

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 445 OF 2002

**(From Original Conviction and Sentence in Criminal Case No. 1085 of 2002
of the Chief Magistrate's Court at Mombasa J. Oseko, SRM)**

MOHAMED MWALIMU APPELLANT
- Versus -
REPUBLIC RESPONDENT

RULING

The Appellant was charged with robbery with violence contrary to Section 296(2) of the Penal Code. It was alleged that on the 21st day of April 2002 at about 6.30 a.m. at Mwandoni Retail Shop of Mombasa District within Coast Province jointly with others not before the court robbed Simon Ayoyi a weighing machine, weighing stone and cash of Sh. 500/= all totaling to the value of Sh. 16,000/= and at or immediately before or immediately after the robbery used or threatened to use actual violence on the said Simon Ayoyi. The Appellant pleaded not guilty but after trial he was convicted and sentenced to death. He has appealed against the conviction and sentence.

At the hearing of the Appeal Miss. Mwaniki, learned State counsel, conceded the appeal but sought a retrial. She submitted that there was ample evidence against the Appellant and that the witnesses are available and can be called to testify. The Appellant on his part stated he knows nothing about this case.

The Appellant appeared in court on the 29th April 2002 before R. Ndubi Resident Magistrate who took the plea. Under the Criminal Procedure Code an offence of robbery with violence under Section 296(2) is triable by a magistrate of the rank of Senior Resident Magistrate and above. As a plea is an integral part of the trial, the Appellant's trial was therefore a nullity. We allow this appeal set aside the conviction and sentence.

The State has asked for a retrial. A retrial is normally ordered when the original trial was either defective or illegal and when the interest of justice so demand. In this case the Appellant in the company of about 10 other people is alleged to have confronted the complainant as he opened his shop at about 6.30 a.m. and while pointing a knife at him robbed him of cash of Sh. 500/= and a weighing machine and a weighing stone. After about two hours the Appellant went back to the complainant's shop and asked if they had been robbed. He was wearing the same clothes he was in earlier on. He was properly identified by P.W.2 and P.W.3 who knew him as a local matatu tout they used to see around.

After carefully perusing the record we are satisfied that the Appellant was properly identified and there is evidence against him. In the interest of justice we accordingly order that the Appellant be retried by another court of competent jurisdiction.

DATED THIS 14th day of June 2004.

J. MWERA

JUDGE

D.K. MARAGA

AG. JUDGE