



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

CORAM: KWACH, BOSIRE & KEIWUA, J.J.A.
CRIMINAL APPEAL NO. 83 OF 2001

BETWEEN

1. BOSCO LEWA MBABU

2. MALOMBO NDEGWA RUNGUWA APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a Judgment of the High Court of Kenya at
Mombasa (Mr. Justice Waki & Comm. Khaminwa, Mrs) dated
18th July, 2000**

**in
H.C.CR.A. NO. 286 OF 1998)**

JUDGMENT OF THE COURT

Bosco L ewa Mbabu (Bosco) and Malombo Ndegwa Runguwa (Malombo) , the appellants, were convicted of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. The charge alleged that on 18th December, 1997 at about 7 p.m. at Shimo La Tewa stage in Mombasa jointly with another not before the court robbed Safari Charo Gona of a Nissan matatu KAJ 344V and cash Shs 3,000/= and used personal violence against him. Their appeals to the superior court against conviction and sentence were dismissed on 18th July, 2000.

Justin Kazungu Kapombe (P.W.2) and Safari Charo (P.W.3) were employed by Edward Charo Manyara (P.W.1) as conductor and driver of the matatu. Their evidence was that at 7 p.m. that evening they picked passengers at Mtwapa. Among these were the two appellants Bosco and Malombo . At a point near Shimo La Tewa Prison, Bosco took out a gun and pointed it at Charo and ordered him to stop. He turned to Malombo whom he said is related to him for help, but Malombo ordered him to look down. Malombo then jumped into the driver's seat and drove the vehicle into a nearby bush where the witnesses were robbed, tied up with ropes and abandoned there. The two robbers then drove off in the vehicle. Kapombe and Charo managed to untie themselves and then walked back to their house for fares before going to report the matter to the police. They went first to Central Police Station where they were told to go and make a report at Bamburi Police Station. Charo proceeded to Bamburi Police Station while Kapombe went back to inform their employer Edward Manyara (P.W.1) about the incident. He did not tell his employer that he knew the people who had robbed them. He actually told him he did not know

them.

On his part Charo told the court:-

"I know how accuseds were arrested. I recall 19th December, 1997 I was at Bamburi Police Station after I was collected from home at 6 p.m. I went to the police station where I was accompanied by police officers who wanted me to point out to them where accused live. I brought them back to my home as I live next to accused 1 and 2. They were my neighbours. So I knew them well. We found Bosco (accused 1) sleeping in his house and I pointed him out to the police and they arrested him."

In cross-examination, he admitted that he first told the police that he did not know the robbers. It was also Kapombe's evidence that he knew their attackers but he did not disclose this to the police when he reported at Bamburi police station. The prosecution, the trial court and the superior court tried to get round this glaring and fatal omission by saying that Kapombe and Charo were in shock and that was why they did not name the robbers either to their employer or the police at the earliest possible opportunity. With respect we cannot agree because these witnesses had the presence to walk home from the scene of crime to look for fare before going to the police. If indeed they had been robbed by people they knew they would have informed the police or their employer at once. We believe they did not tell the whole story and it would be most unjust to punish the appellants for a crime which may well have been committed by the driver and his conductor.

Mr. Gumo , Principal State Counsel, for the Republic, quite properly conceded this appeal and we agree with Mr. Gacuhi, for the appellants, that the appellants were improperly convicted. Accordingly, we allow this appeal, quash the convictions of the appellants, set aside the sentences and order that they be released forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 26th day of July, 2001.

R. O. KWACH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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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