



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 54 OF 2011

INNOCENTUS WAMBUA MUTINDAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 3923 of 2009 of the Chief Magistrate's Court at Mombasa – Hon. R. Kirui – PM)

JUDGMENT

The Appellant herein **INNOCENTUS WAMBUA MUTINDA** was charged with another for the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code. His colleague one **IBRAHIM MBUGUA KINYANJUI** was acquitted but the appellant was found guilty Convicted and Sentenced to suffer death.

The particulars of the charge were that on the 25th day of November, 2009 at Coca cola store in Kongowea, Mombasa County jointly with others not before the Court and while armed with dangerous weapons namely, iron bars robbed **OBED UYONGA** cash Ksh. 65,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **OBED UYONGA**.

The Complainant is a salesman with an outfit called Changamwe Sodas. He was at his place of work in the company of one **PHILEMON MUSAVI LUBUTA (PW 2)** when at about 4:00 pm the said **PHILELMON** returned a wheelbarrow inside the depot with four men on tow. When he demanded from the men why they had entered the depot, they ordered him to open the safe. He decided to throw the keys to the floor. One of the men suddenly hit him below the right eye and left ring-finger upon which the Complainant fell down. One of the men stepped on him as another proceeded to open the safe. In the safe he had placed Ksh. 65,000/= in currency notes which he had counted which the men took and left.

They therefore reported to their operations manager of what had transpired and he arrived promptly and took them to Hospital for treatment. They later recorded their statements to police. The Complainant further told the Court that one of the Accused persons was arrested after a witness showed him to police and he identified him at an identification parade.

The second was arrested by members of public.

PW 2 also testified to have been returning a wheelbarrow to their depot when he was followed by a

group of young men. Upon checking behind he recognized them, when he asked them why they were following, he was slapped on the eyes and he fell down. When he tried to rise up he was hit with a metal bar which blow fractured his right hand and he fell unconscious, regaining consciousness after Fifteen (15) minutes later.

They were taken to Hospital for treatment. Three days later they went and recorded their statements to police. Two of their attackers were later arrested and they were called at the police station where identification parades were conducted and they identified them. The third prosecution witness (PW 3) is a lady by the name **JANE WAIRIMU** who sells food near Kengeleni. She testified to have seen four men emerge from the complainants store including the 1st and 2nd Accused. She later heard that they had robbed the Complainants.

We note from the outset that the main issue in this case is that of identification.

The incident took place at about 4:00 pm which was in broad daylight, however, we also do note that the robbery took place at Kongowea market which is a densely populated area.

Secondly, the attackers appear to have been very swift and ruthless people. Consider this, both PW 1 and PW 2 were hit on areas generally around the eyes, this was meant to ensure that their vision was impaired or blurred.

After the concurrent blows each of them fell down. PW 1 was stepped on such that he could not see who stole the money. PW2 when hit fell down unconscious and came to after fifteen minutes later.

Bearing in mind that this was a very busy area which was densely populated, we are of the view that the circumstances obtaining at the time did not afford favourable conditions for identification.

The problem of identification is compounded by the fact that it is not the Complainant and his colleague (PW 2) who pointed out the Accused persons to police for them to effect the arrest. Further to that, no arresting officer was availed before that Court to testify on the circumstances surrounding the arrest.

None of the prosecution witnesses testified to have pointed out the Accused persons for the arrest.

The Complainant in his evidence did tell the Court that they were called at the police station where an identification parade was conducted and they identified the Accused persons. We do note that no evidence as to identification parade was adduced before the trial Court.

The identification if any was not free from error.

We accordingly find that the Conviction was not safe.

We quash the Conviction and set aside the Sentence.

The Appellant is set at liberty unless otherwise lawfully held.

Judgment dated and delivered in open Court this 4th day of June 2013.

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M. ODERO

JUDGE

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M. MUYA

JUDGE

In the presence of:-

Learned State Counsel

The Appellant

Court clerk