



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.288 OF 2006**

**CONSOLIDATED WITH CRIMINAL APPEAL NO. 287 OF 2006**

**MICHAEL KAMAU.....1<sup>ST</sup> APPELLANT**  
**RICHARD KIPROTICH..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[Appeals from original conviction and sentence in Narok  
SNR.P.M.CR.C.NO.1578/2005 by Hon S. M. Githinji, Principal Magistrate, dated 30<sup>th</sup> November,  
2006]**

**JUDGMENT**

The two appellants, **Michael Kamau** and **Richard Kiprotich Rono**, whose Appeals were consolidated have challenged their conviction for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** and the death sentence consequently imposed.

In identical grounds of appeal the appellants alleged that:

- i) the learned trial magistrate relied on the evidence of a single eye witness to convict them without warning himself
- ii) material witnesses were not called
- iii) the learned trial magistrate shifted the burden to the appellants

Learned counsel for the respondent conceded the appeal on the ground that the mobile phone which formed the basis of the charge was not produced. Similarly, the person alleged to have purchased it from the appellants was not called. Before we consider the grounds of appeal and the submissions by counsel, we are bound to re-evaluate the evidence on record afresh in order to arrive at our own independence conclusion, always bearing in mind that we have neither seen nor heard the witnesses.

In a rather lengthy but consistent testimony, the complainant, Fredrick Koriata, recalled that on 17<sup>th</sup> December, 2005 at 11p.m. at Narok town, while entering his motor vehicle, he was approached by three men who apparently knew him but whom he did not know. The three asked to be dropped off at a place called Osupuko. The three sat at the back and rode with him to Osupuko Hotel where they alighted and the three went separate ways from the complainant who went in to Osupuko Hotel.

While at the hotel, the 1<sup>st</sup> appellant once more approached the complainant with the message that a

certain lady from Nairobi wanted to see him (the complainant) at Park View Hotel. Instead of being taken to Park View Hotel where the lady was allegedly waiting for him, the complainant was led to Nyati Bar. At the gate of Nyati Bar, the 1<sup>st</sup> appellant confirmed to the complainant that the lady was at the bar. While at the gate, the complainant heard people coming towards him. Before he could understand what was going on, the 1<sup>st</sup> appellant got hold of his neck with his right hand in what he described as “*Ngeta*” as two other men took the complainant’s mobile phone, Nokia 2600, cash Kshs.2,400/=, a wallet containing ATM card and other personal items. After this, the 1<sup>st</sup> appellant and the two men ran away while the complainant returned to Osupuko Hotel where he spent the night.

The next morning, the complainant went to Park View Hotel where he met a friend by the name Yunis who upon the complainant explaining to him his ordeal of the previous night, volunteered to assist him in tracing his attackers. That evening at 7p.m., they traced the 1<sup>st</sup> appellant, had him arrested and subsequently charged.

The only other evidence in support of the prosecution case was presented by **P.C. Joel Dawa** who re-arrested the 1<sup>st</sup> appellant when the latter was taken to the police station. Then there is finally the evidence of **P.C. Stephen Ndonye** who conducted the investigations. He explained that the 1<sup>st</sup> appellant led him to the 2<sup>nd</sup> appellant who he arrested. Both appellants upon further interrogation informed P.C. Ndonye that the mobile phone stolen from the complainant had been sold to a man by the name Nyoike. The phone was indeed recovered from the said Nyoike who recorded a statement with the police.

In their defence, both appellants denied any involvement in the commission of the offence and raised the defence of *alibi*. They both maintained that they were arrested when they failed to produce identification cards

The learned trial magistrate in a well reasoned judgment, found the complainant to be an honest witness. He also found that there was sufficient prosecution evidence pointing to the appellants’ participation in the robbery, hence their conviction and death sentence.

The case turns on two points, identification and recovery of recently stolen goods. According to the complainant, he met the appellants first at 11p.m. outside Talek Bar. The appellants and a third person exchanged greeting with him before asking for a lift. They appeared to know him as they called him by his middle name. He however, did not know any of them. After dropping them outside Osupuko Hotel, the 1<sup>st</sup> appellant followed him to the hotel with a message that a certain lady from Nairobi wanted to see him at Park View Hotel. The complainant was reluctant but on further consideration agreed to accompany the 1<sup>st</sup> appellant to Park View Hotel to meet this lady who was not even known to him. The 1<sup>st</sup> appellant led the complainant, walking, towards Park View Hotel. Halfway the walk, they were joined by the two other men. As they got close to Park View Hotel, the 1<sup>st</sup> appellant told the complainant that they had made a mistake; that the lady was not at Park View Hotel but at Nyati Bar.

At this point, the complainant became suspicious and insisted he could only go with the 1<sup>st</sup> appellant alone. As they got to the gate of Nyati Bar, the 1<sup>st</sup> appellant held him by the throat as the other two men frisked him for valuables. Once they were done with him, they ran away. The complainant estimated that from the time he refused the 1<sup>st</sup> appellant’s colleagues to accompany them, he walked with the 1<sup>st</sup> appellant for about 100m. There was light albeit not very bright. Of the three persons who attacked him, he was only sure of the identity of the 1<sup>st</sup> appellant. He admitted that he would not have identified the 2<sup>nd</sup> appellant but for the 1<sup>st</sup> appellant implicating him.

The complainant, from the detailed events preceding his attack, in our view had ample time with the 1<sup>st</sup> appellant. They talked and even walked together. He explained to Yunis and the police that he could identify one of his attackers. We, are persuaded that although it was at night, the circumstances were such that the complainant was able to positively identify the 1<sup>st</sup> appellant. We, however, find that the 2<sup>nd</sup> appellant was not identified by the complainant but was only mentioned by the 1<sup>st</sup> appellant.

The only other evidence said to link him with the offence is that he was said to have sold a mobile phone stolen from the complainant during the robbery to one Nyoike. Although Nyoike recorded a statement with the police, he was never called to complete the nexus between the phone he was found with and the 2<sup>nd</sup> appellant. Furthermore, the phone itself was not produced and the photographs taken by private photographers were erroneously admitted in evidence in clear contravention of **section 78** of the **Evidence Act**. The prosecution evidence although presented by a single witness was overwhelming and indeed displaced the defence of *alibi* raised by the 1<sup>st</sup> appellant.

We come to the conclusion that there being no sufficient evidence against the 2<sup>nd</sup> appellant, the learned trial magistrate erred in finding him guilty, convicting and sentencing him to death. That finding is hereby reversed and the 2<sup>nd</sup> appellant's appeal is allowed, conviction quashed and death sentence set aside. He is acquitted and is set free forthwith unless held for any other lawful cause.

The 1<sup>st</sup> appellant's appeal, on the other hand fails and is dismissed as we are satisfied that he was properly identified by the complainant and the ingredients of the offence under **section 296(2)** of the **Penal Code** proved.

**Dated, Delivered and Signed at Nakuru this 28<sup>th</sup> day of February, 2011.**

**M. J. ANYARA EMUKULE**  
**JUDGE**

**W. OUKO**  
**JUDGE**