



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 113 'A' OF 2001**

*(From the Original Conviction and Sentence in criminal case  
No.614 of 1999 of the SRM Magistrate's court at Kangundo)*

**JOSEPH MWANZIA MULWA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**

**IN THE HIGH COURT**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 113 'B' OF 2001**

**REGINA MUTUA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT OF THE COURT**

The two appellants in this case namely JOSEPH MWANZIA MULWA and REGINA MUTUA were convicted by the Senior Resident Magistrate Kangundo one Mr. Nyamweya with one count of robbery with violence contrary to section 296 (2) of the Penal Code. The other three accused persons were acquitted for lack of evidence while the appellants herein who were the 2nd and 5th accused persons in the original trial were convicted and sentenced to death. Being dissatisfied with the conviction and sentence both accused persons filed separate appeals which were later consolidated and argued in this appeal (Machakos High Court Criminal Appeal Case No.113/01).

In the petition of appeal filed by the 1st accused person he raises 8 grounds of appeal. The petition of appeal was drafted by C.M. Ndolo & co. Advocates. The petition of appeal in respect of the 2nd appellant was drawn by the 2nd appellant in person and cites six grounds in support of the same.

In the case of the 1st appellant his first ground of appeal is that no medical evidence was adduced to support the case of robbery while the 2nd ground relates to the burden of proof where the appellant claims that the learned SRM shifted the burden of proof to the (him) appellant. The third ground relates to the issue of identification and recognition where the appellant argues that; that issue was not given adequate

attention by the trial Magistrate. The fourth ground touches on the issue of contradictions in the prosecution's case while the fifth and sixth grounds relate to the issue of benefit of doubt in the prosecution's case which the appellant argues ought to have been given to him.

In the seventh ground the 1st appellant argues that the evidence of the prosecution was unreliable and unsafe to be relied on to support a conviction.

The 2nd appellant takes issue with the trial in that her identification by voice was doubtful. She also quarrels with the length of time the prosecution took before her arrest.

Both appellants argued this appeal in person and also presented written submissions in support of their appeals. We have perused those submissions.

Mr. Orinda supported the 1st appellant's conviction but not the 2nd appellant's. He correctly argues that it was unsafe to convict the 2nd appellant while the only evidence supporting her conviction was her identification by voice only. I agree with Mr. Orinda's observations on the issue of identification by voice and the inherent dangers posed in relying on such evidence.

The 1st appellant has argued that the complainant should have given out his name in his first report to the police if it is true she had recognised him. He argues that since he continued meeting the complainant long after the robbery he does not understand how the complainant did not have him arrested. He also argues that no investigating officer ever testified. He also argued that his defence was never considered by the trial magistrate.

We have considered the 1st appellant's submission carefully. We have also considered the evidence of the complainant in the lower court. She claims to have identified the 2nd appellant through torch light. She says that she put the torch on and saw him through a glass door. The torch light was not therefore shining directly to the 2nd appellant.

She admits that she did not give his name to the police and that though she told the police she could identify him she was told to wait for a while by the police before they arrested him.

Although she claims that the 2nd appellant was her neighbour and was able to recognise him easily it should be noted that her husband who was in her company did not recognise or identify the same second appellant yet the lighting was the same and the surrounding circumstances the same. There is no other evidence available on the record of the lower court which connects the 2nd appellant with the robbery of the complainant. It should be noted that the complainant (PW2 in the original trial) did not even identify his assailants.

We are therefore not satisfied that there was adequate evidence to implicate the 2nd appellant with the charge. Given the artificial lighting with which PW2 purported to identify the 2nd appellant it was only necessary that the evidence of complainant (PW2) be corroborated by some other independent evidence.

We therefore find that the 2nd appellant was not properly identified as the person who robbed the complainant herein beyond any reasonable doubt. We therefore allow the 2nd appellants appeal against his conviction and sentence.

In essence we set aside the conviction and sentence imposed on the 1st and 2nd appellants in this case and order that both be set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated and delivered this 4th day of February, 2002.

R. NAMBUYE

JUDGE

R.M. MUTITU

JUDGE