



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL APPEAL NO. 49 OF 2011**

*(Appeal from the original Conviction and Sentence by Hon. D.W. Nyambu-PM  
in Criminal Case No. 389 of 2010 at Malindi)*

**KYALO MUYOKI MWINDA.....APPELANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant was charged with the offence of Robbery with violence contrary to the provisions of Section 296(2) of the Penal Code.
2. According to the particulars of the offence, on 25<sup>th</sup> March 2010, at Kurawa Krystaline Company in Malindi, the Appellant robbed Elina Stephen Nzai Kshs.69,121 and at or immediately before or immediate after the said robbery wounded Elina Stephen Nzai. The Appellant was convicted by the trial Magistrate and was sentenced to suffer death.
3. The facts of the case are that on 25<sup>th</sup> March 2010, at around 1:30 PM, Elina Stephen Nzai, PW1, was at her place of work at Krystaline Salt Works Limited. PW1 was employed as a cashier and she had just been given by his boss Kshs.70,000 to pay the casual labourers. After paying three workers, she heard a knock on the door and on opening the door, she met a short thin man pointing a pistol at him. The short thin man was not one of the casual labourers that he was supposed to pay but one of the robbers who robbed him Kshs.69,121.
4. PW1 informed the court that the short thin man who was holding the pistol hit her on the leg and she fell down. The man then placed a pistol on her neck whereafter another tall black man appeared. The man entered the office and carried all the cash that was meant for the casual labourers. The two men then left and she immediately raised an alarm. The casual labourers who were waiting to be paid by PW1 gave chase. After the robbers had left, PW1 notified her boss who immediately notified the Administration Police
5. PW1 stated that she never saw what happened at the gate because the robber locked the door from outside on their way out. PW1 was however informed by the security guard who was manning the gate that the robbers who entered the premises were three. There was a fourth man who ferried the robbers away on the motorcycle that he was riding.

6. PW1 informed the court that at around 3 PM, the man who was riding the motorcycle that ferried the robbers in and outside the premises was arrested. She recognised the man as the same person who had gone to her office the previous day asking if he could purchase scrap metals from the organisation. PW1 identified the Appellant in the dock as the person she had seen the previous day. PW1 also identified the motorcycle that was used by the robbers to escape after the robbery.

7. PW2, the Company's driver, was outside the cash office relaxing. He suddenly heard shouts from the cashier's office and then saw a man emerging from the office running. He started chasing the man but when the man pointed a pistol at him, he lay down. There was a second man who joined the man PW 1 had seen emerging from the cashier's office. He shouted for help and told the guard to close the gate. However, when the guard saw the pistol, he hid and one of the robbers alighted from a motorcycle and opened the gate and they left on the motor cycle. According to PW2, he saw the two men who had robbed PW1 jumping on the awaiting motorcycle and leaving the compound.

8. PW 2 then proceeded to the police station in the company of Harrison Thoya. However, before leaving the premises, PW2 had called his friend Martin and informed about the three robbers on a motorcycle.

9. When PW2 and his colleague arrived at police station, they found the Appellant had been arrested. He identified the Appellant at the police station as the person whom he had seen riding the motorcycle outside the company's premises together with the two robbers. He also identified motorcycle registration number KMCH 940 J as the same motorcycle that he saw being ridden by the Appellant outside the premises.

10. The guard, PW3 stated that he heard someone shout "thief thief" and then saw a motorcycle approaching the gate. It had two passengers. One of the passengers alighted and pointed a pistol at him. He walked away towards the road leaving the gate closed but not locked. The robber who had pointed a pistol at him opened the gate and then they left on the motor cycle. The Administration Police who had been notified about the robbery gave chase and arrested the Appellant.

11. PW2 recognised the Appellant in the dock as the same person who ferried the two robbers outside the company's premises on the motorcycle. PW2 stated that the premises did not have a fence and that he did not see the three enter the premises. He only saw them leaving the premises on the motorcycle after the robbery.

12. The owner of the motorcycle, PW 5, stated that she leased her motorcycle for three days to somebody she never saw. It is her friend Zakayo who took the motorcycle for the purpose of taking it to the person who was to lease it. However, after three days, her friend Zakayo could not trace the person who had leased the motorcycle. PW 5 identified the motorcycle that the Appellant was riding as hers. She produced a receipt dated 17<sup>th</sup> February 2010 for a motorcycle number SW 817589 for Kshs.84,000 as exhibit number 2 and the Sale Agreement between her and the seller as exhibit number 3. However, PW5 confirmed that the Appellant was not the person who had hired the motorcycle from Zakayo.

13. Police Corporal Noah Kiplagat, PW 7, informed the court that while at Malindi police station, the Administration Policemen from Marereni presented to him the Appellant who was among the robbers that had robbed an employee of Krystaline Salt Company. The members of staff of Krystaline Salt Company called the police at Kanagoni AP Camp. When the passengers on the motorcycle saw the policeman at Kanagoni, they jumped from the motorcycle and fled on foot. The rider of the motorcycle, the Appellant, refused to stop and that is when the policeman shot at the motorcycle and arrested the Appellant. According to PW7, the owner of the motorcycle produced evidence to show that he was the owner. The motorcycle had been hired to Joel Nyaga who was still at large.

14. Administration police constable Wekesa Nicholas, PW9, stated that on the material day, he was working at Kanagoni AP Post. At around 1:30 pm, a person living at Kwawa called him on his phone and informed him that armed robbers had robbed a cashier of unknown amount of money at Kwawa Krystaline Salt Company. He was told that they the three men were on a motorcycle. He went to the road and then one motorcycle appeared with one person. He stopped the rider but he refused. He then

requested the Matatu driver to chase the rider who turned into the bush. PW 9 shot at the Appellant and he fell down. That is when he arrested him and took him to Malindi police station.

15. In his defence, the Appellant stated that he was a boda boda operator. While on his way from Kanagoni, a matatu blocked him and he was arrested by two men.

16. The trial Magistrate analysed the evidence that was presented before her and found, correctly so, that the evidence on record showed that the robbers who attacked PW1 were armed with a pistol which is a dangerous and offensive weapon.

17. The Magistrate further found that when the Appellant was arrested by PW9, he was riding exhibit number 1. Exhibit number was identified by PW 5, the owner. It also had bullet marks on the seat.

18. The Magistrate was satisfied that the Appellant was the one who ferried the robbers to and from the scene of crime. The learned Magistrate found that the Appellant, jointly with other robbers had a common intention to commit an unlawful offence of Robbery with violence and convicted him.

19. The Appellant counsel submitted that the ingredient of the Appellant being armed with a dangerous and offensive weapon was not included in the charge sheet and consequently the charge sheet was irredeemably defective. The learned counsel further submitted that in the absence of an identification parade, the conviction and sentence of the Appellant by the lower court should be quashed by this Court.

20. Counsel finally submitted that the Magistrate relied on a confession to convict the Appellant, which is unlawful.

21. The state counsel reiterated the evidence that was given by the prosecution witnesses in the lower court and submitted that the evidence that was given was consistent. Counsel submitted that there was no need for an identification parade because the Appellant was arrested on the same day that the robbery occurred. The state counsel finally submitted that the Appellant was arrested with the motorcycle that belonged to PW5. The Appellant did not explain how he came into possession of the motorcycle that was used to ferry the robbers to and from the scene of robbery.

22. As the first appellate court, we are required to re-evaluate the evidence that was tendered in the lower court, assess it and make our own conclusion. (**Okeno Vs R (1972) EA 322**).

23. Section 296 (1) and 296(2) of the Penal Code provide as follows:

**“296 (1):Any person who commits the felony of robbery is liable to imprisonment for fourteen years.**

**296 (2):If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, if, at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

24. It is true, as argued by the Appellant's counsel, that the charge for Robbery under Section 296(2) must specify the essential ingredients of the offence. The ingredient of being armed with a dangerous and offensive weapon is just one of the ingredients. The other ingredient is the “hitting”, “wounding”, “beating”, “striking” or using any other violence to any person before or immediately after the robbery. The court is not required to look for the presence of either of the other two set of circumstances before convicting an accused person.

25. The charge against the Appellant person, with another person who was not before the court, was that they robbed, Elina Stephen Nzai and at or immediately before or immediately after such robbery used actual violence to the said Elina Stephen Nzai.

26. Elina Stephen Nzai, PW1, informed the court that he was hit on the leg and was kicked by one of the robbers (not the appellant). PW8, the clinical officer working at Malindi produced in evidence the P3 form for Elina Stephen Nzai which showed that PW1 sustained injuries on her right lumber region after the robbery. The learned Magistrate, correctly so, held that PW1 was injured on the hip joint by one of the robbers during the robbery.

27. In view of the fact that the ingredient of violence was specifically stated in the charge sheet, and the said ingredient having been proved at trial, we are in agreement with the learned Magistrate's findings that there was nothing defective about the charge sheet as argued by the Appellant's advocate. (see also section 134 criminal procedure code)

28. It is true that PW1 never saw the Appellant on the day she was attacked by the two robbers. However, PW2 and PW3 were outside the office, when PW1 was attacked. All along, there was a third person outside the office but within the premises of Krystal salt company with a motorcycle who beckoned one of the robbers after robbing PW1 by whistling.

29. The robbery happened at 1:30 PM and PW2 saw the Appellant waiting for the other two robbers to board the motorcycle which he was riding. PW2 had ample time to see the Appellant and even gave chase but had to lie down when the pistol was pointed at him. In the meantime, PW3, the guard, also had ample time to see the Appellant with his two pillion passengers approaching the gate that he was manning. He walked away from the gate towards the road when one of the pillion passengers pointed a gun at him. The Appellant stopped the motorcycle at the gate to allow one of his accomplices to walk towards the gate and open it.

30. In view of the fact that the Appellant was arrested in a span of less than two hours after the robbery, PW2 and PW3 could not have been mistaken on the identity of the Appellant at the police station and in the dock. Their evidence in identification is therefore rendered worthless. But, with regard to the evidence of Pw1 it was a case of recognition as the Appellant had on the previous day visited her office inquiring about scrap metal. Recognition evidence is more reliable than identification of a stranger. (**see Anjonora -vs R ((1976-80) KLR).**)

31. Having said that, even if none of the witnesses placed the Appellant at the scene of crime, which is not the case, the only person who could have answered the question as to how the Appellant came to be in possession of the motorcycle that he was arrested with when he tried to run away from PW9 is the Appellant himself. PW 5 produced documents in court showing that he was the owner of the motorcycle that the Appellant was arrested with. The said motorcycle had been hired by an individual for three days. That person never returned the motorcycle.

32. Section 111 of the Evidence Act provides as follows:

**“When a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.”**

33. The Appellant is the only person who had knowledge of how the motorcycle he was riding on the day of the robbery came into his possession. Thus, even without any other evidence, the fact that the witnesses placed the motorcycle that was identified at the scene of the crime points to the fact that he is the one who ferried the two robbers to and from the scene of crime within hours he was caught while riding the motorcycle. His conduct when police sought to stop him is evidence of guilty knowledge. He fled and was stopped by the action of police firing their gun.

34. The evaluation and analysis of the evidence leads us to only one conclusion; that the trial magistrate did not error in law and fact when she found and held that the Appellant was the one who ferried the robbers to and from the scene of crime, and that the Appellant, together with the other two robbers were joint offenders in the prosecution of a common purpose pursuant to the provision of section 21 of the

Penal Code. Accordingly, we have no reason to disturb that finding. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen money on the Appellant made the conviction unsafe.

35. For the reason we have given above, we dismiss the appeal in its entirety and confirm the sentence.

Dated and Delivered in Malindi this **7<sup>th</sup>** day of **March**, 2014.

**C.W.MEOLI**

**JUDGE**

**O.A.ANGOTE**

**JUDGE**