



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 335 OF 2001**

(Being an Appeal against Conviction and Sentence by the Senior Principal Magistrate's

Court at Malindi in Criminal Case No. 1728 of 2000 – J. Manyasi – S.P.M.)

**MWALILI CHARO KOPLO ..... APPELLANT**

**- VERSUS -**

**REPUBLIC ..... RESPONDENT**

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

The Appellant MWALILI CHARO KOPLO was charged and convicted for the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. He has preferred an appeal on both Conviction and Sentence.

The brief facts of the case as they appear in the proceedings, are that on the 8.9.00, KALUME KATANA TSUMA (PW1) had received payment of Kshs.30,000/= in cash from his lawyer at Kilifi. He then proceeded to Malindi in the company of his brother KAHINDI KATANA TSUMA with an intention to put the said money in the Bank. Unfortunately he found the Bank had closed and they decided to go home. Before they reached home they parted ways at around 6.00 p.m. and PW1 decided to have a drink of Mnazi (Palmwine) at a place where the appellant used to sell it. After a while however the mnazi (Palmwine) ran out and the other customers left. By then SULTAN DADI, DW1 who was Appellant's employer had arrived. He testified that PW1 had called the Appellant aside and gave him a Kshs.1,000/= note to pay for his drink and that the Appellant had given him change of Kshs.960/=.

According to PW1, he left to go home while Appellant and DW2 left together going to different direction. Before he reached his home, he said he saw the appellant walk past him only to stop ahead to answer a call of nature.. PW1 talked to him but he did not answer and it was while he continued walking that he was hit with a Rungu from behind his arm twisted and he fell. A struggle ensued and in the process PW1 managed to wrestle the Rungu from his assailant. In the process he said he had bitten his assailant's finger prompting the assailant to punch his mouth and he lost 4 teeth. In the process his money identity card and photographs were taken, PW1, then proceeded to go home and woke up his brother; PW2 and narrated that he had been attacked by the Appellant. Together they went and reported, the matter to the Chief, William Charo Karisa (PW4), and the events of the attack narrated. PW1 told him he was attacked by the Appellant. The next day PW4, instructed PW3, Gabriel Mtowah Kiti Yaa a youth winger to arrest the Appellant. He did not see him until the 10.9.2000. On his arrest PW3 and PW4 saw, noticed that he had an injury on his finger as PW1 said he had bitten his finger. Appellant said the injury had been caused when he was hurt by the bicycle as he went to collect palmwine. He was then handed over to OC Gilbert

Sang of Malindi C.I.D. Headquarters and charged with the offence.

In his appeal, the appellant has raised 7 grounds. He submitted firstly that the charge was defective in that it did not meet the requirements/ingredients of a charge under 296(2). It failed to describe the weapon as dangerous. The state in response conceded that the evidence did not support a charge under Section 296 (2) but one under Section 296 (1) and urged the Court to alter the sentence accordingly.

The Appellant also challenged the identification. This was by recognition by a single witness. PW1, in his evidence says he saw Appellant walk passed him but he, the appellant refused to answer when he spoke to him. In a short while he was attacked and a scuffle ensued. PW1, says it was at night and there was moonlight. However the intensity of the said moonlight was not described and neither did PW1, give further details or description of his assailant such as height or colour or type of clothing. He just reported to his brother and the Chief that it was Appellant who had attacked and robbed him off his money. PW1, said he had been drinking palm wine while his brother, PW2 said he, PW1 was drunk.

In his defence Appellant said he had accompanied his employer DW2 home where they ate their supper and later went to bed after listening to the 9.00 p.m. Radio news. This was corroborated by the evidence of DW2. Apart from the time Appellant went to have a bath, he was with DW2 and even then there was no evidence to show that the offence may have been committed between the time Appellant went to have a bath and when he returned to join DW2.

There was neither an attempt to show how far away PW1 was attacked from the Appellant's home.caused by the Bicycle as he alleged.

We have evaluated the evidence as adduced before the trial court and find that identification which is crucial was doubtful. And in the absence of any other circumstantial evidence to connect the Appellant with the said crime we find it was not safe to arrive at a conviction. In the circumstances, the Conviction is hereby quashed and the sentence is set aside. The Appellant shall be set free forthwith unless held for other lawful reasons.

**Dated and Delivered at Mombasa this 4th day of April, 2003.**

**J.W. ONYANGO OTIENO**

**JUDGE**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**