



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, O'KUBASU & GITHINJI, J.J.A.)
CRIMINAL APPEAL NO. 181 OF 2002
BETWEEN

SULEIMAN JUMA ALIAS TOM..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at
Mombasa (Justice Hayanga & Justice Waki) dated 3rd
October, 2002
in
H.C.C.R.A. NO. 132 OF 1998)

JUDGMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to *Section 296(2)* of the Penal Code in that on 18th September, 1997 at Shimanzi area of Makupa within Mombasa District of the Coast Province jointly with others not before court, while armed with knives robbed Daniel Muli Musyoka of one sack of tea leaves valued at Kshs.7,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Daniel Muli Musyoka. He was tried by the learned Ag. Senior Resident Magistrate who convicted and sentenced him to death. His appeal to the superior court was dismissed.

He comes to this Court by way of second appeal. Mr. Bosire for the appellant has raised the issue of the charge. In his view, the charge was defective.

We have considered the particulars of the charge and it cannot be denied that the charge refers to the appellant having been armed with knives. The particulars of the charge do not clearly state whether the knife was a dangerous weapon. Under *Section 296(2)* of the Penal Code the charge must state that the accused was armed with a dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at or immediately before or immediately after the time of the robbery the accused wounds beats or strikes or uses any other personal violence to any person. In this appeal the charge as laid was defective as it did not clearly specify the essential ingredients of the offence under *Section 296(2)* of the Penal Code.

We wish to point out that in charging a person under *Section 296(2)* of the Penal Code the prosecution must be extremely careful as the consequence of a conviction are serious. Care must be taken when dealing with drafting of charges as it is the life of an individual that is at stake.

We have carefully considered the charge as laid and the evidence adduced in support thereof. We agree with Mr. Bosire, counsel for the appellant that the charge as laid was incurably defective. That being our view of this appeal we order that the appeal be allowed, conviction quashed and death sentence set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 4th day of August, 2003.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR