



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 217 OF 2012**

**KIRIA ROBERT MBUMBA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 599 of 2009 in the Resident Magistrate's Court at Githunguri – R.A.A. Otieno (PM) on 5<sup>th</sup> April 2011)*

**JUDGMENT**

**Introduction**

1. The Appellant **Kiria Robert Mbumba** was charged together with one Michael Wanjala with two counts of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The appellant separately faced two other charges of being in possession of suspected stolen goods contrary to **Section 323 Penal Code** and of being unlawfully present in Kenya contrary to **Section 13(2)** of the **Immigration Act** (Cap 172 laws of Kenya).
2. At the close of the trial the appellant was convicted for the offence of robbery with violence and sentenced to death in accordance with the law in the first two counts. He was also convicted and sentenced to serve 18 months imprisonment for the offence of being unlawfully present in Kenya. The sentences in count II and IV were ordered to remain in abeyance in view of the sentence in count I.
3. The brief facts in count I and II were that on the 16<sup>th</sup> day of April 2009 at Kiambururu village in Kiambu District within Central Province, jointly with others not before the court, while armed with rungas (clubs) and a stone they robbed the following:

**Esther Wairimu Mwaura** of one TV make LG, Sonitec radio, Nokia 3310, assorted clothes, one wall clock and cash Kshs.6960/= all valued at Kshs.45,967/=, in **count 1** and,

**David Kimani Mwaura** of one DVD make Panasonic, shoes, Motorola phone V3 and charger all valued at Kshs.13,500/= in **count II**.

It was stated that at, or immediately before, or immediately after the time of such robbery they threatened to use actual violence against the said victims.

4. **In count IV**, it was alleged that on the 6<sup>th</sup> day of May, 2009 at about 5.00 a.m. at Kiangema Stage in Kiambu District within Central Province, being a Ugandan citizen he was found present in Kenya without a valid pass or permit to remain in Kenya.

### **Grounds of Appeal**

5. He subsequently filed an appeal against the convictions and sentences, on grounds first, that the prosecution's evidence was contradictory and in any case did not incriminate the appellant; second, that the prosecution was based on a single identifying witness; third, that the charge sheet was defective and lastly, that the defence was not duly considered.
6. Learned state counsel Miss Maina, opposed the appeal on behalf of the state and relied on the judgment and proceedings of the trial court. She urged that the appeal be dismissed.

### **Summary of the Case**

7. To assess the evidence properly we first set out the summary of the case which was presented before the trial court. In sum, the court was told that on 16<sup>th</sup> April 2009 **PW1** was asleep in her house when at about 12.40 a.m. her bedroom door was suddenly pushed open. People entered her bedroom and demanded money from her. She retrieved Kshs.6000/= from under her mattress and gave it to them.
8. The men ransacked her room and took some of her husband's clothes. One of the robbers slapped her during the ordeal. The robbers went out of her room and returned with her son and daughter, who had been sleeping elsewhere and pushed them under her bed. Meanwhile she remained in bed and covered her head as ordered.
9. The robbers left after some 20 minutes and when she got up she noticed that the main door and the inner doors had been broken using stones. She checked the house and noted that they had lost property as listed in the charge sheet.
10. In count II, **PW2** told the court that he too was asleep at about the same time and on the same date when he had a knock at the door. He opened his eyes and found three men standing by his bed. One of the men was armed with an iron bar. One man demanded his mobile phone and picked it up himself from the shelf.
11. The robbers herded him into his mother's living room where he found four other robbers. They ushered him into his mother's bedroom and he found yet two more robbers. He was pushed under his mother's bed as the robbers continued to ransack the house. At the end of the ordeal the robbers took from him all that property set out in count No. II.
12. The court was further told that on 6<sup>th</sup> May 2009 while **PW2** was plying his trade as a matatu conductor along Kiambu-Githunguri road, he picked up two passengers one of whom he recognised as having been among the robbers. He directed the matatu into Muthaiga Police Station and caused the suspected man to be arrested.
13. The appellant gave his defence on oath and called one witness. He told the court that he is a Ugandan national who entered Kenya lawfully in the year 2002. He denied any involvement in the robbery and only testified as to what happened on the day he was arrested. **DW2** who testified on his behalf told the court that she was his wife and that he came to Kenya in the year 2000. She could not however, account for his whereabouts on the night of the robbery.

### **Analysis of Evidence**

14. This being the first appeal, we are mandated to look at the evidence adduced during the trial afresh, re-evaluate and re-assess it and reach our own independent conclusion. However, in doing

so we have warned ourselves that we did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot comment on their demeanour. See **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.**

15. Upon a careful scrutiny and reassessment of the evidence we concluded that the appeals against conviction and sentence in count I and II must succeed for several reasons.
16. These reasons are first, that the conviction was based on the testimony of a single identifying witness, who purported to have identified him in very difficult circumstances. The robbers struck at 12.40 a.m. when the family had already retired to bed. There were about twelve robbers according to the testimony of **PW5**, P C Ongaria who received the report. **PW1** testified that she did not identify any of them.
17. **PW2** said that three men removed him from his house and took him to **PW1**'s house and shoved him under the bed. The witnesses testified that the lights remained on during the robbery and that the robbers made no attempt to cover their faces. **PW2** testified that as he came into his mother's living room he saw four intruders in the living room and two more in the bedroom and that all this happened in the space of two minutes. In our view the observation of the intruders by **PW2** was therefore fleeting and we are not convinced that he would have been able to see the intruders' faces from his position under the bed where he was showed.
18. We bore in mind that these three intruders had startled him out of sleep. We observed that by **PW2**'s own admission the appellant was not a person who was known to him before the attack. That when he made his report to the police he did not give his name or description which might lead to the conclusion that he had identified the appellant on the fateful night.
19. From the evidence, **PW2** met the appellant three weeks later and purported to recall that he was one of the men who had robbed them. None of the stolen items was recovered from the appellant to link him to the offence.
20. For the foregoing reasons we find that the evidence of identification was too tenuous to sustain the conviction in **counts I and II** and that it created a reasonable doubt whose benefit we give the appellant and **allow the appeals.**
21. In **count IV** we observed that the appellant, having admitted to being an alien, the burden shifted to him to produce evidence of being in the country lawfully as he alleged. This he failed to do and we are therefore satisfied that he was properly convicted and sentenced.
22. On 25<sup>th</sup> July 2012 the appellant was sentenced to serve 18 months imprisonment in **count IV**. Following ordinary computation of time he has therefore served the sentence.
23. For these reasons we order that the appellant be repatriated back to his country of origin.

**SIGNED DATED and DELIVERED** in open court this **11<sup>th</sup>** day of **December 2013.**

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**MUMBI NGUGI**

**JUDGE**

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**L. A. ACHODE**

**JUDGE**