



IN THE COURT OF APPEAL  
AT NAKURU

(CORAM: BOSIRE, GITHINJI & ONYANGO OTIENO, J.J.A.)

CRIMINAL APPEAL NO. 60 OF 2010

BETWEEN

SIMON MORARA ONCHONKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Emukule & Ouko, JJ.) dated  
5<sup>th</sup> March, 2010

in

**H.C.CR.A. NO. 561 OF 2003)**

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JUDGMENT OF THE COURT

The appellant was convicted by the Senior Principal Magistrate, Nakuru for robbery with violence contrary to **Section 296 (2)** of the *Penal Code* and sentenced to death.

His first appeal to the superior court against conviction and sentence was dismissed; hence this appeal.

The particulars of the charge alleged that on 24<sup>th</sup> June, 2003 at Naivasha township, the appellant jointly with others not before the court robbed **Antony Nzuki Mulei** of his jacket and Kshs.10,000/=.

The prosecution called three witnesses to support the charge, namely, **Antony Nzuki Mulei** (PW1) (Antony), **Peter Kaburu ole Lekaiya** (PW2), (Peter), and **PC. Lawrence Ledada** (PW3) the arresting officer.

The evidence of Antony and Peter was briefly as follows: Antony is employed as a driver of motor vehicle registration No. KTW 559, while Peter is employed as a conductor. They buy and transport goods in Narok, Nakuru and Nairobi. On 24<sup>th</sup> June, 2003 they arrived at Naivasha at 9.30 a.m. Thereafter they took the vehicle to a garage for repairs and then proceeded to Heshima butchery for meat. At the butchery, two men entered and sat next to them. They were immediately joined by two other men who also sat down. The four persons kept on looking at Antony and Peter. Antony became suspicious of them and left the butchery in the company of Peter. Later he saw the same four people seated on a pavement and wherever Antony and Peter went the four people would look at them. The vehicle was ultimately

repaired and Antony went to pick it up while Peter went to Walk-In Hotel to book lodging rooms. Antony drove the vehicle and parked it near Heshima butchery after which he walked towards Walk-In Hotel. Antony described the subsequent events, thus:

**“As I walked, four people sandwiched me. One of them held me on the neck. I raised alarm and the others tore off my Kaunda shirt and ran away. I struggled with the one who held me. I had documents like ID Card, driving card and Kshs.10,000/= in the Kaunda shirt. People came to my assistance. People came and the suspects ran. People ran after him and caught him. I had fallen down. The public brought him to me and I recognized him”.**

Meanwhile, Peter who was at Walk-In Hotel, went out after hearing noise. On arrival at the scene he saw four people. The four people ran away. Peter and members of the public chased them and arrested the appellant. PC. Lawrence Ledada later went to the scene and re-arrested the appellant. The appellant had been beaten by members of the public.

The appellant stated in an unsworn statement, among other things, that he took a lady whom he had found stranded to a club at about 11.30 p.m. and bought her a soda; that a man entered into the club and called the lady; that when the lady refused to go, the man pulled her outside; that the man and the lady started abusing each other; that the appellant intervened; that the man slapped and kicked the respondent. He continued:

**“I was held and beaten. The people beat me and I managed to jump. Then they called me a thief I was hit with a bottle. I decided to run away to BP Petrol Station. Other people ran after me and caught me. I was taken back to those people. They alleged that I had stolen .....”.**

The trial magistrate made a finding that the appellant indeed robbed the complainant. On appeal to the superior court, the superior court upheld the decision of the trial magistrate.

Mr. Maragia, learned counsel for the appellant relied on the grounds of appeal in a supplementary memorandum of appeal. The appellant complains in those grounds, inter alia, that the superior court failed to properly analyse and re-evaluate the evidence; that the evidence of identification was not free from possibility of error and that the superior court failed to warn itself on the dangers of relying on the evidence of identification.

It is trite law that a second appeal such as this one, can only be based on a matter of law and not on a matter fact. (**Section 361 (1)** of the *Criminal Procedure Code*). Where the right of appeal is confined to a point of law the Court has loyalty to accept findings of fact of the lower court(s) and has to resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and should not interfere with such findings unless it is satisfied that no reasonable tribunal could have, on the evidence, reached such a conclusion (see **M’Riunga vs. Republic** [1983] KLR 445). Moreover, even a first appellate court should not interfere with findings of fact by the trial court which are based on the credibility of the witnesses unless, among other things, no reasonable tribunal could have made such findings (**Republic vs. Oyier** [1985] KLR 353).

In this case, the trial court had two versions of what took place, the version presented by Antony and Peter – that the appellant was among the four people who robbed the complainant and the version presented by the appellant that he was attacked apparently by Antony and members of public when he intervened to help a lady who was exchanging abusive words with Antony. The two versions comprised purely matters of fact. The issue raised was whether this was a robbery or a confrontation over a woman. The trial magistrate made a specific finding that this was a robbery. This finding was based on the credibility of Antony and Peter. The superior court re-considered and re-evaluated the evidence at length and concluded that there was indeed a robbery. Thus, there were concurrent findings of fact by the two courts below.

The appellant admits what Nzuki said that he was chased and arrested and returned to the scene. From what the appellant stated, the issue of identification or recognition does not arise as the appellant

admits that he was at the scene and that he had a confrontation with a person. As we have already observed, the issue for determination at the trial was whether this was a robbery or a confrontation over a woman. That is a matter of fact. The appeal being based on a matter of fact is incompetent.

In the final analysis, we have come to the conclusion that there was no legal ground on which we can interfere with the concurred findings of fact.

Consequently, the appeal is dismissed.

**Dated and delivered at Nakuru this 10<sup>th</sup> day of June, 2011.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR