



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

**Criminal Appeal 83 of 2003**

**ONESMUS MUTUNGA NZUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**ONESMUS MUTUNGA NZUKI** was found guilty and convicted for one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. He had been charged together with another person of violently robbing the Complainant **KHRISTOPER KISILU**. The Appellant's co-accused was acquitted of the charge. The Appellant was then sentenced to death. It is against the conviction and the sentence that he now appeals.

The brief facts of the prosecution case were that the Complainant had argued at a bar with the Appellant who was his elder brother. Following the quarrel, their neighbour David, PW4, paid Kshs.300/- to the Appellant on behalf of the Complainant being slaughter house fees. Later that night PW4 and another found the Complainant lying on the road at about 11.00 p.m. They carried him to his butchery. The next morning PW2 found the Complainant critically ill in his butchery and helped take him to a doctor, PW5, **DR. MWANGI**, who saw the Complainant at Machakos Hospital in a coma and referred him to Kenyatta National Hospital for specialized treatment on discovering that he had a ruptured spleen.

The Appellant raised four grounds of appeal in his supplementary grounds which were that the Learned trial magistrate erred in finding that the Appellant was positively identified by the Complainant; that the evidence adduced by the prosecution was flimsy and could not sustain a conviction; that the charge was not proved and that the Learned trial magistrate erred in rejecting his defence on grounds that he failed to account for his whereabouts on the day of the incident.

The State represented by the Provincial State Counsel **MR. OMIRERA** conceded to the appeal.

We have carefully re-evaluated the evidence adduced before the lower court before drawing our own conclusions as we are mandated to do as a first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32**.

On the evidence of the Complainant being a single identifying witness the Learned State Counsel conceded that the court failed to warn itself of the dangers of relying on the evidence of a single identifying witness before convicting on it. That is not the only complication in this case. The Complainant's evidence was that he was at City Guest Bar drinking with friends including PW4. That his brother the Appellant together with the neighbour, the Appellant's co-accused were also there drinking.

That in the course of the evening the Appellant demanded fees for the use of the slaughter house which he said he did not have. That PW4 paid the fees for him in the sum of Kshs.300/-. That later he followed his brother, the Appellant, and his co-accused at about 10.30 p.m. to go home. That the two walked ahead of him before stopping after walking for a distance and attacking him. The Complainant claimed that the two hit him on his neck then kicked him in the stomach and back before stealing Ksh.4000/- from him. He said that he identified them with the moonlight.

The Complainant's evidence did not receive corroboration from other witnesses. PW3 who was the bar maid on duty at City Guest Bar that night contradicted the Complainant by saying that the Appellant walked out of the bar with the Complainant hand in hand on the fateful night. PW4, the other patron who was with the Complainant that night contradicted him further saying that the Complainant had left together with the Appellant but that the Appellant's co-accused was left behind. It would appear that according to PW3 and PW4, the Appellant and Complainant left together to go home. Yet according to the Complainant it was the Appellant and his co-accused who left together and he followed them from a distance.

If the Complainant's version of the evidence is to be believed, a critical issue arises which hinges on the circumstances of identification since the Complainant followed the Appellant and his co-accused at a distance, the nature and condition of the light at the time of incident should have been disclosed to enable the court decide whether or not there was sufficient light to enable a positive identification. All the complainant said was that there was moonlight. The Complainant did not say what enabled him to identify his assailants. We noted that the Complainant did not tell PW4, David, and his friend that he had been attacked when they found him lying down on the road. In fact according to PW4, he concluded that the Complainant must have been so drunk and decided to take him to his (the Complainant's) butchery, where the Complainant said he should be taken.

We also noted that the next morning when PW2 found the Complainant lying down at his butchery, all the Complainant said was that some thugs had beaten and robbed him. He gave no names by then.

Going by the Complainant's version of the events of that day, we find that the Complainant's evidence did not implicate the Appellant until much later on.

In MAITANYI vs. REPUBLIC [1988-1992] 2 KAR 75 at page 77 the Court of Appeal stated: -

***“There is a second line of inquiry which ought to be made and that is whether the Complainant was able to give some description or identification of his or her assailants to those who came to the Complainant's aid or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant the witness will usually be able to give some description.”***

In yet another earlier Court of Appeal case of TERE KALI & ANOTHER vs. REPUBLIC [1953] EACA it was held: -

***“Evidence of first report by the Complainant to a person in authority is important as it often provide a good test by which the truth and accuracy of subsequent statements may be gauged and provide and safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others.”***

Even though the later case dealt specifically with statements taken or given to a person in authority, the principle in that case is still applicable here. That is the statement made by a reporter or Complainant to the person in authority or the person who first goes to his aid, is very important as it provides a good test of the truth and or accuracy of the information. In this case we believe the test is applicable, not only to gauge the accuracy but most importantly the truth of the Complainant's evidence. We are convinced that the Complainant was not telling the truth about his injury. If as he claims he knew that the Appellant had beaten him up, he would have given his name first and foremost to PW4. PW4 would not have been

surprised because he had been with both of them earlier that evening. The fact that the Complainant never implicated the Appellant to PW4 the same night and to PW2 the next morning is a clear indication that either the Complainant did not know who attacked him or two that the Complainant was never attacked at all.

We have considered the possibility of the Complainant not being injured after an attack by any one for two reasons. The failure on the Complainant's part to come out clearly that he had been attacked by anyone at all until much later on. Secondly the doctor's finding that the injury was caused by a blunt object. The Learned trial magistrate stopped short of inquiring whether a fall on a blunt object may have caused similar injury. A fall was not far fetched considering that PW3 and PW4 thought that the Complainant was drunk by the time he left the bar on the fateful night.

Going back to the evidence of PW3 and PW4, if indeed they saw the Appellant leave with the Complainant on the fateful night then another issue arises. How far did the two of them walk together? It is relevant to consider whether the two walked together at all. In light of the Complainant's evidence that he walked alone following two people who he thought were his brother and his co-accused, the evidence of PW3 and PW4 taken alone would still not suffice to establish that the Appellant thereafter injured the Complainant. In our own assessment of this evidence the prosecution did not discharge its burden of proof that the Appellant either alone or with another injured the Complainant causing him serious injuries.

The other issue which arises from this evidence is whether indeed the Complainant was robbed at all. The Complainant said he lost Kshs.4,000/- during the attack. He did not say where that money was. Most important, it was because the Complainant had said to the Appellant that he had no money that the Appellant argued with him and insulted him that night. If the Complainant could not afford to pay the Appellant Kshs.250/- that same night where could the Kshs.4000/- have come from?

Even if we believe, which we do not, that the Complainant was beaten by the Appellant and critically injured, we are not convinced that the Complainant was at the same time robbed of any money.

The last ground of appeal raised by the Appellant was also supported by the Learned State Counsel, which is that the Learned trial magistrate shifted the burden of proof. The Learned trial magistrate at page J3 observed: -

***“Both accused person in their defence neither of the defence have failed to give evidence on what transpired on the night they were in the bar with PW1 neither of them has given an account of how they spent their time on the material day...”***

The paragraph is not too clear but we did not miss the Learned trial magistrate's finding on the defences given by the Appellant and his co-accused. That they did not account for their whereabouts on the fateful night. The Learned trial magistrate clearly shifted the burden of proof against the Appellant and his co-accused. Of greater importance is the fact that the magistrate proceeded to convict the Appellant and acquit the co-accused. If the Complainant's evidence (PW1) was believed that he walked behind the Appellant and his co-accused, how was the co-accused acquitted? The Learned trial magistrate considered the evidence of PW3 and PW4 to exonerate the Appellant's co-accused yet that evidence materially contradicted the Complainant's evidence.

Having carefully considered this appeal we agree with both the Appellant and the Learned State Counsel that the conviction was unsafe and can not be sustained from the evidence adduced. We allow this appeal and consequently quash the conviction and set aside the sentence. We order that the Appellant should be set at liberty unless he is otherwise lawfully held

Dated at Machakos this 5<sup>th</sup> day of April 2006.

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**D. ONYANCHA**

**JUDGE**

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**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

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**D. ONYANCHA**

**JUDGE**

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**LESIIT, J.**

**JUDGE**