



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, O’KUBASU & DEVERELL JJA

CRIMINAL APPEAL NO. 75 OF 2004

BETWEEN

JACKSON NDETI KYUMU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a conviction and judgment of the High Court of Kenya at
Machakos (Nambuye & Mutitu, JJ) dated 3**

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September, 2002

in

H.C.CR.A. NO. 150 OF 2001)

JUDGMENT OF THE COURT

The appellant, **JACKSON NDETI KYUMU** and two others, namely **JONES MAKAU** (Makau) and **MUINDE MWANTHI** (Mwanthi) were jointly convicted of robbery with violence contrary to **Section 296(2)** of the Penal Code and was each sentenced to death. In their first appeals to the High Court of Kenya at Machakos, the convictions of the appellant and Makau were upheld but the appeal of Mwanthi was allowed, the conviction quashed and he was set at liberty. However, Makau has not appealed because he was released in error from custody and is at large. This appeal therefore concerns the appellant only.

The complainant Albert Munyawa (PW1) operated a retail shop at Kambu market. During the material night at about 8.30pm on 7th February, 2001, he was in his shop when a person pretending to be a customer entered and enquired about cigarettes. PW1 identified that person as the appellant. He was soon followed by two other persons. PW1 testified that the appellant pointed a pistol at him and ordered him to produce money. When PW1 hesitated the appellant snatched his wrist watch and proceeded to tie him with ropes. The rest of the gang jumped over the counter and removed shop goods from the shelves and packed them in sacks. The commotion attracted the attention of neighbours who shouted and screamed making the robbers to flee. PW1 testified that his shop was lit with electricity lights and was able to identify Mwanthi whom he had known for a long time. He was a local matatu driver. PW1 further testified that he was able to identify the appellant though he was seeing him for the first time.

Rebecca Kamene (PW2), the wife of PW1 who was also in the shop during the raid testified that she

identified Mwanthi as a member of the gang that attacked them and robbed them of property during the fateful evening.

In his defence the appellant testified:-

“On 7th February, 2001 I left home and proceeded to work in Nairobi. I left work at 3.00p.m and on my way to Kambu, I found that there was no transport to a place called Kingelete where I was heading. I then entered a bar called Corner. I intended to secure myself a place to sleep. As I made enquiries, I was called by a person who questioned me as to my origin. He asked for my identity card which I did not have. I handed over my driving licence but the person declined. He identified himself as a police officer and arrested me.”

Mwanthi while defending himself told the trial court:-

“On 7th February, 2001 I was in Nairobi where I had gone to check on my vehicle which I work with. It was undergoing repairs and was not complete. I left the scene of repair and decided to go to Makadara to visit a friend called Peter. I did not find him but his wife. He arrived at about 7.00pm from work. We viewed video cassettes upto 2.00a.m. when I went to bed. I woke up on the following day at 6.30a.m. and proceeded to town where I boarded a vehicle upto Kambu town. At Kambu town I heard people talking about a robbery that had occurred on the previous night. I went to my home and learnt that my brother was sick. I went to see him on 15th February, 2001. On 16th February, 2001 I was arrested by C.I.D Officers and taken to Kibwezi Police Station where I was questioned,

On 1st March 2001 I was charged with the present offence which I did not commit. I do not know accused two and three.”

The first appellate court thought that the conviction of Mwanthi was based on doubtful evidence because his defence of alibi was not given due weight by the trial magistrate. It concluded:-

“Had the trial magistrate addressed his mind on the defence raised by the third appellant (Mwanthi), it is our considered view that he would have given him the benefit of doubt.”

We note that the first appellate court’s holding followed the submission of the State Counsel that it did not support Mwanthi’s conviction.

The records laid before us show that the defence of alibi raised by the appellant was not considered by the trial magistrate and this magnanimous reasoning granted to the case for Mwanthi should also have been extended to the case for the appellant. There is no reason for the selective exclusion of the rule on alibi as far as the appellant is concerned. Moreover, Mwanthi was known to PW1 while the appellant was a total stranger to him. If Mwanthi was believed, there is no reason or reasonable explanation why the appellant was not believed while the evidence regarding them was basically the same.

The upshot of the matter is that the conviction of the appellant was and remains unsafe.

We allow the appeal, quash the conviction and set aside the sentence of death. The appellant is to be set at liberty forthwith unless he be held for some other lawful cause.

Dated and delivered at Nairobi this 8th day of July 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR