



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 962 OF 2001

(From original conviction (s) and Sentence(s) in Criminal case No. 8060 of 2000 of the Senior Principal Magistrate’s Court at Kibera (Ms. Mwangi-P.M.)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 963 OF 2001

(From original conviction (s) and Sentence(s) in Criminal case No. 8736 of 2000 of the Senior Principal Magistrate’s Court at Kibera (Ms. Mwangi-P.M.)

ROBERT MUKWANA MASINDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

JAMES NJUGUNA GITAU and ROBERT MUKWANA MASINDE (herein after referred to as the 1st and 2nd Appellant) were convicted of one charge of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the Penal Code. Each was sentenced to death as prescribed under the law. They were both aggrieved by the conviction and so lodged these Appeals. Their Appeals have been consolidated for ease and having arisen out of the same trial.

The facts of the Prosecution case were that on 30th September 2000 at Dagoretti Corner, Nairobi, the Appellants together with their co-accused, and others not before court robbed the Complainant of 65 tyres and three sports rims. They were alleged to have been armed with pistols at the time of the robbery.

The learned counsel for the Respondent, **MRS. TOIGAT** submitted that the state was conceding to the Appeal on grounds that the evidence was insufficient to sustain the charge.

The first issue raised by the Appellants in their Petitions of Appeal is that of the identification on two points; that is the identification of the Appellants themselves and also that of the tyres allegedly recovered in their possession, the same night the offence was committed. **MRS. TOIGAT** submitted that the Appellants were not identified as among those who robbed the Complainant of his goods. That further the tyres identified by PW2 as those he had bought were never verified by the Prosecution to be his. She submitted that PW2’s evidence lacked the basis of identifying the tyres as his.

The Complainant in this case was the watchman who guarded German Tyres Shop at night. The owner of the shop was PW2. PW1’s evidence was that at about 1.00 a.m., he saw a group of 26 people approaching. He blew his whistle and one **MATHENGE** was shot in the arm and injured. The Complainant said that a neighbour raised an alarm. In the meantime the group broke into the shop and took 65 tyres. He said that police eventually came, and a search conducted in nearby houses led to the recovery of three tyres. PW2 identified the tyres as his. In his evidence, all he said about their identity was: -

“These are tyres from firestone. They are in the batch of our purchase.”

We have re-evaluated the entire evidence adduced by the Prosecution. Nowhere was any document adduced in court in which the batch referred to by PW2 was cited. If indeed the tyres had batch numbers, that evidence was vital in order to establish that the recovered tyres were among those stolen from PW2’s shop. Since no such evidence was adduced, the Prosecution failed, in our view, to bring any nexus between the tyres stolen from the Complainant and those recovered from the Appellants. On that point, we agree with **MRS. TOIGAT** for the State, and also with the 2nd Appellant, that the tyres were not properly identified as those stolen from PW2’s shop.

The Appellants were also not identified by PW1, the Complainant herein as among the 26 men who broke into the shop and stole from it on the material night. The only evidence against them was therefore that of the recovery of the 3 tyres. That evidence is inadequate to sustain the conviction on the grounds we have demonstrated above.

Even without considering the other issues raised in this Appeal, the one on the identity as discussed above is sufficient, in our view, to conclude this Appeal. We are in agreement that the conviction entered herein was unsafe and should not be allowed to stand. We accordingly quash the conviction, set aside the sentence and order that the Appellants should be set free unless they are otherwise lawfully held.

Those are the orders of this court.

Dated at Nairobi this 7th day of December 2004.

LESIIT

F. A. OCHIENG’

JUDGE

Ag. JUDGE