



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: TUNOI, SHAH & KEIWUA, JJ.A.)
CRIMINAL APPEAL NO. 72 OF 2001
BETWEEN**

MWINYI ABDALLA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and order of the High Court of

**Kenya at Mombasa (Hayanga, J & Hon. Tutui,
Commissioner of Assize) dated 29th November, 2000**

in

H.C.C.R.A. NO. 69 OF 1998)

JUDGMENT OF THE COURT:

The appellant in this appeal was charged with and convicted of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the offence were that the appellant on January 22, 1998 at 11.00 pm at Darling Village of Diani Location, Kwale District, jointly with others not before the court being armed with dangerous weapons namely pangas, rungus and bows, robbed Michael Ochieng Okanga (hereinafter called the complainant) of cash Kshs. 6,000/= a wrist watch, bank cheques and other items all valued at Kshs. 80,000/= and at or immediately after the time of such robbery threatened to use violence on the complainant.

The complainant who testified at the trial of the appellant stated that he was attacked by a group of about 10 people who robbed him of various items, which had been listed in the particulars of the offence. However, the complainant was unable later to identify any of his attackers. But his wife (PW 2) and who was driving the vehicle at the time when the offence was being committed was able to identify the appellant at what she called a line up at the police station. She was able to do so because she had seen and recognized him at the scene of the attack.

PW 2 stated that she continued to drive the vehicle despite it having had a tyre burst and only stopped it when she reached near some houses on the road side at which point the complainant went out to change the wheel and in the course whereof he was attacked by the appellant and other people who had not been apprehended. The appellant moved to the passenger window of the vehicle whereat he hit the witness on the arm and demanded money which she said she did not have and instead PW 2 gave the appellant her newspapers.

The appellant had stuck his head into the vehicle thro the passenger window and PW 2 said she was able to see him clearly because the interior light of the vehicle was on. The witness had also testified that

there were lights at the place where she had stopped the vehicle. She, however, did not say whether these were streetlights or otherwise. This omission coupled with the inability of the complainant to identify the appellant, had given rise to a doubt whether the lighting at the scene of the attack was sufficiently bright to enable conclusive recognition of the appellant by PW 2 who was the only one able later on to identify him.

We have elsewhere in this judgment pointed out that if the lighting was as good as PW 2 appears to say, that would have enabled the complainant who was already outside the vehicle, to recognize the appellant at the time of the attack. In the absence of any other evidence to corroborate that of the witness we think it is unsafe to uphold the appellant's conviction and we must therefore quash it, which we hereby do and set aside the sentence of death imposed on the appellant by the Resident Magistrate's Court and upheld by the superior court and order that he be released forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 17th day of January,

2002.

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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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