



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 493 of 2002

**(From original conviction and sentence in Criminal Case No. 500 of the
Chief Magistrate’s Court at Nairobi: J.N. Wanjala)**

UNKNOWN ADULT ALIAS WAMATHINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein, **UNKNOWN MALE ADULT ALIAS WAMATHINA** Criminal Appeal No. 493 of 2002, was charged for **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code and sentenced to death as prescribed by the law in Criminal Case No. 500 of 2002, in Chief Magistrate’s Court, Nairobi. The particulars of the charge were that: On 10/2/02 along River Road Nairobi, jointly with another not before court while armed with dangerous weapons namely Somali sword robbed **GLADYS MULAMU MUEMA** K.Shs.500/- and a watch all valued at K. Shs.950/- and at or immediately before or immediately after such robbery threatened to use actual violence to the said **GLADYS MULAMU MUEMA**. The appellant was convicted and sentenced to death, as by law required, and being dissatisfied with both the conviction and the sentence, has appealed in this court on the following grounds:

1. The lower court erred in both law and fact in not considering that the recognition was not supported by the first report.
2. The lower court erred in both law and fact by not considering that in the whole of the prosecution case there was no eye witness.
3. The lower court erred in not considering the contradictions in the evidence of P.W. 2 and P.W. 3.
4. The lower court erred both in law and fact by failing to consider the appellant’s defence of alibi.

At this stage, our considered view is that the appellant’s grounds can be reduced to three grounds. These are identification by a single witness; that the evidence was riddled with discrepancies; and the appellant’s defence and the lower court’s handling of the same.

Briefly, the prosecution case was as follows: P.W. 1 – the complainant – Gladys Mulamu Muema – was walking along Kirinyaga Road, Nairobi, at 6.30p.m. on the 10.12.01 when she met the appellant with

another person, not before court. The appellant stood behind her, and was armed with a Somali sword, while the other robber stood in front of her. P.W. 1 testified that the two robbers got hold of her, and the one standing in front took her watch, make Seiko, and her money. Both robbers told P.W. 1 to give them money and they took the money from her pocket; and her Identification Card. P.W. 1 further testified that the robber in front gave the other 200/- and the watch and he remained with 300/-. P.W. 1 was then told not to shout or she would be killed. So she never made any noise as the appellant threatened to stab her with the Somali sword if she did.

It was P.W. 1's testimony that both robbers started taking her to a back street, but as they did so, their action attracted some people. A watchman, not called as a witness, saw what was happening and when he tried to go there, one of the thugs ran away, leaving P.W. 1 with the appellant, who continued to pull her to the back street. By that time, the appellant was holding the Somali sword. P.W. 1 stated that the robber who took the watch and the 200/- was the one who ran away, leaving the appellant who had taken the 300/-.

P.W. 1 further stated that the appellant threatened people who tried to come nearer, saying he was going to stab P.W. 1 if they, the people, tried to go near him, the appellant. P.W. 1 stated that five people who were passing by saw what was happening, and when they tried to intervene the appellant pushed P.W. 1, who fell down, and by that time the police officers approached the scene and got hold of the appellant, who had raised his sword and was trying to stab other people who had intervened, but the police arrested him and recovered the Somali sword from him. The police officers also recovered three notes of Shs.100/- each, which the appellant was trying to chew.

P.W. 2 – P.C. Japheth Mambo – stationed at the Central Police Station, Nairobi, C.I.D. patrol base, told the court that at the material time he was on patrol along River Road with P.C. Lorkan, when they heard screams behind one of the buildings in River Road. As they approached the scene, they saw some people running away, and on inquiry they were told that there was a man armed with a Somali sword who wanted to cut the people with it. P.W. 2 and his colleague moved to the scene and saw the appellant returning the panga in his waist. P.W. 2 ordered the appellant to stop, but the appellant defied P.W. 2's order whereupon P.W. 2 drew his pistol and the appellant sat down. P.W. 2 then recovered the panga which the appellant had on his waist. Then P.W. 1 came forward and told P.W. 2 that she had been robbed of 500/- and a wrist watch.

P.W. 2 began searching the appellant and as they did so, they saw the appellant chewing something, and when P.W. 2 held the appellant's mouth, P.W. 2 told the appellant to open his mouth, he refused and P.W. 2 held appellant's jaws and forced his mouth to open. P.W. 2 saw 300/-, which he removed from appellant's mouth. The money was in 3 notes of 100/- each. P.W. 2 took the money and P.W. 1 to the Central Police Station, together with the appellant, the latter to be charged.

P.W. 3 – P.C. Rochard Lorkan – was with P.W. 2 and gave similar evidence as that of his colleague, P.W. 2.

In his defence, the appellant stated that the police officers planted the case on him and he saw, for the first time, P.W. 1 at the Police station in Office No. 10 when the police officer pointed at him as the one who had robbed P.W. 1. He stated that he was arrested at Kirinyaga Road when he was picking waste papers. He denied ever having the Somali sword, or being found with the Shs. 300/-.

We have carefully gone through the record from the lower court and re-evaluated the evidence in light of the grounds of appeal

We begin with the issue of identification, which is the appellant's first ground of appeal.

Our review of the evidence on record shows that whereas the robbery took place at 6.30p.m, the appellant was caught re-handed by P.W. 2 and P.W. 3, the two police officers who were on patrol at the material time and at the scene of the robbery, while the appellant was still holding P.W. 1 – the complainant – hostage. Upon arrest, the appellant was found with part of the 500/- which he had robbed

P.W. 1. The sword which he had used to threaten P.W. 1 with, was still in his hands. As the evidence of P.W. 2 shows, he had to pull out his pistol to force the appellant to surrender and stop threatening both the members of the public and P.W. 1.

While considering that the incident took place in the evening, we have no doubt in our minds that there was no break between the robbery and the time when the appellant was apprehended. Accordingly, the issue of identification cannot be contested. We reject this ground of appeal as unfounded and lacking in merit.

The next ground of appeal is based on alleged discrepancies in the prosecution evidence. This is with regard to the items found on the appellant when he was arrested, and particularly the sword.

Appellant contends that he was alleged to have had a sword, but a panga was produced as exhibit in the court. Our review of the evidence shows that whereas the Charge Sheet talks about a Somali sword, the witnesses talked of a panga. For example, P.W. 1, in her evidence, mentions the panga more than 7 times as the weapon used during the robbery. She also identified the panga produced in court as the one she saw being used by the Appellant. On Cross-examination by the appellant she stood her ground that the appellant was arrested with a panga. P.W. 2 – P.c. Japheth Mambo testified that **“they moved in and saw the suspect (appellant) returning the panga in his waist.”** He further stated that he was forced to draw his pistol when the appellant defied his (P.W.2’s) orders to surrender, and when the appellant sat down he **“recovered the panga which the appellant had on his waist....”**

This witness, P.W. 2, also said that earlier on, the people around the scene of the robbery told them – P.W. 2 and his colleague – that there was a man armed with a small sword. P.W. 3 referred to the weapon used as a Somali sword, twice, in the course of his evidence. Then, at the end he said **“this is the panga” which he put in as exhibit 1...”**

From the above evidence, our understanding is that the two witnesses – P.W. 2 and P.W.3 – seem to have used the words **sword** and **panga** interchangeably. This is clearly so especially with the evidence of P.W. 3 who testified that they saw a man holding a sword and went and arrested that man – the appellant – then he, P.W. 3, produced the weapon they found in the possession of the appellant, calling it a panga.

It is our view that whereas the two words – sword and panga – may technically mean different things, in the instant case, no injustice was occasioned by the use of the two words interchangeably. Whether a sword or a panga, the evidence on record shows that the weapon recovered from the appellant, which weapon was used by the appellant to threaten both P.W. 1 and the members of the public, is the same that was produced as exhibit in the court, and is the one P.W. 1 identified as the one-panga-used by the appellant in the process of robbing her.

Accordingly, we dismiss that ground of appeal as one without merit and substance.

The last ground of appeal is that the appellant’s defence was not considered. The defence was that he, appellant, was framed by P.W. 2 and P.W. 3, the arresting officers. The lower court considered the defence and rejected the same as hollow in light of the weight of the prosecution evidence.

We have found no basis for disagreeing with the Learned Magistrate’s conclusions and holding on the issue of the defence by the appellant.

All in all, and because of the above reasons, we dismiss this appeal, confirm both the conviction and the sentence by the lower court.

DATED and delivered in Nairobi, this 23rd day of June, 2005.

LESIIT J.W.

JUDGE

O.K. MUTUNGI

JUDGE