



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: TUNOI, OWUOR & KEIWUA, J.J.A)
CRIMINAL APPEAL NO. 63 OF 2002
BETWEEN

KURA CHARO NDOMBOAPPELLANT

AND

REPUBLICRESPONDENT

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

**Mombasa (Mr. Justice Osiemo & Omwitsa, Comm. of
Assize) dated 5th October, 2001**

in

H.C.Cr. Appeal No. 97 of 1999)

JUDGMENT OF THE COURT

The appellant, **KURA CHARO NDOMBO**, was after trial convicted of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. His first appeal to the High Court of Kenya at Mombasa against both conviction and sentence was dismissed on 5th October, 2001 and thus paving the way for this second appeal.

It is urged before us that the identification of the appellant was not proper and hence his conviction ought to be quashed.

The facts upon which the appellant's prosecution was based are short, straightforward and not largely in dispute. At about 10.30 p.m. on 12th June, 1998, the complainant was riding home on his bicycle from his place of work. When he reached Alaskani grounds within Mombasa Municipality three armed persons attacked him and snatched the bicycle from him.

He suffered multiple cuts inflicted upon him with a sharp object. The complainant picked out the appellant during an identification parade because, he alleged, was able to identify him as there was moonlight during the fateful night.

Though a bicycle resembling that of the complainant was recovered from the appellant, this piece of evidence was of no evidential value since the bicycle had been repainted and broken into various disjointed parts. Also in the circumstances, the application of the doctrine of recent possession was not feasible.

Though it was said that the appellant was viewed by aid of moonlight, the trial court was not given its intensity, duration and the state of lighting. The upshot is that the appellant was not positively identified and the complainant may well have been mistaken as to who he saw during that fateful night.

In our view, in the absence of other evidence, circumstantial or direct, pointing to guilt, from which a trial court can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, a conviction cannot be safely accepted as being free from the possibility of error.

We agree with Mr. Kamoti for the appellant that we should not uphold the conviction. Mrs. Mwangi has quite properly conceded the appeal.

Consequently, the appeal is allowed and the conviction is quashed. The sentence of death is set aside and the appellant, unless otherwise lawfully held, shall be set at liberty forthwith.

Dated and delivered at Mombasa this 24th day of January, 2003.

P.K TUNOI

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR