

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.450 OF 1999

(From Original Conviction and Sentence in Criminal Case No.2521 of 1999 of the
Chief Magistrate's Court at Mombasa – B. Maloba, Ms – S.R.M.)

DANIEL WAMBUA MUTELELI.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONDENT

J U D G E M E N T

The Appellant was charged with two counts: Robbery with Violence contrary to Section 296(1) of the Penal Code and Assault causing Actual Bodily Harm contrary to Section 251 of the Penal Code. He was tried, convicted and sentenced to death for Count 1 and 12 months imprisonment for Count 2. His appeal to this court is against that conviction and sentence.

The prosecution case was that on the 23.7.99 while PW.1 and PW.2 were asleep, they heard a loud bhang at the door. Immediately thereafter people entered the room. They hit PW.1 on the leg and demanded for money and threatened to kill them. They robbed PW.1 of 4 rings, a TV set, Passport, 2 watches and cash shs.6000/- and they escaped. PW.1 did not identify any of the assailants. But PW.2 managed to identify the Appellant through the light from the torch the Appellant flashed and the light was reflected through the mirror. This is the basis upon which the Learned Trial Magistrate based her conviction.

The Appellant denied any involvement in the robbery.

The conviction of the Appellant was based entirely on the evidence of identification by a single witness. Before accepting visual identification as a basis for conviction the court had a duty to warn itself of the inherent dangers of such evidence. A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the Accused person under observation, together with need to exclude the possibility of error was essential and more so when the identification is by a single witness in difficult circumstances.

The complainant and PW.2 were attacked in their room after they had been woken from their sleep in the middle of the night. The assailants were armed and as soon as they gained entry, they ordered their victims to lie down, which they did and they were hit by those assailants.

The conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt, from which a Judge or Jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error. In the present case that other evidence is lacking. The circumstances were far from ideal for identification.

We consider that the conviction is unsafe and give the Appellant the benefit of the doubt.

The other issue raised by Mr. Magolo for the Appellant is that the Learned Trial Magistrate erred in shifting the burden of proof to the Accused. In page 3 of her judgement the second paragraph, the Trial Magistrate sealed as follows:-

“The Accused in evidence deals a great deal on events preceeding his arrest. He did not state where he was on the date of the robbery”.

This was a misdirection. The onus of proof throughout lies with the prosecution to prove its case beyond any reasonable doubt.

The end result is that there is no evidence upon which the conviction can be sustained.

For these reasons, we allow the Appellant’s appeal, quash the convictions, set aside the sentences and order for his immediate release unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 8th day of October, 2001.

J.L.A. OSIEMO

J U D G E

J.N. KHAMINWA

COMMISSIONER OF ASSIZE