



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

**AT MACHAKOS**

**Criminal Appeal 3 & 25 of 2004**

**(From Original conviction (s) and Sentence (s) in Criminal Case No. 187 of 2002 of the Senior Resident Magistrate’s Court at Mwingi( Ondabu D.O. SRM)**

**MUSYOKA MAIMBA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**HIGH COURT CRIMINAL APPEAL 25 OF 2004**

**MUSYOKA MAIMBA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

The appellant Musyoka Maimba, was charged with the offence of robbery with violence Contrary to Section 296 (2) of the Penal Code. He was convicted and sentenced to death as provided by law. He appealed against the conviction and sentence.

The facts of the prosecution case, as we understand them, were that on 30/6/2001 the complainant was traveling home from Nuu Market when he was dropped at Kasese bus stage where he found his worker Mutua Nzeko, waiting for him. The time was 9.00 p.m. when they parked some luggage of various goods on a donkey and began walking home. A short distance ahead they met with the accused in company of two other people along the route. The donkey which got frightened, dropped the luggage (sugar) as the complainant flashed his torch to see what frightened the donkey. That is when he saw the person he concluded was the accused person and his colleagues. He asked what the accused wanted. Instead the accused raised his hand to hit the complainant with a stick. The complainant raised his hand to block the blow and was hit on his left hand last finger which got fractured. A second blow on the complainant’s head brought him down to the ground. Complainant screamed as the attackers proceeded to administer more blows. Appellant’s friend tried to stop him from continuing to beat the complainant but he continued to do so all over the body, until he became unconscious. The accused and his colleagues then removed complainant’s trousers and left him lying there. They stole the complainant’s cash of Kshs.31,950/= which was in his long trouser pocket. Meanwhile, the complainant’s worker had been

made to lie down all the time but threatened not to scream. Soon thereafter people went to the scene of robbery from where they tried to truck the attackers down without success. The following day the complainant was taken to hospital at Mwingi. On 27/9/2002 the Chief's Administration Police officers were allegedly dispatched to arrest the appellant but when he saw them he allegedly managed to escape. On 4/3/2002 the appellant was arrested and the process of charging and prosecuting him started. In the meantime the complainant's stolen trouser and the stick used to beat him were recovered at the accused's father's shamba. It was in the evidence that before the incident, the complainant knew the appellant well and that he clearly recognized the appellant during the robbery. PW2 who heard the complainant's screams and ran to the scene, testified that he saw the appellant escape after he saw the witness coming. He however claimed to have recognized the appellant through the moonlight although he could not identify appellant's colleagues. However, the complainant immediately reported that besides being beaten, he had been robbed.

The complainant's worker, Mutua Nzeko, PW3, who was in company of the complainant appeared to confirm and corroborate the complainant's testimony and also confirmed that it was the accused who managed and was in charge of the robbery. PW7, Mathew Muli of Nguni Police Post had on 4/7/2001 received the robbery report from the complainant, showing that the robbery had taken place on 30/6/2001. He was given a P3 which was later filled by a clinical officer Joseph Maluki, PW8 who established the complainant's injuries and classified them as grievous harm.

The appellant's defence was that on the material day he woke up, worked at his shamba and went to sleep in the evening. He called his wife as witness to confirm his story. He argued that if he had attacked the complainant who knew him that well, complainant should have led the police immediately after the attack to arrest him, and that the fact that he took several months to have him arrested confirms that complainant did not recognize or identify his attackers.

The honourable trial magistrate believed the testimony of the complainant, his worker, PW3 and PW2 Mbuvi, who answered the complainant's screams. He believed that there was adequate moonlight and torch light to enable the witnesses to recognize the appellant. He accordingly decided that it was safe to convict.

We have carefully re evaluated the evidence in this record. The complainant stated that when he reached the scene of attack and his donkey threw down the goods it carried for being started, he flashed his torch and saw the appellant whom he knew well. He talked to him before the appellant turned on him with the help from his colleagues and thoroughly beat him. He also said there was moonlight which helped him to recognize the appellant. What is strange about this is that the complainant failed to reveal the identity or his attacker to the people who came to help him when he screamed. He claimed in his evidence that this was his secret. There is also the fact that although he soon received medical treatment he failed soon thereafter to make any effort to have the appellant arrested. The complainant tried to explain this lack of interest upon the ground that the appellant escaped from home until several months later when he was to be arrested. However there is no evidence on the record that complainant even visited the appellant's home and missed him soon after the attack. Furthermore, even the first report to authorities did not take place until a period of five or so days after the attack. We have considered this piece of evidence as did the honourable trial magistrate. We have however come to the conclusion unlike the trial court, that for a person who was that seriously beaten and who knew the attacker well, it was very unlikely that he could simply withhold his identity that long. The likely situation is that he did not recognize the people who attacked him and he had to take time doing consultations or exchange guesses until he later settled on the appellant. PW3, Mutua Nzeka, in our view did little in his testimony to help. He claimed that the complainant gave out to those who came to help, the name and identity of the appellant. This is in contradiction to the complainant's version that he deliberately kept the information close to his heart. This being a case where conviction depended on identification and the latter having failed, the conviction would be unsafe to be left standing.

On the other hand, the fact that the complainant's trouser was recovered on the appellant's father's shamba, was not link close enough to connect the appellant to this offence. We attach little weight to this evidence which we dismiss as too remote.

For the above reasons, we hold that there was no adequate evidence upon which the trial magistrate would base a conviction. The conviction herein is therefore unsafe and cannot be left to stand. It is hereby quashed and the sentence of death set aside forthwith. The appellant is hereby set at liberty from prison unless otherwise lawfully therein held. It is so ordered.

Dated and delivered at Machakos this 20<sup>th</sup> day of December, 2005.

**D. A ONYANCHA**

**JUDGE**

**J. LESIIT**

**JUDGE**