



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**CORAM; KWACH, TUNOI & SHAH, J.J.A.**

**CRIMINAL APPEAL NO. 39 OF 1999**

**BETWEEN**

**WILLIAM NYANGUSI KITHUKU .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

(Appeal from a judgment of the High Court of Kenya at Mombasa (Hayanga & Waki JJ) dated 6th November, 1998

in

H.C.CR.A. NO. 129 OF 1997)

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**JUDGMENT OF THE COURT**

**WILLIAM NYANGUSI KITHUKU** (the appellant) was convicted by the Senior Resident Magistrate, Mombasa, on a charge of robbery with violence contrary to **section 296 (2) of the Penal Code**. It was alleged that on 10th day of November, 1996 at Makaburini village in Mombasa in Coast Province, jointly with others not before the court, robbed Cecilia Levi of a motor vehicle registration No. KAC 492L Isuzu pick-up, Shs.10,000/- in cash and hot drinks worth 5,000/-. It was also alleged that in the process they used violence against the said Cecilia Levi. The appellant was sentenced to death.

The appellant's first appeal to the superior court against conviction and sentence was dismissed because the learned Judges who heard his appeal were satisfied that he was positively identified as one of the robbers who raided Cecilia's shop in Kisauni on 10.11.96 at 7 a.m. Immediately after she opened the shop, four robbers burst into the shop and one of them with Somali features, who was wielding a pistol, ordered her to produce all the money she had, and threatened to shoot her if she failed to do so. Cecilia pressed a security alarm button which alerted KK Guards to the emergency at the shop who promptly came to the rescue. One of the robbers demanded the keys to the pick-up and Cecilia gave them to him. He took the keys and went out and sat in the vehicle. Another robber, who was not armed, locked all the doors from inside and then ordered everyone in the shop to lie down. Apart from the robber with Somali features, there was also a second robber who was also armed and both of them trained their guns on Cecilia. One of them spoke to her in Kikuyu demanding money, but she pleaded with him to be left alone because she had not sold anything and besides she had children to feed. The man lost his temper, jumped over the counter and slapped and kicked Cecilia. This robber then emptied the cash box which had Shs 10,000/- and then proceeded to take the liquor from the spirits counter and a number of packets of

cigarettes.

As the robbery was in progress KK Guards arrived and were confronted by the robbers who repulsed them with their guns and escaped. All four of them jumped into Cecilia's pick-up and drove off towards Freretown. At a point near Khadija estate, they stopped and three of the occupants came out. When the KK Guards vehicle appeared, one of the three got back into the vehicle and sped off leaving the other two behind. These two tried to chase the vehicle but were unable to catch up with it, so they ran in different directions to escape arrest by KK Guards who were fast closing in on them. The two robbers who escaped in the pick-up encountered another KK Guards vehicle which apparently blocked their passage. In a desperate effort to escape, they jumped out of the vehicle while it was still in motion and it hit a tree and stopped. The two occupants started running away and two KK Guards followed hot on their heels.

The two guards chasing these two robbers were Moses Kituyi (PW5) and Vincent Adala (PW6). Both of them concentrated on the robber who had jumped out from the passenger side. In his evidence, Kituyi said he was all the time two or three yards behind him and the chase went over a distance of some 300 yards. At no time did the quarry slip out of their sight. Adala was not far behind. Kituyi caught up with the escaping robber and apprehended him. Adala immediately came to his aid. They handed this man over to the police, and Adala confirmed in his evidence that this was the same man he met at the door of the shop walking out with bottles of whisky and who had jumped into the pick-up at Khadija estate leaving behind his two colleagues. This man was identified as the appellant in this case.

The appellant's complaint in this appeal, as urged by Mr. G.S. Ngombo on his behalf, is that he was not positively identified as one of the robbers. In his unsworn statement he said he was a fruit seller at Kongowea market, and that morning he was on his way going to buy fruit and took a short cut from Kisauni to join the main road when he came upon some people running. Since these people were running, he also started running and then KK Guards arrested and beat him up. The learned magistrate rejected the appellant's account and found as a fact that he was one of the robbers who raided Cecilia's shop and made their escape bid in her pick-up.

Cecilia had also picked out the appellant at an identification parade but having regard to the fact that there were two armed gangsters, each threatening to shoot her, one cannot say, with absolute certainty, that in those circumstances she was able to identify the appellant properly. The learned Judges therefore directed themselves properly when they said no reliance should be placed on Cecilia's evidence. The evidence of Kituyi and Adala was that they chased the appellant from the point where he jumped out of the pick-up, keeping him in sight all the time and arrested him. Their evidence was that at no time did he escape from their sight. Adala had also earlier seen him jumping into the vehicle and driving off leaving two of his colleagues behind. This evidence is watertight and we are accordingly satisfied that the appellant was positively identified as one of the robbers, and we reject Mr Ngombo's submission that the appellant's identification was not free from error. Accordingly this appeal fails and it is dismissed.

**Dated and delivered at Mombasa this 30th day of July,1999.**

**R.**

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**JUDGE OF APPEAL**

**O.**

**KWACH**

**P.**

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**JUDGE OF APPEAL**

**K.**

**TUNOI**

**A.**

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**JUDGE OF APPEAL**

**B.**

**SHAH**

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

**DEPUTY REGISTRAR**