



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 94 OF 2012**

**RASHID KYALO KALOKI ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of the Principal Magistrate J. Karanja PM delivered on 17/5/2012 in Makueni Principal Magistrate Criminal Case No. 131 of 2011)*

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*(Before Beatrice Thurania Jaden and J.M Ngugi JJ)*

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

1. The Appellant, **Rashid Kyalo Kaloki** was charged with three counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

In Count I, the particulars of the offence were that on the 28<sup>th</sup> day of July 2010 at **Wote Township** in **Makueni District** within **Eastern Province** jointly with others not before court while armed with dangerous weapons namely homemade gun and pangas, the Appellant robbed **Simon Kyalo Ndonye** of cash Kshs.1,000, one mobile phone **Chinese** make, one wallet and national ID card all valued at Kshs. 6,200 and at the time of such robbery threatened to use actual violence on the said **Simon Kyalo Ndonye**.

2. The particulars of the offence in the second count were that on the 28<sup>th</sup> day of July 2010 at **Wote Township** in **Makueni District** within **Eastern Province**, jointly with others not before court while armed with dangerous weapons namely homemade gun and pangas, the Appellant robbed **Justus Mwanzia Kisio** of cash Kshs.600/= and at the time of such robbery, threatened to use actual violence on the said **Justus Mwanzia Kisio**.
3. The particulars of the offence in the third count were that on the 28<sup>th</sup> day of July 2010 at **Wote Township** in **Makueni District** within **Eastern Province**, jointly with others not before court while armed with dangerous weapons namely homemade gun and pangas, the Appellant robbed **Emilio Kinyua Mugo** of Kshs.200 and a mobile phone make **Nokia 1110** all valued at Kshs.3,000 and at the time of such robbery threatened to use actual violence on the said **Emilio Kinyua Mugo**.
4. In the fourth Count, the Appellant was charged with the offence of being in possession of an imitation of a firearm contrary to **section 34 (1) (3)** of the **Firearm Act**.

The particulars of the offence were that on the 29<sup>th</sup> day of July 2010 at **Nyunzu village** in **Makueni**

**District within Eastern Province** the Appellant was found in possession of an object resembling a firearm namely pistol.

5. In the fifth count, the Appellant was charged with escape from lawful custody contrary to **section 123 of the Penal Code**.

The particulars of the offence were that on the 3<sup>rd</sup> day of August 2010 at **Makueni District Hospital in Makueni District within Eastern Province** being in a lawful custody at **Makueni Police Station** after an arrest for the offence of robbery with violence contrary to **section 296 (2) of the Penal Code** escaped from such lawful custody.

6. The case for the prosecution was that PW1 **Justus Mwanzia Kisivo** and PW2 **Emillio Kinyua Mugo** the complainants in the robbery case who are taxi drivers had gone to **Shimo area of Wote** to drop a colleague. As the car turned after dropping the colleague they were attacked with pangas by a group of three men. The motor vehicle windows were shattered. PW1 was robbed of cash Kshs. 600/= and his mobile phone. The robbers then ran away.
7. A report was made to **Makueni Police Station** and investigations commenced. The police officers went to the scene with a sniffer dog. The sniffer dog picked the scent and followed the same for a distance of about 8 – 9 kilometres to a house where they found 4-5 men sleeping. A scuffle ensued and the men managed to run away from the house. The Appellant was arrested after being shot on the leg and arm. The Appellant was escorted to the police station and subsequently charged with the offences herein.
8. In his defence, the Appellant elected to remain silent.
9. In his judgment, the trial magistrate arrived at the conclusion that there was overwhelming evidence against the Appellant as the sniffer dog tracked the scent from the scene to the house the Appellant escaped from before he was shot. The trial magistrate observed that the police officers recovered two pangas, a toy pistol and a homemade gun from the same house.
10. In count I the Appellant was acquitted. In II and III the Appellant was sentenced to death. In Count IV the Appellant was sentenced to serve six years imprisonment. The Appellant pleaded guilty to count V and was convicted and sentenced to two years imprisonment. The sentence has already been served and is not the subject of this appeal.
11. The Appellant was dissatisfied with both the conviction and sentence and appealed to this court. The grounds of appeal can be summarized as follows:-

- v. **The complainants failed to identify their assailants.**
- v. **The evidence by the prosecution was insufficient, inconsistent and unreliable.**
- v. **The application by the Appellant for the trial magistrate to transfer this case to another court was denied.**
- v. **The conviction was based on circumstantial evidence yet the legal requirements for reliance on circumstantial evidence had not been met.**
- vi. **The defence case was rejected without any valid reasons.**
- v. **Statements of prosecution witnesses were not supplied to the defence.**
- v. **The prosecution case was not proved beyond reasonable doubt.**
- v. **The sentence meted out was excessive and illegal.**

12. We have duly considered the rival submissions filed by counsel for the Appellants and by the State Counsel.

13. This being a first appeal, we are duty bound to re-evaluate the evidence and the record afresh and come to our own conclusions and inferences – **See Okeno –vs- Republic (1972) EA 32.**

14. PW1 and PW2 who are the complainants in the robbery case have given a corroborative account of evidence on how they were robbed of the aforementioned properties. There is no doubt that the robbery took place.

PW1 was however not able to identify the attackers. PW2 only identified the Appellant in the court room. Dock identification of a suspect is generally worthless evidence unless other evidence is adduced to corroborate it (**See Gabriel Njoroge v Republic (1982-88) 1KAR 1134**).

No identification parade was carried out to test the reliability of PW2's evidence. No description of the robbers was given to the police officers by PW2. The identification was also in difficult circumstances. The only source of light was moonlight.

PW5 the dog handler is the only witness from the scene of arrest. One **PC Kibet** who is said to have shot and arrested the Appellant did not testify. This was a crucial witness who could have shed light on exactly where he arrested the Appellant and also stated whether he lost sight of him or not to avoid and mix up with other innocent citizens. There were 4 -5 men sleeping in the house in question according to the dog handler. It is noteworthy that the complainants' evidence was that they were attacked by a group of three men. There is therefore, a possibility of some innocent man having also been in the same house.

15. There was no recovery of the goods the complainants were robbed of. The evidence of PW5 the dog handler regarding the circumstances of arrest remains uncorroborated. The evidence of PW3 **Cpl. Paul Kiprop Kipkore** and PW4 **Sgt. Francis Njuguna** deals with the formal aspects of the case and is of no probative value. PW3 re-arrested the Appellant while PW4 the Investigating Officer had the imitation firearm examined by the ballistics expert.
16. The Appellant when called to his defence elected to remain silent. As analyzed above, we have found the prosecution case rather weak. It was not appropriate to put the Appellant on his defence as it was not his duty to fill in the gaps in the prosecution case.
17. One of the issues raised by the Appellant was that the defence was not supplied with the statements recorded by the prosecution witnesses. The record of the lower court shows that although the court made orders for the supply of statements, the same were made on the same day that the court proceeded to record the evidence of PW1 and PW2. PW1 and PW2 were key prosecution witnesses and the complainants in Count I and II. The court commenced the hearing of the case without the Appellant having been provided with sufficient time and facilities to prepare for his case contrary to the provisions of **Article 50 (2)** of the **Constitution** of the Republic of Kenya.
18. However, with the trial magistrate having sentenced the Appellant to death in count II the sentence in Count III and IV ought to have been held in abeyance.
19. With the foregoing, we reach the conclusion that the appeal has merits and must be allowed. The convictions in Count II, III and IV are quashed and the sentences set aside. The Appellant is at liberty unless otherwise lawfully held.

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**B. THURANIRA JADEN**

**J.M. NGUGI**

**JUDGE**

**JUDGE**

**Dated and delivered at Machakos this 15<sup>th</sup> day of October 2013.**

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**B. THURANIRA JADEN**

**JUDGE**