



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 162 OF 2007

NELSON KITESE MAWEU

ROBERT KYALO MUIA

JOHN NGANZO MWEU.....APPELLANTS

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (O.K. Mutungi & F.A Ochieng JJ.) dated 26th April 2005)

in

H.C.Cr.A. Nos.926, 927 & 928 of 2002)

JUDGMENT OF THE COURT

The three appellants herein, Nelson Kitesse Maweu, Robert Kyalo Muia and John Nganzo Mweu were convicted of robbery with violence, contrary to section 296(2) of the Penal code, and each sentenced to death, by Mrs. R. Kimingi, Principal Magistrate on 16th August 2002.

They were dissatisfied with both the conviction and sentence, and appealed to the superior Court. Their appeals were however dismissed on 26th April 2005. (*O.K Mutungi & F.A. Ochieng, JJ*). The three have now appealed to this Court on points of law, as appear in their petitions of appeal.

The main ground of appeal raised and argued before us by Mr. Onalo for Nelson Kitesse Maweu (1st appellant) and John Nganzo Mweu (3rd appellant), and Mr. Ondieki for Robert Kyalo Muia (*the 2nd appellant*) was that the “**superior court erred in law by confirming the conviction on the basis of a defective charge sheet**”.

The charge on which the appellants were convicted in the Magistrate’s court reads:

“Nelson Kitise Maweu, John Nganzo Mweu and Robert Kyalo Muia, on the 28th January 2001 at Baba Ndogo area within Nairobi Province, whilst armed with (*sic*) pistol, jointly robbed Paul Mwangangi Mwanzia of Kshs.2,000/= and a wrist watch and at or immediately before or immediately after the time of such robbery used actual violence on the said Paul Mwangangi

Mwanzia”.

The evidence which was accepted by both the trial court and the first appellate court was that the complainant Peter Mungai Chengecha (PW1) then a Manager at Yaya Inn in South ‘B’ was robbed of Kshs.18,000/= on 28th January 2001, at about 7.30 a.m. whilst in his office.

Two witnesses who were in the Inn at the same time as the complainant, namely Esther Munyiva Wambua (PW3) and Ann Wanjiru Kahwai (PW5) supported his evidence about the robbery. Charles Mwangi Njeri (PW2) who was in a neighbouring butchery, also testified on the robbery.

Both Mr. Onalo and Mr. Ondieki, for the appellants submitted that both the trial court and the superior court relied on a charge sheet which gave the complainant’s name as Paul Mwangangi Mwanzia, and the amount robbed from him as Kshs.2,000/= and the place of the robbery, Baba Ndogo, yet the evidence adduced in court showed that the complainant was one Peter Mungai Chengecha, who was robbed of Kshs.18,000/= at Yaya Inn in South B.

The learned advocates argued further that their clients, the appellants did not commit the offence for which they were charged, hence their denial before the trial court. They termed the error or mistake in the charge, “**a substantial one**”, which cannot be cured under Sec. 382 of the Criminal Procedure Code as it occasioned a failure of justice on the appellants.

The Learned Senior State Counsel, Mr. Kaigai did not support both the conviction and the sentence of the appellants and did not ask for a re-trial because of the defective charge which he submitted, relates to a different case.

We have considered the evidence on which the appellants were convicted by the trial Magistrate. That evidence was accepted by the first appellate Court which proceeded to dismiss the appellants’ appeals, as already stated. There was an error and/or omission in the charge preferred against the appellants as pertains to the complainant’s name, the amount robbed and the place of the robbery.

This court made a finding on a similar point in the case of **YONGO v REPUBLIC [1983] KLR**, when it held:

“A charge is defective under section 214 (1) of the Criminal Procedure Code (Cap. 75) where:

b) it does not accord with the evidence given at the trial”.

From the foregoing, it is clear that the charge on which the appellants were tried and convicted was incurably defective and the trial court made no attempt to rectify it. The first appellate court failed in its duty to carefully examine and analyse afresh the evidence and come to its own conclusion as was held in **OKENO v REPUBLIC [1972] EA 32**.

For these reasons, we allow the appeal, quash the conviction and set aside the sentence imposed on each appellant. We order that the three appellants be and are hereby released forthwith, unless otherwise lawfully held.

Dated and Delivered at Nairobi this 4th day of April, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

P.N WAKI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR