



**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 473 OF 2013**

**(Appeal against Conviction and Sentence in Thika CM Criminal Case No 244 OF 2012 – S. Mbungi, Ag CM)**

**DICKSON ISIAO MUSALIA**

**(Alias DICKY SIAO MUSALIA).....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant herein, **Dickson Isiao Musalia**, was charged with, tried for and convicted of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. It was alleged that on 14/01/2012 at Witeithie Stage in Thika Town within Kiambu County, he robbed **John Muruani Kabuthi** of one Samsung mobile phone make E 250 valued at KShs 5,000/00, and that at the time of the robbery he assaulted the said victim. He was sentenced to death as by law provided. He has appealed against both conviction and sentence.

2. The Appellant's main grounds of appeal, as submitted by his learned Counsel, Mr. Magani, are that there was no proper and positive identification of the Appellant, and that the trial court did not critically evaluate the evidence placed before it, thereby failing to appreciate that there was no proper and full investigation of the alleged offence by the police.

3. Learned **Prosecution Counsel**, Mr. Njeru, did not support the conviction. He submitted that there was no proper identification by the complainant of the mobile phone allegedly stolen from him, and further, that the circumstances of the attack did not accord an opportunity for proper identification of the Appellant.

4. I have read through the rather brief record (for this type of case) of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

5. The attack took place at night, about 11.00 p.m. It was sudden and fleeting, and took place in what appears to have been a back street. There was no proper evidence of the kind of light available, or how bright or how far it was from the place of the attack. The attacker himself ran off immediately after cutting the complainant on the head and snatching a mobile phone from him. The complainant (PW1) and his friend chased after him; he fell down but scrambled away leaving behind the panga and the phone. The complainant and his friend did not state that they struggled with the attacker in any other way.

6. The testimony of the complainant's friend (PW2) that the attacker subsequently went back to the scene to collect the panga and the phone where he had dropped them while fleeing, and where he was allegedly arrested, was rather unlikely. He was not arrested with anything incriminating. At any rate, the officers who arrested the Appellant did not testify and there was not before the trial court evidence of the circumstances of his arrest. The so-called investigation officer (PW4) does not appear to have conducted any meaningful investigation of the alleged violent robbery. Upon the Applicant's arrest he was taken to the complainant who was directed to "positively identify him". No identification parade was conducted. The complainant and his friend had stated that the attacker was a stranger to them.

7. In all these circumstances, there was no proper and positive identification of the Appellant, and his conviction for such a grievous crime carrying the ultimate penalty is not safe at all. Learned Prosecution Counsel properly did not support the conviction.

8. I will allow this appeal in its entirety; I hereby quash the conviction and set aside the sentence of death imposed upon the Appellant. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED, SIGNED AT MURANG'A THIS 21<sup>ST</sup> DAY OF APRIL 2016**

**H P G WAWERU**

**JUDGE** \_\_\_\_\_

**DELIVERED AT MURANG'A THIS 22<sup>ND</sup> DAY OF APRIL 2016**