He appealed against the said conviction and sentence.

Before the trial court, the complainant, who was a student at a secondary school, told the court that on 10th January 2002 at about 7 p.m., he alighted from a bus carrying his bag. On his way home, he met three boys and one of them told him that he was being called by the others. He said that he did not know them and that the appellant and his colleagues pulled the complainant's bag. The complainant resisted and he was stabbed by the appellant with a knife. A lady screamed and members of the public followed up the complainant's assailant and arrested him. The complainant said that although he lost consciousness after the attack, he saw the appellant when members of the public took him to the hospital where he had been admitted. He said that he had not seen the appellant before and he saw him for the first time during the attack.

PW2, Police Constable Brian Nyakundi told the court that on 10/1/2001 he received a telephone call that there was a suspect who was being beaten by members of the public. He found the appellant unconscious and took him to hospital.

The appellant was placed on his defence but he elected to remain quiet. In his short judgment, the learned trial magistrate relied on the evidence of the complainant and a charge and cautionary statement allegedly signed by the appellant before PW3, one Inspector Mugandu where it was alleged that the appellant simply stated: "**YES I DID IT**".

The appellant submitted that PW1 did not sufficiently identify him as the person who attempted to rob him and alleged that he was arrested by members of the public as he was going to board a public vehicle.

Although during the trial the appellant said nothing in his defence, it is trite law that an accused person is not under any obligation to prove his innocence. It is for the prosecution to establish its case beyond any reasonable doubt. We are not satisfied that the prosecution discharged its obligation sufficiently. The complainant was attacked at 7 p.m. It was dark and if there was any light at the scene of the attack, that

was not stated. The complainant did not know the appellant. The appellant was arrested by members of the public after an alarm was raised. None of those people who effected the arrest was called to testify so that it could be established that indeed the appellant was the one who had stabbed the complainant and not otherwise.

PW2 went to the scene after he was telephoned by somebody whom he did not identify. He found the appellant having been beaten and was lying unconscious. He did not carry out any investigations to determine the exact circumstances under which he appellant was beaten and whether he was actually the one who had the knife which he collected at the scene. He should have dusted the knife to lift the finger prints thereon and try to match them with those of the appellant. He should also have summoned some eye witnesses. It is not uncommon for an innocent person to be beaten by members of the public in mistaken belief that he has participated in a crime when the actual perpetrators may have escaped. Before convicting such a person and sentencing him to death, it is for the prosecution to adduce watertight evidence to exclude any possibility of mistaken identity. We hold that there was no sufficient evidence to warrant the conviction of the appellant for the offence which he had been charged with.

Before we conclude this matter, one other issue which caused us some concern was that the appellant was 16 years old at the time of his trial and therefore he was a child by virtue of the provisions of the **Children's Act. Section 190(2)** of the said Act clearly stipulates that a child offender charged with murder cannot be sentenced to death even if he is found guilty. Section 191 sets out the various methods of dealing with a child offender.

It was therefore wrong for the learned trial magistrate to pronounce a death sentence against the appellant, even if he had found him guilty. However, we have already stated that there was no sufficient evidence upon which a conviction could be sustained. For reasons already stated, we allow the appeal, quash the conviction and set aside the death sentence that had been handed down. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 2nd day of February, 2006

D. MUSINGA

JUDGE

2/2/2006

L. KIMARU

JUDGE

2/2/2006