



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

CORAM: OMOLO, SHAH & O'KUBASU, J.J.A.

CRIMINAL APPEAL NO. 82 OF 2001

BETWEEN

NGUMBAO LUWETI BINDO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at
Mombasa (Hon. Mr. Justice Hayanga & Comm. Shah) dated
7th July, 2000

in

H.C.CR.A. NO. 116 OF 1998)

JUDGMENT OF THE COURT

We think the conviction of this appellant on the charge of robbery under section 296(2) Penal Code cannot be sustained on the recorded evidence. The robbery, the subject of the charge against the appellant, occurred on the 31st October, 1997 and there was only one identifying witness, Vital Sabatina who was also the victim of the robbery.

She said in her evidence that at the time of the robbery the appellant wore a long beard and long hair, but that by the time of the identification parade at which she picked out the appellant the appellant had shaved off the beard and trimmed the long hair. But she insisted she was still able to identify the appellant because the appellant's "mouth and eyes are the same." She did not attempt an explanation as to why she was able to remember the mouth and the eyes. The parade at which the appellant was identified was conducted on 25th January, 1998, some three months after the robbery.

However, both the trial Magistrate and the first appellate court proceeded on the basis that the parade was held within one month from the date of the robbery. As Mr. Gumo concedes, this was a misdirection which deprived both courts below of the chance to consider whether Sabatina could have been able to remember the mouth and eyes of the appellant some three months after the robbery. We are unable to say that had the two courts below correctly directed themselves on this point, they would still have come to the conclusion that Sabatina's identification of the appellant was free from any doubts. As we are unable

to make that conclusion on a second appeal we must give the benefit of doubt to the appellant with the result that we allow his appeal, quash the conviction recorded against him, set aside the sentence of death and order that he be released from prison forthwith unless he is held for some other lawful cause.

Dated and delivered at Mombasa this 18th day of July, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR