



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CORAM: KWACH, SHAH & BOSIRE, J.J.A
CRIMINAL APPEAL NO. 85 OF 2001

BETWEEN

JOSEPH MUTINDAAPPELLANT

AND

REPUBLICRESPONDENT

**(Appeal from a conviction and judgment of the High Court
of Kenya at Mombasa(Waki J & Hon. Khaminwa, Comm.
of Assize) dated 15th May, 2000**

in

H.C.CR.A. NO. 91 OF 1998)

JUDGMENT OF THE COURT

The appellant, Joseph Mutinda , was on the 23rd day of April, 1998, convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence with which he was charged were as follows:-

"On the 30th day of June, 1997 at Makadara area in

Mombasa District within Coast Province, jointly with others not before the court, being armed with dangerous weapons, namely pistols robbed JESCA SITUMA NELIMA of cash Kshs.89,460/= the property of COAST PROVINCIAL GENERAL HOSPITAL."

The facts relating to the robbery were that on the 30th day of June, 1997 at about 2.30 p.m. some employees of Coast General Hospital were travelling in the hospital ambulance to carry out certain errands, one of which was to take cash (Shs.89,460/=) to a bank for depositing there. On the way the ambulance was overtaken by a Nissan saloon car which swerved abruptly in front of the ambulance causing it to stop. Two people then emerged from somewhere and demanded the money Jesca Nelima was carrying for banking. The demand was made to **Kirundi Kiema (PW2)** who was seated next to Jesca Nelima. The demand was followed up with death threats. In the face of such demand, Jesca gave the cash over to the robber. The robbers then commandeered the ambulance and drove off in it. The vehicle which blocked the ambulance had two occupants. These were not the ones who carried out the robbery.

None of the robbers was apprehended immediately after the robbery; but a month and a half later Kirundi Kiema saw one of the robbers at a kiosk near the hospital. He was sure the person he saw there was one of the robbers. He informed the police. The alleged robber (the appellant) was arrested. Kirundi Kiema said that it was the appellant who was standing next to the driver of the ambulance and that he was the one who pointed a pistol at him. Kiema insisted that it was the appellant who was one of the robbers. He said the appellant was close to him and that he took note of all his physical features **John. Etyang (PW6)** was in the ambulance at the material time. He confirmed the version of events narrated by Kiema.

He went on to say that one of the robbers who was armed with a pistol threatened the occupants of the ambulance. He added that as he faced the robber during the robbery he could not have mistaken him for any one other than the appellant. Etyang was called to identify the appellant at an identification parade. He denied the suggestion that Kiema had described the appellant to him.

The learned trial magistrate considered the evidence of Kiema in the light of events of the day of the robbery. As regards identification of the appellant as the robber the learned Magistrate was satisfied that he was positively identified. She said:

"Given the circumstances, i.e. him having been in close

contact with the suspect at time of the robbery. It was also in broad day light that is 2p.m. He never hesitated in calling the police, he identified him positively."

As regards the identification of the appellant by Etyang at the parade the learned Magistrate considered the possible danger that Etyang may have been told of the identity of the appellant by Kiema prior to the identification. Having considered that the learned Magistrate discounted that danger as the appellant did ask for and got a change of shirt before going on to the parade. The appellant was convicted and sentenced to death.

The appellant's first appeal to the High Court was dismissed. The superior court (Waki J and Mrs. Khaminwa, Commissioner of Assize) dismissed the appeal and as a result what we have before us now is a second appeal.

The superior court re-evaluated the prosecution evidence and concluded that Kiema and Etyang could not have been mistaken in their identification of the appellant. The superior court said:

"It is not disputed that the robbery occurred in broad

day-light and the attackers were armed with pistols. PW2 said that the Appellant is the one who was pointing a gun at him. the appellant was very close to him and he observed all the appellant's physical features.

".....John Etyang, PW6, was seated at the back

inside the ambulance. He witnessed the incident through the broken glass separating the main body of the ambulance and the driver's cabin --- -- Etyang turned his face to him and Etyang had a good look at his face. On 18/8/97 he was able to identify the appellant at the police station.

We find that the circumstances leading to identification

were satisfactory. It was during day time and the sun was bright. The ambulance was stopped and the witnesses were in a position to see what was happening."

Mr. Ngombo who argued the appeal before this Court took umbrage with the fact of Kiema taking Etyang to the police station for attending at the identification parade. He argued that Kiema must have described the appellant to Etyang. He went on to say that if the evidence of Etyang was disregarded the

conviction was based on, only, the evidence of Kiema who had, under stressful circumstances, only two minutes to see the appellant at the material time and that the recognition of the appellant near the hospital a month and a half after the event could well be faulty as to render the conviction unsafe. He attacked the fact of holding of the identification parade when there was a probability that Kiema would have described the appellant to Etyang.

However, what Mr. Ngombo argued does not stand scrutiny. The two courts below were satisfied that Kiema was positive about the identity of the appellant, that is to say, he was one of the robbers. Kiema's evidence was credible. Kiema was emphatic about the identity of the appellant. We are satisfied that the appellant was positively identified.

Both courts below considered the issue of identification parade and concluded that Etyang properly identified the appellant. It must be remembered that the appellant asked for and got a change of shirt before the parade began and made no adverse comments about the parade itself and voluntarily signed the parade Police form number 156.

There is one factor which caused some concern. The learned Magistrate, S. Muketi, took over the hearing of the case when it was part-heard by Mr. Njuguna S.R.M. Whilst she invoked **Section 200** of the Criminal Procedure Code to continue with the trial from where it was left off by Mr. Njuguna she has omitted to record if she explained to the accused person his rights under **Section 200(3)** of the said Code. No issue was taken thereon either in the superior court or before us so we assume she did explain to the accused his rights. We suggest that if such an event occurs in future the fact that the accused's rights have been explained to him must be reflected in the record. We do not, however, see any prejudice having been suffered by the appellant by failure on the part of the trial Magistrate to indicate that she had explained to the appellant his rights.

We are unable to discern any fundamental or for that matter any error at all in the judgments of the courts below. We agree with their concurrent findings of facts. This appeal is dismissed.

Dated and delivered at Mombasa this 18th day of January,

2002.

R.O. KWACH

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JUDGE OF APPEAL

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR