



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO. 24 OF 2011**  
**(CONSOLIDATED WITH CRIMINAL APPEAL NO. 208 OF 2010)**

**LESIT and MUSYOKA JJ**

**MARIGO KANYAGO ITHARE.....1<sup>ST</sup> APPELLANT**

**JAPHETH MURIUNGI KITHAKA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the original conviction and sentence in Criminal Misc. Application case No. 48 of 2010 of the Senior Resident Magistrate Tigania Hon. M. T. Kariuki - Senior Resident Magistrate)**

**JUDGEMENT**

The appellants in this matter were convicted by the Senior Resident Magistrate in Tigania Senior Resident Magistrate's Court criminal case number 1790 of 2009 and sentenced to death. They had been charged with three counts of robbery with violence contrary to **section 296(2) of the Penal Code**. The particulars were that the appellants had on 23<sup>rd</sup> December 2009 at Kathithine Village, Tigania East District within Eastern Province jointly robbed Rose Malika Kathiwa, Stephen Mutio Musyoka and Stella Nthathu Mutua of assorted amounts of pigeon peas and finger millet valued at Kshs. 10, 500.00, Kshs. 4,500.00 and Kshs 10, 300.00 respectively, and that at or immediately before or after the time of such robbery they threatened the said complainants. They pleaded not guilty, were tried and convicted of the offence charged.

They were aggrieved by the said conviction and sentence, and filed the current of appeals in person. In the appeal, they listed several grounds. At the hearing of the appeal, the first appellant was unrepresented, while the second appellant was represented by Mr Murango Mwenda. The first appellant presented hand written submissions, while Mr Mwenda presented his client's case orally. The state, represented by Mr Makori, opposed the appeal. He submitted that the evidence against the appellants was overwhelming, and invited the court to uphold the conviction and confirm the sentence..

This being a first appellate court we are bound to follow the guidelines set by the Court of Appeal in ***Kinyanjui vs. Republic (2004) 2 KLR 364***, with respect to criminal appeals. It was said that the first appellate court must look at the evidence presented before the trial court afresh and re-evaluate and re-examine the same, and thereafter reach its own conclusions. The first appellate court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant. I also remind myself of the point made in ***Buru vs.***

**Republic (2005) 2 KLR 533** and **Republic vs. Oyier (1985) KLR 353**, that a first appellate court will not normally interfere with the finding of a lower court on the credibility of witnesses unless it is shown that no reasonable tribunal could make such findings.

We have perused the record of the lower court. We note that the attack occurred at broad daylight. The appellants are said to have stood some 50 to 60 metres away. Such distance was close enough for day time identification. Furthermore, the assailants were recognised by their victims who claimed to have known them before then. It is also on record that the names of the assailants were given to the police by the victims. The appellants were positively identified as the assailants by the complainants.

The elements of the offence of robbery with violence are set out in section 296(2) of the Penal Code. There must be a theft accompanied by an assault. The envisaged acts of assault include the attackers being more than one, being armed with dangerous or offensive weapons and the attackers employing violence in their pursuits. The charge in this case alleges that there was theft of foodstuffs from the complainants using threats of violence and that the attackers were more than one in number. We are left to ask whether the circumstances establish the offence of robbery with violence.

There is evidence that one of the appellants was found in possession of the allegedly stolen foodstuffs shortly after the commission of the offence. There is no direct evidence of the taking of the foodstuffs, but the presumption of recent possession can be made in the circumstances as the said appellant has not satisfactorily explained how he came to be in possession of the foodstuffs in question. We are also of the view that the taking, if any, was too removed from the violence directed at the complainants. After the arrows were shot at them, the complainants fled. None of them witnessed the alleged theft. The theft in our view occurred at some unknown time after the alleged violence and it cannot therefore be said to have been accompanied by the acts of violence alluded to.

There is also the issue of the violence itself. It took the form of arrows being shot at the complainants. None of them was injured. In any event the mere act of shooting arrows at some which do not hit the target does not fall within the ambit of **section 296(2) of the Penal Code**. The provision envisages that the assailant wounds, beats, strikes or uses any personal violence to any person. That was not the case here. The charge is in fact of threatening to use violence on the complainants. Threats to use violence is not an element of the offence created under **section 296(2) of the Penal Code**, but of that created under **section 296(1) of the Penal Code**. To that extent the charge was defective.

In view of what we have stated above, we have come to the conclusion that the appellants were tried on the basis of a muddled up charge. There was no basis upon which the charge could be established as framed. The appellants ought not to have been convicted on the basis of such a charge. We hereby allow the appeal. The conviction of the appellants of robbery with violence is hereby quashed and the sentence of death on them is hereby set aside. The appellants shall be set free from prison custody unless they are otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS

24<sup>TH</sup> DAY OF OCTOBER, 2013.

J LESIIT

JUDGE

W MUSYOKA

JUDGE