



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NOS. 372 & 373 OF 2007**

**ABDI AZIZ AHMED .....1<sup>ST</sup> APPELLANT**  
**YASSIN ABDI ALI .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From the original conviction and sentence in Criminal Case No. 465 of 2006 of the Principal Magistrate's Court at Garissa by S. M. Kibunja - Ag. Senior Principal Magistrate**

**JUDGEMENT**

The appellants were charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars are that on 19<sup>th</sup> day of February 2006 at about 7.20 p.m. at Ngamia Road in Garissa district within North Eastern Province with others not before the court jointly robbed Yusuf Mursal of a mobile phone make Motorola C200 valued at Kshs.5,000/= and cash Kshs.6,000/= and at the time of such robbery wounded the said **Yusuf Mursal**.

The two appellants were convicted and sentenced to death. The basis of the appellants' conviction is the evidence given by the complainant PW1 who contended that he was encountered by four people as he was heading home.

According to PW1 the four robbers grabbed him and demanded money. He said he knew two of them very well being the 1<sup>st</sup> appellant and another person who was not arrested. He screamed for help and PW2 who was walking behind him did not answer his call. PW1 contended that it was not dark but he was able to see the 1<sup>st</sup> appellant with the help of moonlight and light from a neighbouring house.

The question that arises is whether the complainant was able to see the attackers and whether the area where the robbery took place was well illuminated. According to PW1 the attack was sudden and swift making the possibility that the intruders could be mistaken for other people. It is also clear that the circumstances prevailing at the scene was not favourable for positive identification. In the circumstances we think that the circumstances prevailing at the scene and the fact that PW1 did not clearly establish how he was able to identify the 1<sup>st</sup> appellant creates doubts in our mind. It is also clear that the trial court did not warn itself of the dangers of convicting the appellants on the evidence of a single identifying witness. We think that was material omission which goes to the root of the appeals under our determination. The failure by the trial court to warn itself of the dangers of basing its conviction on a sole identifying witness greatly and materially affects the propriety of the conviction.

Having re-evaluated the evidence, we are of the view that PW1 did not have ample opportunity to clearly see the persons who robbed him on the material night. According to PW2 the area was dark and that is why he ran away after PW1 was attacked. In view of the conflicting and contradictory evidence by PW1 and PW2, we think it is unsafe to sustain the conviction entered by the trial court. As rightly pointed out by Mr. Onono learned counsel for the appellants, the evidence on record is insufficient and that there are too many unexplained areas or doubts in the prosecution case. The conviction entered is against the weight of the evidence on record. We think both appeals are well merited. Consequently, we are minded to allow the two appeals, quash the conviction and set aside the sentence. We order for the immediate release of

both appellants unless lawfully held.

Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of February 2011.

**J. KHAMINWA**  
**JUDGE**

**M. WARSAME**  
**JUDGE**