



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 152 OF 2001

MICHAEL MWANZIA MUOKA APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant MICHAEL MWANZIA MUOKA was convicted by the Senior Resident Magistrate Nyeri of the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to death.

The Prosecution case is that on 20th October 2000 at about 7.30 p.m. the Complainant Samuel Kamau Kamundigu (PW1) was on his way home when he met someone who hit him on the left eye with a metal bar. After struggling with the Complainant the attacker ran away with the Complainant's bag. PW1 testified that he was able to identify the appellant as the person who robbed him since there were security lights at the scene of the attack. PW2 who went to the rescue of PW1 did not see the face of the attacker but saw the bag which was taken from PW1.

On 2-2-2001 PW1 was at his place of work when he saw the appellant's wife (PW4) carrying the bag. PW1 stopped PW4 who informed him that the bag was given to her by the appellant on 21-10-2000. PW4 was arrested was only released when the appellant was arrested.

In his defence the appellant stated that he picked the bag on 21-10-2000 as he was going to work.

After reevaluating the evidence we find that the conviction of the appellant was unsafe. The circumstances under which he was convicted in our view were not conducive to positive identification. The intensity of the lights at the scene was not indicated. The distance of the lights from the spot PW1 wrestled with the attacker was also not stated. This was identification by a single witness under difficult circumstances. PW2 did not recognize the attacker although he went to the rescue of PW1. Mistaken identity cannot be ruled out.

It is apparent from the proceedings in the lower court that PW1 did not know the appellant before. No identification parade was conducted. The purported identification of the appellant in court by PW1 amounts to dock identification is not of much worth to the prosecution case.

PW4 is the wife of the appellant. She could not be a competent witness for the prosecution in respect of the charge with which the appellant was charged. Under Section 127(3) the wife or husband of a person charged with a criminal offence is a compellable and competent witness for the prosecution in a case where the other is charged with:

1) Bigamy

2) Offences against morality

3) An act or omission affecting the person or property of the wife or such person or children or either of them.

The testimony of PW4 prejudiced the appellants defence and in our view amounted to miscarriage of justice.

The conviction cannot be sustained. The learned state counsel rightly conceded the appeal.

We allow the appeal, quash the conviction and set aside sentence. The appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated this day of 2002

J. V. O. JUMA

JUDGE

J. K. MITEY

JUDGE