



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO.164 OF 2000**  
**(From Original Conviction and Sentence in Criminal Case No. 1950 of 1999  
of the Chief Magistrate’s Court at Mombasa)**

**GABRIEL MWAVULA MALASI .....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) in two counts in that jointly with others not before the court armed with dangerous weapons namely pistols robbed Kalu Kithi Kalu and threatened to use kill or shoot the said Kalu Kithi Kalu and also in similar manner robbed Geoffrey Mwendeta Maseno. On 12-3-1998 before the hearing of the appeal the appellant applied for production of proceedings on criminal case No. 2031 of 1998 in the Chief Magistrate’s court at Mombasa being Republic –versus- Alex Juma Mwadime. This was done with leave of this court.

The said proceedings relate to another criminal prosecution regarding the same robbery. The witnesses into that case were same people in this trial.

The charge sheet shows that the offence was committed on 12-3-98 while the appellant was arrested on 7-6-1999. He was brought to court on 25-6-1999.

The reason of delay in arresting the appellant with this offence is to be seen in the evidence of PW5 IP. Kingi who said that on 18-6-98 he was taking statements from one Alex Juma Mwadime alias Jimmy Kazungu who had been arrested (in connection with the criminal case 2031 of 1998 aforesaid) and in course of taking statement he said Alex mentioned Gabriel and gave description of Gabriel to him. Inspector Kingi was told that the appellant had been arrested and had been suspected to be among the robbers who committed robbery at General Cargo Services.

Inspector Kingi charged the appellant with the offence. The appellant was not found with anything when arrested.

The appellant amended his grounds of appeal and complaints that the visual identification by PW2 and PW3 was not satisfactory. And that the identification parade was prejudicial to him. And that the evidence on how he was mentioned by an accused in that other case was not considered nor was the source of his arrest. And also that his defence was not considered and the case was not properly investigated. On the issue of identification at the scene the appellant was not identified by PW1.

However, he was later at the parade on 23-6-99 identified by PW2 who said that the appellant is the one who said “leteni pesa”. The appellant was also identified by PW3 – a guard who was guarding in front of the door where the other witness were with money. PW3 said a white Toyota vehicle KAJ 785R stopped and two men got out. They said to him “we went to see the boss”. He asked them what they wanted to do. They continued walking. He held one who pushed him, produced a pistol and pointed it at him. The second man also produced a pistol. They ordered him to lie down. They proceeded towards the office. He said he talked to the robbers for 5 minutes. This witness was able to identify two men one of them being the appellant whom he identified during an identification parade on 23-6-99.

We find that the circumstances surrounding the scene were very satisfactory for identification. It was

during day light. The guard PW3 had very good opportunity to identify the robbers. He exchanged words with them for five minutes. He tried to prevent them physically from entering the office where the money was. They pushed him aside pointed pistol at him and ordered him to lie down. He was a guard by occupation. It is to be noted that although the period between the robbery and the trial was about twelve months there had been another trial of another robbery concerning the same incident. These witnesses gave evidence in that trial and therefore the matter had not disappeared from their mind so as to cause mistake of identification. The evidence of the guard PW3 was so clear as if the incident had only occurred the previous day. There is no reason to say that his memory of the incident had faded. The identification at the scene was confirmed at the identification parade. The forms are exhibited a perusal of which shows that the parade was conducted properly except no details are shown as to how the witnesses were accommodated. However, the officer conducting the parade, PW6, in his evidence said that the witnesses were in a different office. There is no ground to doubt this evidence. The appellant said he saw some three people at the gate talking. Later he saw the person who arrested him in company of the three persons and at the parade he saw the first witness was among those three persons. This witness did not identify him. One would then ask if the first witness had seen him outside how come he failed to identify him? The complaint on this evidence is without merit.

After careful consideration of the identification evidence we find that the circumstances at the scene were satisfactory for positive identification. We also find that the identification parade was carried out correctly. Also notwithstanding the long period between the incident and the trial the memories of the witnesses had not blurred but instead had sharpened due to the related similar trial.

On the issue of the source of arrest (grounds 4 and 5&6) the police have their ways of conducting their investigations on criminal matters. It is disclosed that the appellant was mentioned in cause of police investigations in another case. The police are not required to disclose their sources. What is surprising here is that the appellant is fully conversant with the trial of the robbery in that other case in which he took part. He was aware that the witnesses in that case are the same as those in this case. Where did he get this information? The conclusion one can draw is that he possibly participated in the robbery although we do not base our decision on it.

On the last ground that his defence was not considered, perusal of the record shows that the said defence talks of the day he was arrested from his home. Then he simply says that during 1998 he had gone to the funeral of his son upcountry. This statement cannot be an answer to the specific charge against him in this case. Then he says "why was I not arrested in 1998?".

Recalling that the police found him hiding under his bed it is no wonder he was not arrested earlier. The trial magistrate did consider the statement and came to the conclusion that the prosecution evidence was overwhelming. We also find that the prosecution evidence proved the case beyond a reasonable doubt. We find no reason to interfere. The appeal is therefore dismissed.

**Dated this 10th day of September, 2002.**

**HON. JUSTICE ONYANCHA**

**JUDGE**

**HON. KHAMINWA**

**COMMISSIONER OF ASSIZE**