REPUBLIC OF KENYAIN

THE HIGHT COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.166OF 2003

(From the original suit no 2119 of 2001 of senior principal magistrate'scourt

at machakos)

ALEX MUTUA MUTISYA ……APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

J U D G E M E N T

The appellant Alex Mutua was charged in CRC 2119 of 2001 before Senior Principal Magistrate's court Machakos. He was jointly charged with one Mutinda Munyao for the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code.

The 1st accused in the lower court faced another charge of possession of public stores contrary to section 324(2) of the penal code. After the magistrate heard the case, he convicted both appellant and 1st accused for the first charge and they were sentenced to suffer death as per law provided. The appellant who was the 2nd accused in that case is dissatisfied with the said conviction and sentence and filed an appeal. His petition of appeal contains five grounds of appeal which can be summed up as there not being sufficient evidence upon which the appellant was convicted. Briefly stated the case in the lower court was that PW1 and PW2 were asleep in their employer's house at Kavumbu Village, Machakos District when at about 2.00a.m. they heard dogs barking. PW1 went to the toilet while armed with a bow and arrow. He saw people flashing torches when he was in the toilet. PW1 heard an explosion. Meanwhile PW2 remained in the house and he said that the people entered the house and opened fire.The people enquired from PW2 the whereabouts of PW1 and PW2 told them PW1 was in the toilet. As the people moved to the toilet PW1 shot one with the bow and arrow and the people fled. The next morning at 6.00 a.m. they started following the direction of the trail of blood from the injured person. They found the arrow which was blood stained first, then later found a blood stained sweater which PW5 who was with PW1 and 2 identified as that of Mutinda. They went to report at Masii police post when they learnt that a person who was injured was at the chief's camp. The witnesses found the accused 1 Mutinda at chiefs camp who had a bleeding wound. He had worn another sweater and shirt which were all blood stained. Mutinda claimed to have been with the appellant.PW1, 3, 6 went to the appellant's house where he was sleeping. Nothing was recovered but appellant led to the recovery of an explosive device which was hidden underground and he dug it out. It was produced in court as exhibit 5. The appellant in his defence said he was sick in bed on the date of his arrest when Assistant chief and Police Corporal found him in his house, His house was searched and nothing found.

The evidence against the appellant was circumstantial. Pw1 and 2 did not see or identify any of the assailants. It is after the appellant's arrest that he allegedly led to the recovery of an explosive device. It was not clear from the prosecution witnesses whether the device was found in the appellant's house or in a bush outside his house.

It was the prosecution evidence that something exploded or was fired at the house where PW1 and 2 were attacked. The court was not told what it was. Whatever device that was allegedly recovered from the appellant was produced in court as exhibit no. 5 but there is no nexus between that device and what was fired or what exploded at the house were PW1 and 2 were attacked. The device was never examined by an expert to confirm whether it was an explosive or not. In considering circumstantial evidence the court

of appeal had this to say in the case of **JAMES MWANGI VERSUS REPUBLIC 1983 KLR 327**:

> *"In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

In the present case we find that there is no link between the alleged offence and the appellant. After carefully re-evaluating the evidence adduced we find that the offence was not proved beyond any doubt and the conviction was unsafe and should not be allowed to stand. We accordingly quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, read and delivered at Machakos this 15th day of July 2004.

J. LESIIT

JUDGE

R. WENDOH

JUDGE