REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL 116 OF 2002

BETWEEN

STANLEY MWITHALI MUNGANIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and order of Principal Magistrate's Court

at Maua (Mr. N. Kimani) dated 5.6.2002 in Criminal Case No. 2406 of 2002)

JUDGMENT OF THE COURT

Stanley Mwithali Mungania, the appellant herein was tried and convicted by the Principal Magistrate Maua (Mr. N. Kimani) on one count of robbery with violence contrary to section 296(2) of the Penal Code

The particulars of the offence were that on the 17th day of January 2001 at Maua Township in Meru North District within Eastern Province, with another not before court robbed Yusuf Sheikh Noor of cash Kshs. 38,850/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Yusuf Sheikh Noor.

The appellant, being dissatisfied with both conviction and sentence of the learned principal magistrate appealed against the whole judgment. The appellant set out nine homemade (9) grounds of appeal vide his Memorandum of Appeal (should have been petition of appeal) dated 20.6.2002. The grounds of appeal are:-

> 1. That the learned trial magistrate erred in law and fact in failing to direct his mind to the principles applicable in the hearing of a criminal case and thus arrived at an incorrect and erroneous judgment.
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> 2. that the learned trial magistrate erred in law and in fact to have misdirected himself to lay a conviction upon the accused on insufficient and incogent evidence.
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> 3. That the learned trial magistrate erred in law and infact to have misdirected himself and argued the case on behalf of the complainant and to have taken erroneous considerations into account and so acted on wrong principles of law to the prejudice of the accused. 4. That the learned trial magistrate erred in law and infact in not taking into account the effect of the difference in time and date between which the criminal act was perpetrated onto the complainant and the time and date on which the

complainant was admitted in hospital as part of the evidence.

5. That the learned trial magistrate erred in law and infact in considering the evidence of plausibility of the testimony of PW2 who was at the scene of crime at the time of the offence. 6. That the learned trial magistrate erred in law and infact in not taking into account the conflict and confusion of evidence adduced by the witnesses and the testimony of the complainant thus arriving at a completely erroneous judgment.

7. That the learned trial magistrate erred in law and fact in attaching undue weight to the evidence of positive identification of the accused person by the complainant and PW2.

8. The learned trial magistrate erred in law and infact in failing to appreciate the import of the evidence of PW2 to the effect that many people came to the scene of crime yet only the evidence of the complainant and his companion PW2 (both of Somali descent) led to proof of occurrence of robbery.

9. That the learned trial magistrate erred in law and fact in making findings that were against the weight of evidence.

The facts of the case can be briefly given as follows:- On 17.2.2001 at about 12.45am, the complainant Yusuf Sheikh Noor was walking home opposite the market. The complainant testified as PWI. Then two people attacked him with a panga and asked him to produce money. One of the two people held PWI while the appellant cut PWI on the right small finger. The appellant also removed Kshs. 38,850/= together with a calculator from PWI's coat pocket. PWI screamed attracting many people to the scene. PWI was then taken to Maua Methodist Hospital for operation. He was hospitalized for two days and on discharge he reported the matter to the police who issued him with a P3 from.PWI also testified that there was electric lighting at the verandah and that he also saw the appellant from close range. Later when PWI saw the appellant he made a report to the police who apprehended the appellant.

During cross-examination, PWI admitted that he did not know the appellant before but insisted that because of the presence of the electric lighting he was able to see the appellant quite well during the time of the attack.

PW2 was Yaro Adan Bashiri who testified that on the material day at about 12.45am, he was walking to Basin Hotel from the direction of Utility Bar. He was alone. At that time another man was walking about 10 metres ahead of him. PW2 then saw two men attacking the man who was walking ahead. PW2 hid at the municipal market. PW2 went on to state that one of the two men who launched the attack had panga. The walking man was ransacked. That it was the appellant who had a panga and that PW2 saw the appellant remove money, an ID card and calculator from the walking man's pocket. The walking man was PWI.

According to PW2's further testimony, the two men ran away, after which PWI screamed. Then PW2 came and saw PWI bleeding. PW2 administered first aid before PWI was taken to Maua Methodist Hospital. Then on 2.12.2001, PW2 saw the appellant at Maua Town and recognized him as PWI's assailant on 17.1.2001. PW2 then reported the incident to Maua Police Station, after which the appellant was arrested. When PW2 was cross-examined by the appellant, PW2 testified that he had never known the appellant before and that he did not even know him then though he insisted that it is the appellant who cut PWI. PW3, Police Constable Mohammed Abdi testified that while he was on patrol duties within Maua town on 3.12.2001 at about 9.00pm he received a report from PWI that PWI had identified his assailant of 17.1.2001. PW3 then arrested the appellant and charged him. No recoveries were made from the appellant. Pamela Kinaitore, a clinical officer from Maua Methodist Hospital gave evidence as PW4. She testified that on 18.1.2001 she examined PWI who informed her that he had been assaulted. On examination she found that PWI had a deep cut wound on the right writ. That such injury was caused by a sharp object. She produced the P3 form as an exhibit.

The appellant gave unsworn evidence. He called no witnesses. In his brief testimony, the appellant stated that he knew nothing about the charge against him and that he was arrested in Maua town where he had gone to sell miraa.

In his judgment, the learned trial magistrate found that the appellant had been positively identified by both PWI and PW2.The learned trial magistrate however, found as a fact that the complainant reported the robbery to police in December 2001 when PWI recognized the appellant at Maua Town. The learned trial magistrate also concluded that in light of the decision in John Ndungu v. Republic Criminal Appeal No. 116 of 1995, the prosecution had proved all the ingredients of the offence of robbery under section 296(2) of the Penal Code. The learned trial magistrate dismissed the appellant's defence as being a mere sham and unmeritorious.When the appeal came before us on 24.5.2005 for hearing, Mr. Oluoch who appeared for the respondent did not oppose the same on both conviction and sentence. The learned state counsel contended that though the complainant alleged that he was able to identify the appellant on the night of the attack, he (complainant) never made a report to the police about the robbery until 3.12.2001 when complainant allegedly spotted the appellant at Maua Market.

The learned state counsel also argued that the long delay between the time of the commission of the offence and the date when the robbery was reported was unexplained as no report of the robbery was made and that no evidence was adduced to prove or show that the appellant could not have been arrested for disappearing to evade arrest. We were urged to allow the appeal. Mr. Mwongela for the appellant submitted that the evidence on record was insufficient to sustain a conviction on such a serious charge. He also submitted that whatever evidence was available was so contradictory that the same should not be believed.

Though learned state counsel did concede the appeal, our duty as the first appellate court is to subject the whole of the evidence to a fresh and considered look with a view to determining whether the conclusions reached by the learned trial magistrate were sound or not and secondly therefore to be able to determine whether the decision made by learned state counsel to concede to the appeal is sound. S**ee Okeno V R (1972) E.A. 32**

We have carefully considered the evidence afresh. We have also carefully considered the nine grounds of appeal and submission made by counsel on either side.Putting all the circumstances of this case in perspective, we have reached the conclusion that it is true indeed that the conviction in this case was unsafe and should not be left to stand. A brief recap of the evidence given by PWI and by PW2 is contradictory in material aspects. PW2, whose evidence was said to corroborate that of PWI testified that when he saw PWI being attacked, he went and hid himself at the municipal market. In the same breath, he testified that he saw the appellant remove money and ID card and a calculator from the coat pocket of PWI. We have reached the conclusion that PW2 did not witness the alleged robbery and that his testimony is probably what PWI told him to say. Our view that PW2 did not witness the robbery is strengthened by further testimony of PW2 who stated in part:-

> **"That robbery took less than ten minutes. I came and saw PWI bleeding from the hand. I gave him first aid."**

What we are saying here is that PW2 came to the scene after the attack and found PWI bleeding.

Secondly, according to the evidence of PWI, the appellant cut him on the right small finger. On the other hand, the evidence of PW4, Pamela Kinaitore, the clinical officer was to the effect that PWI suffered a deep cut wound on the right wrist. This contradictory and inconsistent evidence can only be weighed in favour of the appellant.

The learned trial magistrate erred in both law and fact in making contrary findings. We have also found as a fact that PWI did not make a report of the robbery to the police as soon as it was practically possible to do so. PWI was released from hospital after two days, but he made no effort to report the attack. The time of robbery was 12.45am. Though PWI and PW2 alleged that there was electric lighting at the scene of the robbery the evidence did not come out clearly how close to the lights the attack took place.It was

therefore of utmost importance in such circumstances for a report to be made forthwith and a description of the suspect(s) given to the police.

No such reports were made until 3.12.2001 when the appellant was allegedly spotted by PW2 at 9.00pm at Maua Market. There was no evidence by PW2 as to any special features on the appellant that would have made a lasting impression on his mind as to make him pick out the appellant at a busy market town some ten months later. It is also not clear whether it was PW2 or PWI who spotted the appellant. According to PW3, it was PWI who spotted the appellant on the night of 3.12.2001 and made the report to PW3 who was on patrol duties within Maua Town.Yet according to PW2, it was PW2 who spotted the appellant at Maua Market on 2.12.2001 at about 7.00pm and reported the matter to the police who then arrested the appellant.

We entirely agree with learned state counsel and counsel for the appellant that the conviction against the appellant cannot stand on the strength of the available evidence.

In the result, we allow this appeal. We quash the conviction and set aside the sentence of death imposed upon the appellant. Unless otherwise lawfully held the appellant should be released from prison forthwith.

It is so ordered.

Dated and delivered at Meru this 29th day of June 2005.

D.A. ONYANCHA

JUDGE

29.6.2005

RUTH N. SITATI

JUDGE

29.6.2005