



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

APPELLATE SIDE

CRIMINAL APPEAL NO. 314 OF 1995

**(From Original Conviction/Sentence and in Criminal Case No. 1932
of 1995 of the Ag. Senior Principal Magistrate's Court: Injene Indeché Esq.)**

MWINYI SULEIMAN SAKWA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

Coram: Osiemo J.

Waweru J.

Mr. Samba -Advocate for the appellant

Mr. Shikuku -State Counsel for the Respondent (State)

Mr. Onduma -Court Clerk

JUDGEMENT

The appellant was convicted with an offence under Section 296 (2) of the Penal Code. He was sentenced to death, his appeal to this court is against both conviction and sentence.

Briefly the facts of the prosecution case were as follows:

On the 20th March, 1995 PW1 the complainant had travelled from Kitale to Kakamega to check on some land he intended to purchase. he had with him cash sh.75,000/- when he reached Kakamega he found that someone else had purchased the land. He decided to travel back to Kitale. He arrived at the bus stage late. He found a taxi registration number KVD 864 and three people who were standing by the taxi. He asked them what the fare was and one of them told him it was Sh.120/- .While another said it was Sh.100/- and sat inside the vehicle. The 3 people also got into the vehicle. He was driven to Bungoma, taken into a certain house where he was given some liquid which he was forced to drink. Those people then drove him to the forest where they again forced him to take a similar liquid and was robbed of the cash Sh.75,000/- which he had. He slept in the forest until the next day at 11 a.m. when he crawled out of the forest. he met some people who wanted to beat him but when he explained to them what had happened, they left him. He went to Bungoma Police Station where he reported the robbery but he was not given any assistance. He travelled to Kitale where he reported the robbery to Kitale Police Station. He was asked to go to the hospital for treatment. While on his way to the hospital he saw the appellant whom he recognised as one of the robbers who on seeing him started moving backwards. He informed his wife that he had seen one of the people who had robbed him.He went and informed the police. He was

accompanied by the police to Laini Moja where he found the appellant surrounded by some people. He pointed him to the police and he was arrested. He proceeded to the hospital for treatment. Later he was shown 2 bottles and a glass which were left at the forest in Bungoma at the time of the robbery which he identified. He had also taken down the registration number of that taxi which was involved in the robbery which he handed over the police.

Mr. Shambad for the appellant submitted that there was no evidence to prove the existence of Sh.75,000/- the subject matter of the robbery. The complainant in his evidence had said that he had been paid Sh.35,000/- as down payment towards the sale of his land but there was no evidence that the balance of sh.40,000/- had been paid. Secondly the name of the forest where the complainant was robbed was not given nor was the house where he was given some liquid to drink visited. Mr. Samba further submitted that the learned trial magistrate erred in convicting on the evidence of a single witness which was not properly tested and he did not warn himself on the dangers of a conviction based on the evidence of a single witness.

When the complainant reported the robbery to the police he never gave any features or description of the people who had robbed him which could have been useful in evaluating his consistency.

Mrs. Shikuku for the State submitted that the evidence against the appellant was overwhelming and that he was properly convicted. She said identification was not the only evidence against the appellant. The appellant after his arrest had taken the police to the forest where the complainant was robbed and where 3 bottles and a glass were recovered according to the evidence of PW2. This contradicts the evidence of the complainant who said that he had left 2 bottles and a glass at the scene.

Mr. Samba for counsel for the appellant submitted that the evidence against the appellant was not sufficient to warrant a conviction. We agree with him. Apart from the trial magistrate relying on the evidence of a single witness without first having warned himself, the case was not properly investigated. This is a serious charge which required thorough investigations.

There was evidence from the prosecution that some colourless liquid in a plastic bottle was recovered at the scene and the same was forward to the government chemist to find out if the same was harmful to human consumption. This was the liquid which the complainant said he was forced to drink. The report from the government chemist indicates that the same contained sulphuric acid, a corrosive liquid and no evidence was led on this to establish what could have been the effect if the complainant

Dated and delivered at Nairobi this 16th day of June, 1998

J.L.A. OSIEMO
JUDGE