



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 119 OF 2000**

**JAMES MOSES MOUSTACHE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***An Appeal from a Judgment of the High Court of Kenya at Nyeri (Juma & Mulwa, JJ) dated 6<sup>th</sup> June, 2000***

**In**

**H.C. Cr. Appeal No. 298 of 1994)**

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**JUDGMENT OF THE COURT**

In the well-known case of **OKENO VS. REPUBLIC [1972] EA 32** the predecessor of this Court stated the duty of a first appellate court to be:-

***“..... to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld.”***

On 8<sup>th</sup> July, 1993 a total of seven persons appeared before the then Principal Magistrate of Nyeri, Muga Apondi Esq., charged on one count of robbery with violence contrary to **section 296(2)** of the Penal Code. Those people were listed in the charge-sheet as:-

1. Peter Ndungu Ndirangu alias Kipande
2. James Moses Moustache (the appellant herein).
3. Antony Maina Moustache
4. Robinson Mwangi Gachanja
5. James Gichuki Kirahira

6. Evariantus Kariuki Kiune

7. John Muthee Wangari alias Maina

The seven persons were thereafter tried on the one charge and at the end of the prosecution's case, the trial magistrate held that the prosecution had failed to establish a prima facie case against the 6<sup>th</sup> and 7<sup>th</sup> accused persons and acquitted them under **section 211** of the Criminal Procedure Code. The others were placed on their defence and in his final judgment, the magistrate once again acquitted the 1<sup>st</sup> and 3<sup>rd</sup> accused persons but found the appellant, (Accused 2) and the 4<sup>th</sup> and 5<sup>th</sup> accused persons guilty of the lesser offence of robbery under **section 296(1)** of the Penal Code and sentenced each one of them to four years imprisonment with five strokes of the cane. They were also ordered to be under police supervision for three years upon their release from prison. The appellant, Accused 4 and Accused 5 appealed to the superior court against their convictions and sentences but it is clear from the record that only this appellant's appeal was dealt with by the superior court. The three appeals were initially dealt with by Osiemo, J and on 19<sup>th</sup> February, 1997, while it was only the appellant who was present before the Judge, Mr. Kabetu, the State Counsel who appeared on behalf of the Republic told the Judge and we quote him:-

***“Mr. Kabetu: I concede to the applicants No. 300/94 Robinson Mwangi Gachanja [i.e. Accused 4] and appeal No. 309/93 James Gichuhi Kirahira [i.e. Accused no. 5].”***

We understand this statement to mean that the State Counsel was conceding the appeals of the appellant's co-accused persons. Those two persons were not even present in court before Osiemo, J and the learned Judge made no order in respect of their appeals. The appeal of the appellant eventually came before Juma, J (as he then was) on 1<sup>st</sup> December, 1999 and the record of the learned Judge for that day shows:-

***“Coram: Juma – Judge***

***Mutahi – c/c***

***Appellant in person***

***Mr. Mwangi for Republic.***

***Court: Appellant warned that he stands to suffer death should his appeal fail as the state was contending that the trial magistrate had no jurisdiction to reduce the charge from robbery with violence to simple robbery. Appellant told he can withdraw if he so wishes but insists on proceeding with his appeal. Appeal stood over to 28<sup>th</sup> March, 2000 for hearing before two Judges.”***

Juma & Kasanga Mulwa, JJ heard the appellant's appeal on 28<sup>th</sup> March, 2000. They again warned the appellant about his proceeding with his appeal and the appellant was the only person before them. The two Judges reserved their judgment to 6<sup>th</sup> June, 2000 and the heading of their judgment dated and delivered on 6<sup>th</sup> June, 2000 shows the names of six appellants, namely:-

1. James Moses Moustache (the appellant herein)
2. Peter Ndungu Ndirangu
3. Antony Maina Moustache
4. Robinson Mwangi Gachanja
5. James Gichuki Kirahira and
6. Evans Kariuki Kiune.

Some of these people had been acquitted by the magistrate who had only convicted three of the accused persons; only the appellant had been present and argued his appeal before the learned Judges of the superior court. Yet their judgment opens with the sentence that:-

***“The appellants have appealed against their sentence and conviction.”***

and the judgment concludes

***“The appeal is dismissed and the appellants are sentenced to death.”***

The learned Judges appear to have thought that they were dealing with the appeals of six people and would appear to have sentenced to death even those who had been acquitted by the magistrate and those who did not appear before them to argue their appeals.

In these circumstances, can it be said that the Judges of the superior court reconsidered the evidence, evaluated it itself and drew their own conclusions in deciding whether the judgment of the trial court should be upheld? We are reluctant to say the learned Judges even attempted to perform that duty, for if they had done so, they would have realized that they were dealing only with one and not six appellants as they appear to have been thinking. It is impossible to conclude on the basis of the material before us that the confusion in the mind of the learned Judges of the superior court did not occasion to the appellant a failure of justice and that being the position in which this Court finds itself, we must give the benefit of the unknown to the appellant. We do so with the result that we allow the appellant’s appeal, quash the conviction recorded against him by the High Court, set aside the sentence of death and order that the appellant shall be released from prison forthwith unless he is otherwise lawfully held. Those shall be our orders on this appeal.

Dated and delivered at Nyeri this 4<sup>th</sup> day of August, 2006.

**R.S.C. OMOLO**

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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.**