

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: GICHERU, OMOLO & LAKHA, J.J.A.
CRIMINAL APPEAL NO. 86 OF 2000

BETWEEN

DANIEL MORARA MOSE..... APPELLANT
AND
REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa
(Commissioners Mrs. Joyce Khaminwa & Mrs. Tutui) dated
13th March, 2000

in
H.C.CR.A. NO. 292 OF 1998)

JUDGMENT OF THE COURT

The appellant was tried and convicted of the offence of robbery with violence contrary to **section 296(2) of the Penal Code** by the Senior Resident Magistrate's Court at Mombasa and sentenced to suffer death in the manner authorized by law. The statement of the offence with which he was charged was as follows:

"ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE",

and the particulars whereof were:

"DANIEL MORARA MOSE:

On the 12th day of February, 1998 at Tononoka area in Mombasa District within Coast Province, while being armed with a knife, robbed RASHIDABNU MOHAMMED HASSAN MANDANI of K.Shs. 2,200/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence against the said RASHIDABNU MOHAMMED HASSAN MANDANI."

The appellant was unrepresented at his trial in the court of first instance but was represented in his first appeal to the superior court.

The appellant's ground one of appeal in the superior court related to the charge against him being defective. Mr. Magolo who appeared for him in that court and also appears for him in this Court submitted in the said court that the charge of robbery with violence contrary to **section 296(2) of the Penal Code** against the appellant omitted the vital ingredients of that offence which in the circumstances of the case against him were that in committing the robbery he was charged with he was armed with a "dangerous or offensive weapon" to wit, a long knife. According to counsel, it was necessary that the relevant ingredients of the offence under the aforesaid section be set out in the particulars of the charge. This had not been done. Hence, such a charge could not have formed the basis of conviction for an offence under section 296(2) of the Penal Code. In dealing with this issue, the first appellate court observed that the evidence adduced showed that the weapon used was dangerous. Indeed, according to that court, the evidence of **P.W.3.** and **P.W.4.** in the court of first instance was that the appellant demanded money from **P.W.4** and when the latter said that she had none, he drew out a long knife and placed it on her neck and threatened to kill her. **P.W.4.** then sent her children to get money from her purse which she gave to the appellant. To the first appellate court, the long knife which ordinarily may not be an offensive weapon turned to be not only offensive but dangerous when the appellant placed it on **P.W.4's**

neck and threatened to kill her. That court did not, however, advert to the effect on the appellant of the omission of the two vital ingredients in the particulars of the offence with which he was charged but proceeded to dismiss his appeal. His appeal to this Court turns on the omission of the said ingredients in the particulars of the said offence.

As indicated in this judgment, the appellant threatened to use actual violence against RASHIDABNU MOHAMMED H ASSAN MANDANI (**P.W.4.**) by placing the long knife he was armed with on her neck and told her that he would kill her if she did not give him money. Indeed, according to her, the appellant had grabbed her by the neck when he demanded the money and threatened to kill her with the long knife with the result that he was given K.Shs.2,200/=. These facts no doubt disclosed the offence of robbery contrary to **section 296(2) of the Penal Code** . But the omission of the essential ingredients in the particulars of the offence the appellant was alleged to have committed meant that he had to wait until 3rd September, 1998 when **P.W.3.** and **P.W.4.** had given evidence in the court of first instance to know what the charge against him entailed after having been arrested on 13th March, 1998 and brought to court on the 17th of the same month. Considering that the nature of the charge against the appellant was a matter of life or death and that he was unrepresented at his trial in the court of first instance, the omission referred to above constituted a defect in the said charge which may have embarrassed the conduct of his defence with the resultant possible failure of justice. On this account, we think that such defect is not curable under section 382 of the Criminal Procedure Code in the sense that the particulars of the charge did not disclose an offence known to the law under section 296(2) under which the charge was laid. Consequently, we allow the appellant's appeal, quash his conviction, set aside his death sentence and order that he be set at liberty forthwith unless held in custody for any other lawful cause.

Dated and delivered at Mombasa this 28th day of July, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR