



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**CORAM: KWACH, TUNOI & OWUOR, JJ.A**

**CRIMINAL APPEAL NO. 23 OF 1998**

**BETWEEN**

**STEPHEN TWANZE**

**SAMUEL NZIOKA .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a conviction and Judgment of the High Court of Kenya at Mombasa (Justice Ang'awa and Justice Waki) dated 15<sup>th</sup> December, 1997**

**In**

**H.C.Cr.A No. 33 AND 378 OF 1996**

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**JUDGMENT OF THE COURT**

Stephen Twanze (the first appellant) and Samuel Nzioka (the second appellant) were convicted of robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged that on 11<sup>th</sup> September, 1994 at or about 3 a.m. at Nyal Estate in Mombasa the appellants and four others persons robbed Cyril Ondatto of one televisions set, an amplifier, a stereo receiver, a radio cassette, a Sanyo speaker, a brief case, one carpet, one golden ring, one lantern lamp stand and Shs. 66,000/- in cash, and in the course of such robbery wounded the said Cyril Ondatto. They also faced the alternative charge of handling stolen goods.

The Magistrate convicted these appellants and a third accused one December Mwawasi Ochieng' on the robbery charge and sentenced them to death. All three appealed to the superior court against both conviction and sentence. The appeal was heard by Ang'awa and Waki JJ who allowed Mwawasi's appeal. And they have now brought this second appeal.

We shall deal first with the first appellant's appeal. His main complaint in his second appeal is that he was not positively identified as one of the persons who were involved in the robbery. In the course of the robbery the complainant was seriously injured and almost lost his life. According to George Kitheka (P.W.10) as he was returning from work on 11<sup>th</sup> September, 1994 at 8 p.m., he met the first appellant who

told him that he had a radio for sale. Kitheka had no money but agreed to put the first appellant in touch with a man called Pius who might be interested in buying the radio. Kitheka did not see the radio but he arranged a meeting between the first appellant and Pius at a hotel and left the two by themselves.

Pius Watila (P.W.4) told the court that he was on duty on a date in September, 1994, when he was approached by Kitheka who told him he had a friend who had a radio he wished to sell. Pius was a bit suspicious because he could not understand why anyone would want to sell a radio at night. Kitheka took him to the hotel where he met the first appellant and discussed about the radio. According to Pius, Kitheka was present at the discussion although this is denied by Kitheka. Pius made it clear to the first appellant and Kitheka that he was not prepared to discuss the purchase unless they produced a permit. The first appellant asked for a down payment of shs. 1,000/- which Pius declined to pay.

Although Kitheka said all this happened on 11<sup>th</sup> September, 1994, Pius himself did not give an exact date but the first appellant himself told the court that it was on the 12<sup>th</sup>, which must be correct. According to the first appellant he had gone to see Pius to recover a debt and Pius then asked him to secure a taxi for him to carry some goods from Kongowea. The impression given by Pius was that the first appellant was a complete stranger to him and they had never met before the encounter at the hotel. Be that as it may, the sum total of the evidence of the first appellant, Pius and Kitheka is that the radio which the first appellant was trying to sell to Pius belonged to the complainant and was one of the items which had been stolen at his house during the robbery.

Mr Ingutia suggested that the court should have preferred the account of the meeting given by Ahmed Mohamed (P.W.5) , a loader, at Mawingo Bus Service but we must reject this suggestion because we have an account of the persons who were actually involved in the transaction. The radio which the first appellant was trying to sell was actually the property of the complainant. And being in recent possession of an item recently stolen from the complainant the presumption arose that he was either the thief or a handler of stolen property unless he could offer an explanation as to how the item came into his possession. In addition to being found in possession of the radio, the first appellant was positively identified by the complainant's son, Mark Ondatto (P.W.3), at an Police Station on 22<sup>nd</sup> September, 1994. We are satisfied that the first appellant was properly convicted and we dismiss his appeal.

As regards the second appellant Mr. Magolo submitted that there was no evidence to connect him with the crime. Apart from the evidence of the two co-accused incriminating the second appellant in the crime there is no other evidence against him and we fail to understand why his appeal to the superior court was dismissed. We allow his appeal, quash the conviction, set aside the sentence and order that he be set at liberty forthwith unless otherwise lawfully held. Those are our orders.

**Dated and delivered at Mombasa this 15<sup>th</sup> day for July, 1998.**

**R.O. KWACH**

**JUDGE OF APPEAL**

**P.K. TUNOI**

**JUDGE OF APEPAL**

**E.OWUOR**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**