



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: TUNOI, O’KUBASU & AGANYANYA, J.J.A.**

**CRIMINAL APPEAL NO. 349 OF 2006**

**BETWEEN**

**SIMON MBAYA MUGO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An appeal from the judgment of the High Court of Kenya at Nairobi (Ochieng, J) dated 10<sup>th</sup> May, 2005**

**in**

**HCCRA NO. 920 OF 2001)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The genesis of this appeal is a charge sheet presented to the Chief Magistrate’s Court at Kiambu in Criminal Case No 359 of 2001, in which the appellant **SIMON MBAYA KAMAU** and his co-accused **PETER NGIGI MUTHONI** were jointly charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**. The particulars of the charge were as follows:

“1. SIMON MBAYA KAMAU 2. PETER NGIGI MUTHONI: On the 21<sup>st</sup> day of February, 2001 at Karuri village in Kiambu District within Central province, jointly with another not before court robbed JOHN OMOKE MOSORA of crates of bread valued Kshs.3,800/- and at or immediately before or immediately after the time of such robbery used actual violence to the said JOHN MOSORA.”

The two pleaded “*not guilty*” to the charge on 2<sup>nd</sup> March, 2001 and their trial commenced before the learned Senior Resident Magistrate (J G Kingori) on 5<sup>th</sup> March, 2001. A total of five witnesses testified for the prosecution. The learned trial magistrate considered the evidence before him and in a judgment delivered on 1<sup>st</sup> August, 2001, convicted the appellant (**SIMON MBAYA KAMAU**) and sentenced him death. The appellant’s appeal to the superior court was dismissed and hence this appeal before us.

In the course of his judgment the learned trial magistrate stated:

“*The complainant PW 1 is a bread supplier. On 21/2/01 at around 5.30am he woke up and went to wait bread delivery van in Karuri. The vehicle arrived and dropped the bread for him. As the vehicle left, a*

*man approached the scene and picked a crate of bread since it was still dark, the complainant pledged (sic) at him and the man dropped the crates of bread and fled. The complainant gave chase but fell down. He walked back to the scene to find 4 other people picking the crates of bread. He managed to grab one as he raised alarm. The others came back and attacked him but he held firmly onto the one he had grabbed as he continued he raised alarm. The men fled but he held onto the one he had grabbed and members of the public who arrived at the scene helped him to subdue the prisoner. With the assistance of members of public the complainant escorted the prisoner to the police station where he was locked up. On 25/2/01 he spotted the 2<sup>nd</sup> accused and arrested him.”*

It was in view of the foregoing that the appellant was convicted while his co-accused was given the benefit of doubt and acquitted.

In the course of their judgment the learned Judges of the superior court (Mutungi & Ochieng, JJ) said:

*“According to PW 1, the robbers were about 5 in number. PW 1 first chased after one robber, but he (the complainant) fell down. As PW 1 turned back to the place where the bread delivery van had delivered bread for him. PW 1 found 4 people picking crates. At that juncture, PW 1 managed to get hold of one of the robbers and then raised an alarm. People responded to PW 1’s alarm by coming to his help and together they arrested the appellant.”*

Having so stated the learned Judges of the superior court proceeded to dismiss the appellant’s appeal to that court.

When this appeal came up for hearing before us on 15<sup>th</sup> February, 2011, Mr E Ondieki, appeared for the appellant while Ms S Nyamosi (Senior State Counsel) appeared for the State.

In her address Ms Nyamosi told us that she was conceding the appeal on the ground that the offence of robbery with violence was not proved. She was also of the view that probably the appellant did not understand and follow the proceedings in the trial court as the record of the trial court does not show what language was used by the witnesses.

In his brief submission, Mr Ondieki stated that the appellant arrived at the scene after the robbery.

Having considered the submissions by both Mr Ondieki and Ms Nyamosi and the entire record, it would appear that the appellant, indeed, may have arrived at the scene after the complainant had been attacked by those who ran away from the scene. It is also clear to us that the appellant arrived at the scene where bread was scattered on the road and as he tried to help himself to the now free loaves of bread, as is common in Kenya in such situations, the complainant held him. There was no evidence that the appellant was in the company of those who had attacked the complainant earlier. In the circumstances, we accept the submission by Ms Nyamosi that the offence of robbery with violence was not proved in respect of the appellant. We need not say anything on the issue of the language during the trial.

Accordingly, this appeal is allowed. The conviction is quashed and the death sentence imposed set aside. We direct that the appellant shall be set free forthwith unless otherwise lawfully held. Those shall be the orders of this Court.

Dated and delivered at Nairobi this 18<sup>th</sup> day of March, 2011.

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR