



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL 40 OF 1999**

**MUIRURI NDUTI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya at Mombasa (Ang'awa & Waki, JJ.)**

**dated 4th July, 1997**

**in**

**H.C.C.R.A. NO. 59 OF 1995)**

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**JUDGMENT OF THE COURT**

The appellant, Mwiruri Nduti, was after trial convicted by the Chief Magistrate, Mombasa, of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. His appeal to the High Court of Kenya at Mombasa (Ang'awa and Waki, JJ) was dismissed on 11th July, 1999. He has therefore preferred this second appeal which contains a total of nine grounds of appeal.

However, the learned Counsel for the appellant, Mr. Bryant, has raised one matter in the supplementary petition of appeal that merits our consideration, namely, the issue of identification.

The deceased, Mohamed Shamsan, was a prominent businessman in Mombasa. On the fateful day, 8th February, 1992 at about mid-day, he left his petrol station along Jomo Kenyatta Avenue for the bank to deposit about Shs.200,000/= being the previous week-end's collection. He was given a lift in a car by one Tom Ochieng P.W.3 a friend to his son. At Barclays Bank, Digo Road, the deceased prepared to alight. One person suddenly got hold of him and attempted to snatch the bag which contained the money and a struggle ensued. Another person suddenly emerged, removed a gun from the inside of his shirt and shot the deceased point blank twice on the chest. The deceased fell outside the car and his two attackers ran away with the money into a waiting car and sped off. He was pronounced dead on arrival a few minutes afterwards at the local hospital.

About a year later on 19th March, 1993, the Police received an information that the appellant, whose name was then associated with many other alleged crimes, was preparing to leave for Nairobi by bus. An ambush was then laid at Mariakani. Consequently, the appellant was arrested and taken to the Police cells

at Mombasa. His arrest led him to name other suspects who were later jointly arraigned with him on the charge the subject matter of this appeal. However, those others were set free after trial for a variety of reasons.

On 27th July, 1993, a period of over 17 months after the killing of the deceased, an identification parade was conducted by IP Mohamed Dida. Both John Yusuf P.W.2 and Tom Ochieng P.W.3 identified the appellant as the person whom they had seen wrestling with the deceased and later shot him.

In convicting the appellant, the Chief Magistrate held:

"The evidence against the appellant is direct ... The incident was in broad day light. The witnesses were certain in Court that they saw him shoot the deceased and they assured the Court that they are very sure about their evidence of identification."

It is complained by Mr. Bryant that the identification parade was of no evidential value since it was conducted after a very long period following the robbery. The incident at the scene, moreover, lasted not more than a few minutes and there was no positive description of the robbers by the witnesses immediately thereafter. Further, Mr. Bryant argued that the prosecution had not even attempted to dislodge the defence of alibi put forward by the appellant.

It is manifestly clear in this case that guilt turned upon visual identification by the two witnesses of the appellant as one of the robbers at the scene. Thus, usually, the trial court ought to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged and the position from the accused. There is evidence that there was great panic by members of the public who ran in all directions when the shots rang out. There is grave doubt therefore that the witnesses had plenty of opportunity to observe the robbers and to retain their clear description in their minds for such a long period - 17 months - yet there is no indication that the witnesses had known the appellant before the day of the incident nor that he had such special features as would make him easily recognisable.

John Yusuf P.W.2 described the person he had seen as the appellant. He testified that the appellant was:-

"A bit short, black short hair (unshaven), smooth face, white upper teeth ... stout and seemed to be running with a difficulty and had a deep voice."

Tom Ochieng P.W.3 in a statement recorded with the police three days after the incident described the assailant as:

"Black, relatively a bit tall but not very tall, red eyes, middle man in his early 30's".

In our view, this aspect of the evidence is at least uncertain and quite unsatisfactory and in the absence of any other evidence, for example, the alleged confession as recorded by the police in the charge and caution statement, inquiry statement and the ballistic report the purported identification could be mistaken.

In the circumstances, we think that it would be unsafe to allow the conviction to stand. We therefore allow this appeal, quash the conviction and set aside the sentence. The appellant is entitled to his freedom unless otherwise lawfully held.

Dated and delivered at Mombasa this 21st day of January, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR