

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEALS NOS. 107, 108, 109 OF 2001

APPELLATE SIDE

(From Original Conviction and Sentence in Criminal Case No.

704 of 2000 of the Senior Principal Magistrate at Machakos)

NICHOLAS MUTINDA MUTAVA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT OF THE COURT

The appellants in Machakos Criminal Appeal Nos.107/2001, 108/2001 and 109/2001 had their appeals consolidated and heard under Machakos Criminal Appeal Case No. 107/2001. The three appellants namely NICHOLAS MUTINDA MUTAVA (Cr. App. 107/2001), PAUL MUTHEE MUSYOKA (Cr. App. No. 108/2001) and SHADRACK MUTINDA MAINGA (Cr. App 109/2000) filed their appeals because they were dissatisfied with the conviction and sentence meted out to each of them in the Senior Principal Magistrate's Criminal Case No.704/2000 which was presided over by the Senior Resident Magistrate, Machakos, Mr. Soita, Esq. The original 8th and 9th accused persons who are now the 3rd and 2nd appellants were convicted and sentenced to death in respect of count three while the 5th accused (who is now the 1st appellants) was convicted and sentenced in death of count four. The other accused persons were acquitted at different stages.

The three appellants submitted their petitions of appeal and each filled written submissions to support their appeals. The question of identification features prominently as a ground of appeal in each of three memorandums. Another ground relied on by the three appellants is that the prosecution case was riddled with a lot of doubts because of the contradictions created by the prosecution witnesses. The three appellants have agreed that they were entitled to being given the benefit of doubt. The 3rd appellant took issue with the failure of the trial Magistrate to consider his alibi defence. We have noted that the state counsel Mr. Orinda did not support the conviction and sentences handed down to the three appellants. We agree with him that the prosecution's evidence did not support the question of the identification of the three appellants properly.

In the circumstances we are in agreement with the learned state counsel that the conviction and the sentences handed over to the three appellants are incapable of being sustained. We therefore quash the convictions and set aside the sentences handed down to each of the three appellants in this case.

We order that the three appellants be set at liberty unless they are otherwise lawfully held. Orders accordingly.

Delivered, dated and signed in open court this 4th day of February, 2002.

R. NAMBUYE

JUDGE

R.M. MUTITU

JUDGE