

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
APPELLATE SIDE
CRIMINAL APPEAL NO. 316 OF 1997

**(From Original conviction and Sentence in Criminal Case No. 10667 of
1994 of the Principal Magistrate's Court at Kibera: J. Ondieki Esq.)**

WILSON MAKHOSI.....APPELLANT
-Versus-
REPUBLIC.....RESPONDENT

Coram: Osiero J.
Oguk J.
Mr. Kanyi for the appellant
Mr. Ondari for the State
Mr. Onduma - Court Clerk

JUDGMENT

The appellant was charged in the Principal Magistrate's Court at Kibera with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He was convicted and sentenced to death. His appeal to this court is against both conviction and sentence. Briefly the prosecution case was that on the 19.6.94 at about 1.30 p.m. 3 robbers struck at the home of the complainant JOHN KASIMILI and robbed him of his T.V. and radio cassette in the course of the robbery, those robbers injured the complainant. The complainant recognised the appellant as one of the robbers by voice and he was the one who inflicted injuries on him. When the robbers had gone away he screamed and neighbours came to the scene and he informed them that he had recognized the appellant by his voice. He had known the appellant for a long time. He reported the robbery to the area chief and to Kabete police station.

But according to the evidence of PW4, Cpl. MBOGHOLI , PW1 reported to him about the robbery on 5-11-94. This is about 6 months later. This long delay is not explained since the complainant claimed he knew the appellant well and he also knew where he lived.

The Learned State Counsel does not support the conviction on the ground that the Learned Trial Magistrate based his conviction on the evidence of PW1 and PW2 who were husband and wife whose evidence contradicted each other. Secondly although PW1 in his evidence said he knew the appellant for a long time and he knew the bar where he frequented there was no report to the police soon after the alleged robbery.

After we have re-evaluated the evidence on record as we are entitled to do, we find that it would be unsafe to allow the conviction to stand.

We therefore allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant.

We order that the appellant be set free forthwith unless otherwise held for any lawful cause.

Dated and delivered at Nairobi this 23rd day of June, 1998.

J.L.A. OSIEMO

JUDGE

S. OGUK

JUDGE