



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT MOMBASA
CORAM: KWACH, OMOLO & O'KUBASU, J.J.A.
CRIMINAL APPEAL NO. 211 OF 2002
BETWEEN

PAUL NZIOKA MUTUA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Mombasa (Ouna J & Comm Khaminwa) dated 28th
February, 2002

in

H.C.CR.A. NO. 135 OF 1999)

JUDGMENT OF THE COURT

Paul Nzioka Mutua , the appellant, was convicted by the Principal Magistrate at Malindi of robbery with violence contrary to **section 296(2) of the Penal Code** on an indictment which alleged that on 25th September, 1998 at Italian Pasta Company in Malindi Location, jointly with others not before the court while armed with dangerous weapons robbed **Bakari Mohammed Mweri** of one motor cycle, one bicycle, one fridge, one weighing machine, one wheelbarrow and other items all valued at KShs.189,925/= and in the process used violence on the complainant. The appellant was sentenced to death. His appeal to the superior court against both conviction and sentence was dismissed and he now brings this second appeal to this Court.

The robbery took place on the night of 24.9.98 when a gang of three armed robbers attacked the security guard at the premises of Italian Pasta Company and after overpowering him made away with the items listed on the indictment. A couple of days later the appellant was arrested at Kilifi. He was taken to Malindi in police custody and it is alleged that he led the police to the places where some of the stolen goods were hidden. In consequence of this, the motor cycle, was recovered hidden in the fence at Malindi Airport and the wheelbarrow was recovered in a slum called Kisumu Dogo, also in MaAlfitnedri . his arrest, the appellant made a statement under caution to the police admitting his involvement in the robbery. He objected to the production of that statement in evidence but it was admitted after a trial within a trial.

The motor cycle was produced at the trial but the wheelbarrow which the appellant was alleged to have stolen was not produced. The police attempted to substitute it with a different one and when this was pointed out by one witness, the prosecutor owned up and told the court that it had been released to the

complainant by mistake. In spite of all this P.C. Obed Murunga (P.W.7) who interrogated the appellant had no qualms in telling the trial magistrate:

*"I took the accused to Malindi Police Station and from there he led me and other officers to Kisumu Dogo. At Malindi Airport fence the accused showed me a motor cycle which had been hidden in a bush at the fence. I recovered the motor cycle and took it to the police station. Next day I went to Kisumu Dogo with the accused. The accused showed me a wheelbarrow which he had given P.W.5 herein which I also recovered. **The wheelbarrow is before the court. It is the same I recovered that day.**" (Emphasis added).*

Clearly when this witness told the court that the wheelbarrow which he produced in court was the one he recovered from the house of Desare Njue (P.W.5), he could not have been telling the truth because Desare Njue was categorical in his evidence that the wheelbarrow which the appellant pledged to him and which the police recovered and carried away, was green in colour and bore no resemblance to the one produced in court. This blatant attempt by the police to mislead the court is regrettable and has caused a miscarriage of justice because it was believed by both the trial and the first appellate court. If Obed Murunga was prepared to lie about such a critical matter as the recovery of the wheelbarrow which casts doubt on his credibility, there was nothing to stop him lying about the recovery of the motor cycle. Moreover, Sgt. Elias Ponda (P.W.2) who was one of the investigating officers simply told the trial magistrate that it was him who recovered the motor cycle and the wheelbarrow. He did not state that it was the appellant who led them to the recovery of the items.

The only other evidence which tended to connect the appellant with the offence was the charge and caution statement made by the appellant at Malindi Police Station on 6.10.98. It was taken by I.P. David Cheruiyot of Divisional CID, Malindi. It was a two sentence confession in which the appellant was alleged to have said:

"It is true we robbed the said items in company of Kilumu Kavinya and Gitau. I took the motor cycle which after robbery I hid it at Ltoli forest."

As we have already pointed out, the appellant retracted this alleged confession but it was admitted after a trial within a trial. Quite apart from the brevity of this confession, it required corroboration since it was retracted before the court could rely on it to convict the appellant. The corroborative evidence could only have been found in the evidence of recovery of the stolen items which, as we have already found, was discredited.

Mrs Mwangi, learned counsel for the Republic, quite properly conceded the appeal and pointed out the deficiencies in the prosecution case. In view of this and the reasons we have set out at length, the conviction of the appellant cannot be sustained. Accordingly, we allow the appeal, quash the conviction, set aside the sentence and order that the appellant be set free forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 31st day of January, 2003.

R. O. KWACH

JUDGE OF APPEAL

R. S. C. OMOLO

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR