



REPUBLIC OF KENYA
COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 558 OF 2010

MOSES MOHAMMED FADHILI APPLICANT/APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ) dated
29th September, 2008**

in

H.C.C.R.A. NO. 241 OF 2002)

RULING OF THE COURT

We have before us an application by way of notice of motion which is brought under the provisions of ***Rules 29 (1) (b) and 2 of the Court of Appeal Rules.***

On 4th January, 2002, **MOSES MOHAMMED FADHILI** [applicant] was charged with the offence of robbery with violence contrary to ***Section 296 (2) of the Penal Code.*** After trial, he was convicted and sentenced to death. His appeal to the High Court was unsuccessful and the applicant has filed **Criminal Appeal No. 558 of 2010**, which is pending for hearing before this Court. Before that appeal was set down for hearing, the applicant seeks for an order that the Occurrence Book of 11th December, 2001, of Kenyatta Police Post, Nairobi, be availed. He contends that he was arrested on 26th December, 2001, by PC Gregory Gitonga who was attached to Kenyatta Police Post on the basis of a complaint recorded in the OB of 11th December, 2001.

The issue of the OB featured during the trial and neither it nor an extract were produced as exhibits at the trial or during the hearing of the first appeal at the High Court.

Mr Wamwayi, learned counsel for the applicant, referred to the proceedings before the trial court where the complainant said in his evidence that he recognized the applicant and gave his names to the police. Further, when PC Gitonga testified, in his evidence in cross examination, he confirmed that the original report by the complainant was that of theft from a person. The witness was shown the extract from the OB during re-examination; the proceedings before the trial court read as follows:

“The OB extract states that the initial report is on theft from person report. But details of the report are meant to [sic] a robbery with violence report and not a theft from a person report. The person who wrote down initial report had done an error.”

However, this extract was not produced as exhibit and it is for that reason the applicant seeks to adduce that evidence.

On the part of the state, Mr Monda, learned Senior Principal State Counsel, opposed this application. He argued that the evidence the applicant wishes to call was already adduced before the trial court. The police officer also explained that although the initial report was recorded as that of theft from a person, the details clearly disclosed an offence of robbery with violence and that is what the applicant was charged with.

Mr Wamwayi also referred to two authorities, one in respect of a criminal case; ***HENRY KIMATHI V R, NYR CR NO. 24 OF 2002***, where this Court allowed the production of the OB, which upon its production contradicted the evidence of the complainant who had testified that he had given the name of his attackers to the police. However, the OB showed the complainant was attacked by unknown persons. For that reason, the appeal was allowed. The other case, ***JUDITH SHOW V FRANCIS SHOW, AICA NO. 361 OF 2005***, involved a civil dispute over properties acquired between a wife and a husband during marriage. We unfortunately find the two cases distinguishable from the facts of this case. The evidence from relevant extracts of the OB was adduced in court although a copy was not produced as an exhibit. Failure to produce a copy is not at all prejudicial to the applicant. The evidence regarding the particular information was adduced by the complainant and the police officer confirmed the initial report that was entered in the OB was one of theft from a person but the details disclosed an offence of robbery with violence. We are of the view that calling for the OB will not be necessary for reasons that the applicant can rely on the record of proceedings which contain the information from the OB.

For those reasons, we are inclined to disallow the notice of motion dated 27th February, 2012 and order that the appeal be fixed for hearing.

Dated and delivered at Nairobi this 9th day of November, 2012.

E. M. GITHINJI

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

D. K. MARAGA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR