



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CRIMINAL APPEAL 119 OF 2012**

**SILVESTER MUTIE MANDA ..... APPELLANT**

VERSUS

REPUBLIC ..... RESPONDENT

*(Appeal from a conviction and sentence in Criminal Case No. 250 of 2008 of the Principal Magistrates Court at Kitui(Hon. E. Juma Osoro SRM) dated 25<sup>th</sup> November 2011)*

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**JUDGMENT**

The appellant, **Silvester Mutie Manda**, was charged with robbery with violence **contrary to section 296(2) of the Penal Code** in that on the night of 3<sup>rd</sup> May 2008 at about 10.30 p.m. at Kunda Kindu Estate, Kitui Township in Kitui District jointly with others not before the court, while armed with dangerous weapons namely pangas, rungas, bows and arrows robbed Symon Musee Singi, cash Kshs.15,200/=, mobile phone make Nokia 2300 and a pair of Safari shoes all valued at Kshs.21,800/= the property of Symon Musee Singi, and at or immediately before or immediately after the time of such robbery used actual violence to the said Symon Musee Singi. In the alternative, he was charged with handling stolen goods contrary to section 322(2) of the Penal Code in that on 4<sup>th</sup> May 2008 at about 3.00 a.m, at Kitui Police Station report office in Kitui District, otherwise than in the course of stealing dishonestly had in his possession a pair of Safari boot shoes valued at Kshs.1,600/= the property of Symon Musee Singi, knowing or having reasons to believe it to be stolen goods.

He pleaded not guilty. After a full trial, he was convicted of the main count of robbery with violence and sentenced to suffer death as by law provided. Being dissatisfied with the decision, he has appealed to this court against both his conviction and sentence.

The grounds of appeal are listed as nine, but can be reduced to six as follows:-

- 1. That the amount stated in the charge sheet was not the amount of money the complainant said was robbed from him.**
- 2. That the trial court erred in relying on contradictory evidence of prosecution witnesses.**

- 3. That the court erred in relying on the evidence of the identification parade which should not have been conducted as the complainant had stated he had recognized him as one of the robbers.**
- 4. That the evidence of identification at the scene was not satisfactory to sustain a conviction.**
- 5. That there was no adequate evidence to justify the alternative charge of handling stolen goods.**
- 6. That his Constitutional rights under Article 49(1) (f) (i) of the Constitution were violated as he was kept in custody for 7 days before being charged.**

At the hearing, with the leave of the court, the appellant filed written submissions, and relied on the same. We have perused the submissions.

The learned State Counsel, Mr Mwenda, opposed the appeal. Counsel submitted that though the time of the incident was 10.30 p.m., the robbers had torches which they flashed repeatedly. When they were counting the money, the complainant (PW1) recognized the appellant among them. He had known him several years earlier. The complainant knew the appellant by name, and informed people he met as well as the police that he was robbed by Mutie. In addition, counsel argued, the appellant at the time of arrest wore brown Safari boots produced as exhibit 2 which were positively identified by the complainant as belonging to him. Counsel emphasized that the magistrate considered the evidence of identification by a single witness and found it to be safe and sufficient to found a conviction.

In response to the submissions of the State Counsel, the appellant submitted that, if indeed the complainant had recognized him, there would be no need for conducting an identification parade. He reiterated that the amount alleged to have been stolen in the charge sheet was Kshs.15,200/= not Kshs.15,000/= testified to by the complainant. He stated that, it was wrong to charge him with the alternative count of handling stolen goods nine months after the incident.

In brief, the prosecution case is as follows. On 3<sup>rd</sup> May 2008 at around 10.30 p.m. PW1 Symon Musee Singi (the complainant) closed his butchery at Kitui Township and headed home. He arrived near the gate of his residence and while he waited for it to be opened, three people emerged with two torches. They flashed a torch towards his face and he could not see them properly. One had a bow and arrows and he pushed the complainant to the wall. Another hit the complainant with a panga on the back. They demanded money and the mobile phone from the complainant. He gave them the mobile phone Nokia 2300 and Kshs.4,300/= from his left trouser pocket. As the complainant gave them the money, one of the robbers threw a panga towards his neck, which the complainant blocked with his left hand which was injured. One of the robbers hit him on the leg and he fell down. He told them he had more money in the wallet. The robbers took the wallet which had Kshs.10,700/=. As the robbers flashed their torches to count the money, the complainant was lying down. In the process, he recognized one person Mutie, whom he had known before. The robbers also removed his shoes. They left him helpless on the ground. Shortly thereafter, he rose up, and though he was bleeding profusely, he went to a nearby bar and reported the incident to Julius Musyimi Mwangangi (PW2). The complainant informed PW2 that he had recognized one of the robbers Mutie who had cut him on the hand. He was given first aid and advised to go to hospital. He found a Nissan at the stage and was taken to Kitui hospital for treatment. He also reported the incident to the police.

On the next day, (PW5) Sgt. Ronald Kilumo Ivuti, received information that there was a suspect at Beach Club Bar. He proceeded there and saw the appellant. He called reinforcements and arrested him, as he knew him before. Later, on 9<sup>th</sup> May, 2008, an identification parade was conducted, wherein the appellant was picked by the complainant. The alleged robbery was the subject of the main charge.

At the police station, the appellant was wearing shoes which were suspected to belong to the complainant. The Safari shoes were taken by the police and were the subject of the alternative count.

The complainant was treated at Kitui hospital and also admitted and treated at Machakos District Hospital. He suffered injuries which were described in the P3 form which was produced in court.

When the appellant was called upon to defend himself, he chose to give sworn testimony. He stated that he was a green grocer. On 4<sup>th</sup> May, 2008, he closed his business at 5 p.m. and went to take beer at the club. He met Sgt. Ivuti and they had an argument after both were drunk. At about 3 a.m., a group of armed people came and arrested him at the table he was sharing with Sgt. Ivuti. The police took him to his house and searched it. On 9<sup>th</sup> May, 2008, an identification parade was conducted. On 15<sup>th</sup> May, 2008, he was charged, after being roughed up by police in the cells. He stated that Sgt Ivuti arrested him because they had differed after the drinking spree. He stated that he was the only member of the identification parade who did not have shoes. He denied committing the offence.

We will start by reminding ourselves that, this being a first appeal, we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences, taking into account the fact that we did not have the opportunity of seeing the witnesses testify to determine their demeanour – see **Okeno –vs- Republic (1972) EA 32**.

We shall first address the technical points raised. The first is to do with the difference of the amount of money stolen in the charge, and the evidence of the complainant. Indeed, the amount of money robbed per the charge sheet is Kshs.15,200/=. In evidence the complainant referred to a total amount of Kshs.15,000/=. In our view, the difference of the amount in the charge, and that testified to in the evidence of the complainant was not fatal to the conviction. It is curable under section 382 of the Criminal Procedure Code (Cap 75). It did not occasion any prejudice to the appellant. We dismiss this ground.

The second technical point raised by the appellant is that there was no adequate evidence to sustain the alternative charge of handling stolen goods. Since the appellant was not convicted of the alternative charge, this ground of appeal is purely academic. It serves no purpose. We dismiss this ground.

The third technical point is the alleged contravention of Article 49(1) (f) of the Constitution in that he was kept in custody for 7 days before being charged in court. The charge sheet shows that he was arrested on 5<sup>th</sup> May, 2008 and brought to court on 12<sup>th</sup> May, 2008. That was a period of 7 days. The replaced Constitution, which was operational then, under section 72(3) required that a person arrested on suspicion of having committed a capital offence be brought to court within fourteen days. The appellant who was suspected to have committed capital robbery was brought to court after seven days, which was within the period then mandated by the Constitution. His complaint on contravention of Constitutional rights is therefore baseless and is dismissed.

The other grounds go to the evidential proof of the charge.

This is a case of identification or recognition by a single identifying witness. The prosecution called six witnesses. The appellant gave his defence on oath. The learned succeeding trial magistrate wrote a short judgment of 4 typed pages. The learned magistrate listed the issues for determination as whether the appellant was identified at the scene, whether exhibit 2 (safari boots) were recovered from the appellant at the time of arrest, the identification parade, the defence raised by the appellant, and the doctrine of recent possession. He went on to conclude thus:-

**“ I do find that the prosecution has managed to proof (sic) the case against the accused to the required standards the accused is accordingly found guilty of the main charge and accordingly convicted.”**

We have perused the evidence on record.

We remind ourselves on the requirements for finding a conviction on the evidence of a single identifying witness. In the case of **Abdalla bin Wendo & Another –vs- R (1953), 20 EACA 166**, the East African Court of Appeal stated:-

**“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a**

**single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.”**

In the later case of **Nzaro –vs- Republic (1991) KLR 70** the Kenya Court of Appeal stated:-

**“Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury (himself) of the special need for caution before convicting the accused person in reliance on the correctness of identification or identifications.”**

In our present case, the learned magistrate did not specifically caution himself on the need for caution before convicting on the evidence of the single witness. Be that it as it may, the single identifying witness was the complainant PW1. It was his evidence that the time of the incident was at 10.30 p.m, and it was dark. He was confronted by three people at his house gate and robbed. The robbers had two torches, which they initially flashed towards his face and he could not recognize anybody. When he was lying down facing upwards, the robbers started counting the money from his purse, using the light from the torches. In the process, he clearly saw the face of one whom he knew before. It was Mutie, the appellant. In particular PW1 stated in evidence:-

**“They took the money from the wallet which was Kshs.10,700/=. They also took my Safari boots which I wore and they were brown in colour. I plead with them to leave me and they flashed the torches as they were looking at the money and I managed to recognize one person who is the accused before court (pointing at the accused). I know him by appearance and name and he was called Mutie. I had known him for several years as he even used to come to the stage.”**

PW2 Julius Musyimi Mwangangi confirmed in evidence that the complainant mentioned the name of Mutie as one of the robbers a few moments after the incident. PW2 was the first person to whom the complainant reported the incident at 10.45 p.m. During the same night the complainant gave the name of Mutie to Sgt. Ronald Kilumo of CID Kitui.

In our view, though the time of the incident was at night, the complainant described how he identified or recognized the appellant so well that there was no possibility of mistaken identity. The complainant had the advantage of visual space when he was lying down, facing upwards with his eyes open, while the robbers were taking out the money from his purse, and counting it while their torches were on. Besides, the fact that the complainant specifically mentioned the name of the appellant to PW2 the first person he met shortly after the incident, and to the police the same night, confirmed positive identification or recognition. There is no doubt in our minds that the complainant knew the appellant before the incident.

Since the complainant had mentioned the appellant by name, and he was arrested on that account, there was no point of conducting an identification parade. It was a superfluous exercise which did not add any evidential value.

It is noteworthy to state that the appellant in his sworn defence, did not address the allegations of robbery brought against him. He merely complained about his treatment after arrest and that he was arrested because he had disagreed with Sgt. Ivuti after a heavy drinking night. Though he had suggested in his cross-examination that the complainant owed him money, he did not mention anything of the sort in his sworn defence.

On the totality of the evidence, we find that there is sufficient evidence on record to sustain the conviction for capital robbery. We will therefore have to dismiss the appeal and uphold both conviction and sentence.

For the above reasons we find that the appeal lacks merit. We dismiss the appeal of the appellant and uphold both the conviction and sentence.

Dated and delivered at Machakos this **17<sup>th</sup>** day of **July** 2012.

**Asike - Makhandia**

**George Dulu**

**Judge**

**Judge**

**In presence of:**

Nyalo – Court clerk

Appellant present in person