

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 171 OF 2002

(Being an Appeal against Conviction and Sentence in Criminal Case No. 550

of 2001 by the Senior Resident Magistrate's Court at Mombasa – J. Oseko)

MWANZIA NZAU APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

The Appellant was charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code in the main charge and with Handling Stolen Property Contrary to Section 322(2) of the Penal Code in the Alternative charge. At the end of the trial the court Convicted him on the main charge. He has preferred an Appeal which mainly is based on the identification and arrest.

On identification he submitted that the Court failed to find that the prosecution had not described the light to ensure there was no mistake. The evidence by the victims PW1 and PW2 is that when they were woken up by the noise of the attackers breaking the main door, PW1 did switch on lights. He describes the lights as that from a fluorescent light and PW2 did confirm in her evidence that indeed PW1 did put on the lights. The attackers then entered and PW1 noted that they were armed with pangas and iron bars and he was hit on the head by one and asked to lie down. Instead he sat down looking straight at them. PW2 too saw 4 men enter the room armed with pangas, and rungus and one had a stone. One hit her on the right knee and thigh twice and asked her for money. She too said she didn't lie down and was looking at them as they searched the room and they took cash of Kshs.120,000/-, a TV, Video grandar. Both witnesses said the incident took a while as PW1 put it as between 10 – 15 minutes while PW2 said it was about 15 minutes. After this the people ran away as neighbours had gathered outside and gave chase arresting the appellant and PW1 went to the place where he was arrested and confirmed he was one of the attackers. This is according to the evidence of PW5, PC. George Ogolla the investigating officer. In Crossexamination by the appellant, the officer said there was no need of an identification parade as the witness PW1 had identified the appellant on his arrest PW3, HAMISI, was a neighbour to PW1 and PW2 and had heard the noise or alarm by them saying there were thieves attacking them. He went to their house and other members of the public too joined in. The thieves had left when he arrived but he and other neighbours sounded the general area towards which they had escaped and searched. A little ahead above 50 meters from PW1's house he saw someone carrying a heavy object and he followed slowly and when he got near him he lit a torch and asked him what he was carrying. The person said it was a Video machine and witness raised an alarm and others came to help him and arrested him. They handed him to the police who had arrived at the scene of arrest. On searching the area they found a sack and inside was the T.V. and grinder. The witness said he never lost sight of the person whom he identified as the appellant.

The State Counsel in his submissions said even in the absence of an identification parade, there was enough evidence to warrant a Conviction as he was found in possession of the stolen items. There is evidence to show there was adequate light and that the appellant was arrested soon after carrying some of the stolen items. PW1 identified him at the scene of arrest and the items found in his possession, that is

the video. He never laid a claim on the Video as his and therefore we find an identification parade would not have been of any meaningful effect as PW1 had already identified him. As to the issue of PW1 and 2 failing to give the police the description of attackers, it is clear from evidence that the appellant was arrested immediately thereafter and the police had on arrival at the victims home been informed someone had been arrested in the vicinity and they did proceed there. It is true the victims didn't describe their attackers but from sequence of events, it does not show the opportunity had arisen for them to say so. The police took a short while and rushed to the scene of arrest and recovery of stolen items. The arrest of the appellants moments after the offence was committed within the vicinity by neighbours who mounted an immediate search and the fact of him being found carrying one of the stolen items and others recovered at the scene of his arrest points to the appellant as one of the attackers. He gave an unsworn defence. He said was arrested on his way to work at 5.00 A.M. but the evidence on record by PW1, PW4, PW5 give the time of the incident as around 3.30 A.M. The Appellant did not give an account of his movements between 2.00 A.M. and 4.00 A.M. on material night.

We have considered the evidence on record and find there was sufficient evidence to warrant a Conviction and find no good reason to interfere with the same. The end result is that the appeal is dismissed.

Dated and Delivered at Mombasa this 29th September, 2003.

A.G.A. ETYANG

J U D G E

P.M. TUTUI

COMMISSIONER OF ASSIZE