



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA AT MOMBASA**

**CRIMINAL APPEAL 43 OF 1998**

**KENGA KARISA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from judgment of the High Court of Kenya at Mombasa (Mr. Justice Hayanga**

**& Waki, JJ) dated 3.7.98,**

**in**

**H.C.C.R.A. NO. 273 OF 1996)**

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**JUDGMENT OF THE COURT**

On the night of 16th November, 1995 at about 10.30 p.m. at Roka location in the Kilifi District of Kenya, Johnson Kathenge Kazungu (the complainant) was attacked whilst he was asleep in his house. He was injured, as a result of the attack, on his face and hand.

According to the complainant, he was attacked by the appellant who ran after the said attack and whilst so running he hit a pole inside the house and fell down, then got up and ran away.

The complainant reported the incident to the police and stated that it was the appellant who had attacked him. Whilst he said that his radio cassette, seven cassette tapes and two tea-shirts were stolen he did not see the appellant taking away any of those items. The complainant said he was able to identify the appellant as his assailant as he knew him for six months prior to the incident and as he was his partner.

The complainant's brother, Charo Kazungu (PW4) confirmed the complainant's version of the incident. He identified the appellant as the assailant, having known him for seven years. The appellant, he said, ran away when the two brothers started screaming and shouting.

Both the complainant and his brother confirmed that they reported the incident to the police on the same night. Unfortunately the report that was made to the police as recorded in the police occurrence book was not brought up in evidence before the trial magistrate. It was brought up as additional evidence in the High Court on first appeal.

The learned trial magistrate convicted the appellant of the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced him to death, such sentence being, of course, mandatory.

The learned magistrate based the conviction on the fact of the recognition of the appellant by the complainant and his brother.

On appeal by the appellant to the High Court the issue of the record of complaint in the Police Occurrence Book was brought up, as already pointed out. There is only one incident recorded which is germane to the events of that night and the record reads as follows:

"18-11-95"

7.00 Assault Report Mr. Kathengi Kalama Kimba of Roka Loc. Kwa Kazungwa Kimber Village to station and report that whilst he was asleep in his house he was attacked by his elder brother Wasi Kazungu Rimba of the same address. During the incident the brother took with him a radio and cassette and four recorded cassettes. Reasons for the attack was due to domestic affairs. Reportee rushed to Kilifi district hospital where he was admitted in fair condition".

P.C. Oduor (PW3) was detailed to attend the investigations of the alleged crime who in his evidence before the magistrate said that whilst he (PW3) was at the police station, the brother of the complainant came and said his brother had been cut with a 'panga'.

It can be seen that the incident recorded in the Occurrence Book differs considerably from the evidence given in the magistrate's court. The High Court (Hayanga & Waki, JJ) considered the additional evidence contained in the Occurrence Book and did not think it made any difference to the facts of the case - The court said:

"Particularly we have looked at the additional evidence contained in the Occurrence Book extracts wherein the appellant's counsel wanted to establish that PW1 meant to say that his brother was the robber, but that inference is against the obvious weight of evidence existing."

We think that the manner in which the High Court dealt with the additional evidence was a misdirection. The version given in the Occurrence Book clearly raised a probability that the attack on PW1 (the complainant) may have been perpetrated by his own brother to take possession of the radio - cassette and the two other items. At least those facts raised a doubt as to the veracity of the version of the complainant and his younger brother.

Although the High Court felt that the version narrated in the Occurrence Book may have been of a different incident and different people, the particulars recorded in the Occurrence Book cannot be divorced from the incident in issue. The other entry in the Occurrence Book (No.24) refers to the same incident but is in respect of the action taken by P.C. Oduor. Here again the High Court misdirected itself when it treated that action taken in the Occurrence Book (entry No. 24) as a report of new occurrence.

In view of these misdirections we think it would be unsafe to sustain the conviction, which is accordingly quashed, and the sentence set aside. The appellant is to be set at liberty forthwith, unless otherwise lawfully held.

Dated and delivered at Mombasa this 21st day of January, 1999.

**Z. R. CHESONI**

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**CHIEF JUSTICE**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**