



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL 36 OF 2003**

**ROBERT MWACHAI ..... APPELLANT**

**Versus**

**REPUBLIC ..... RESPONDENT**

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

Sudi Robert Mwachai, the Appellant, was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on the 22nd day of August 2002 at about 3.00 a.m. at Kisauni area in Mombasa District within Coast Province the Appellant jointly with others at large robbed Samuel James Mangi cash Sh. 450/= and national ID card and at or immediately before or immediately after such robbery they used actual violence to the said Samuel James Mangi. He pleaded not guilty but after trial he was convicted and sentenced to death. He has appealed against both the conviction and sentence.

In his written submissions the Appellant attacked the evidence of P.W.1 and P.W.2 on his identification and said that it should not have been relied on. He also said that the evidence of the two witnesses contradicted each other.

P.W.1 said that when he was attacked he raised an alarm and vigilante group who answered his distress call chased and arrested the appellant about 40 metres away. He never made mention of P.W.2 going to his aid and hunting him. P.W.2 on the other hand said that in answer to P.W.1's distress call he went to his home and saw two people whom he chased and untied P.W.1. That after a while the vigilante members went there and he gave them the Appellant's name and they went to look for him. The Appellant further stated that the evidence of his arrest was also contradictory. P.W.1 said he was arrested after being chased for 40 metres while P.W.3 said they arrested him after about 30 minutes while standing outside somebody's house. The Appellant also attacked the credibility of the complainant P.W.1 wondering what he could be doing on his verandah at 3.00 a.m.

In response the learned State Counsel submitted that the prosecution proved its case beyond reasonable doubt. She submitted that the Appellant was arrested soon after committing the offence and that the alleged grudge which he said P.W.3 and other vigilante members bore against him was a figment of his imagination and an afterthought. She urged us to dismiss the appeal against both conviction and sentence. We have carefully considered the evidence tendered before the trial magistrate. According to P.W.1 when he was attacked and he raised an alarm the first people to go to his aid were the vigilante group who chased his attackers and managed to arrest the Appellant about 40 metres away.

P.W.2 who said he even untied him did not feature in his evidence. According to P.W.2 he was the first person to go to P.W.1's rescue and that the vigilante group went there afterwards. He gave the Appellant's name to them as one of the people who robbed P.W.1. They went away returning with him after a while. He did not talk of the group chasing and arresting the Appellant 40 metres away.

P.W.3, a member of the vigilante group testified that when they left P.W.1's house they followed the attackers and found Appellant standing outside someone's house and arrested him. That does not sound true. How could Appellant who had allegedly attacked and robbed P.W.1 and knowing he was being sought after stand outside someone's house at 3.30 a.m. We found that rather curious and tend to agree

with the Appellant that the evidence leading to his arrest cannot be true. This together with the contradictions in the evidence of P.W.1 and P.W.2 has left doubts in our minds as to the guilty of the Appellant. The benefit of that doubt has to be given to the Appellant. For these reasons we find that the conviction of the Appellant is unsafe and cannot be left to stand. We therefore allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. DATED and delivered this 9th day of November, 2004.

**J. MWERA**

**JUDGE**

**D.K. MARAGA**

**AG. JUDGE**