



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 226 OF 2002**

*(Appeal arising from the conviction and sentence of [MR. A. O. MUCHELULE, C.M.]*

*in Kakamega Chief Magistrate's Court, Criminal Case No.813 of 2003)*

**PATRICK MUNYANGORI.....APPELLANT**

**V E R S U S**

**REPUBLIC.....REPOUDENT**

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

Patrick Munyangori Ombati, the appellant herein was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 13th April 2002 at Kambi Somali Estate in Kakamega Township, the appellant, jointly with others not before court, while armed with iron bars robbed Sammy Kuloba of KShs.3000/=, an identity card and a Post bank book all valued at KShs.3200/= and at or immediately before or immediately after the time of such robbery wounded the said Sammy Kuloba. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. The prosecution called a total of four witnesses in its bid to establish its case. When the appellant was put on his defence, he gave an unsworn evidence. He denied committing the crime. The trial court, after evaluating the evidence, found that the prosecution had established its case to the required standard of the law. The appellant was convicted and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and duly appealed to this court.

In his petition of appeal, the appellant raised four grounds of appeal challenging his conviction. He was aggrieved that he had been convicted on the basis of the evidence of identification that did not stand up to legal scrutiny. The appellant faulted the trial magistrate for convicting him in the absence of the evidence of the investigating officer. The appellant was aggrieved that he had been convicted on medical evidence which did not support the charge. He faulted the trial magistrate for failing to take into consideration the fact that the exhibits produced in court as evidence were not found in his possession. In the premises therefore, the appellant urged the court to allow his appeal, quash the conviction and set aside the death sentence that was imposed upon him.

Before giving reasons for our decision, it is imperative that we set out the facts of this case, albeit briefly. The complainant, Sammy Kuloba (PW1) was accosted by a gang of robbers as he was walking home from Kakamega Township. The incident occurred on 13th April 2002 at about 10.00 p.m. According to the complainant, as he was walking home, he was accosted by a group of men who grabbed him from behind and then tackled him to the ground. Two of the men were armed with knives. They threatened to do harm to the complainant. They then robbed the complainant of his pullover, his identity card, Post bank book and KShs.3000/=. While the robbery was in progress, PW2 Joseph Mwangi Gitau, drove by in his taxi. He testified that with the aid of the motor vehicle's head lights, he was able to see a group of people struggling on the ground by the roadside. When he reached near the scene, the group that was attacking the complainant scattered. At that moment, the complainant managed to grab one of his attackers. The complainant testified that he realized then one of his attackers was known to him. He identified him by his nickname "Mbararo". Similarly too, PW2 testified that he knew the appellant by his nickname "Mbararo". Infact, PW2 on reaching the scene of the attack he called out the appellant by his nickname "Mbararo". According to PW1 and PW2, the appellant took off when PW2 drove into the scene. Both PW1 and PW2 were emphatic that they were able to identify, nay, recognize the appellant as being among the men who accosted and robbed the complainant. In the course of the robbery, the complainant testified that he was injured. The complainant was seen by PW4 Ayienda Sandifin, a clinical officer based at Kakamega Provincial General Hospital. This was on 14th April 2002, a day after the robbery. He confirmed that indeed the appellant was injured on his right forearm, on his chest and upper back. The injuries were caused by a blunt object. A duly filled P3 form was produced in evidence by PW4.

The complainant reported the robbery incident to the police at Kakamega police station. PW3 PC Hezron Mokenye was assigned to investigate the case. PW3 testified that the complainant told him that he knew one of his attackers. The complainant led PW3 to Scheme estate. The appellant arrested. He led the police to his house at Kambi Somali estate. The house was searched but nothing was recovered. The pullover (sweater) which the robbers removed from the complainant was recovered from the scene of crime by PW2. It was produced as an exhibit during trial. When the appellant was put to his defence, he denied committing the crime. He testified that he was innocent and was arrested by the police while he was at his place of work. He stated that on the day that the offence took place he was sick at his house. He

reiterated that he did not commit the offence.

This being a first appeal, this court is mandated to re-consider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witness as they testified and therefore cannot make any determination as to the demeanour of the witnesses (see **Njoroge vs Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved, to the required standard of proof beyond any reasonable doubt, that it was the appellant who robbed the complainant.

We have carefully considered the submissions made by the appellant and by Mr. Orinda, on behalf of the State. It is evident from the facts of this case that the appellant was convicted on the evidence of identification. According to the complainant, he was accosted by a gang of robbers who robbed him of cash and identity documents. The robbery was however interrupted when PW2 drove into the scene in his taxi. PW2 knew both the appellant and the complainant. He stated that he saw the appellant and the complainant struggle on the ground. The other members of the gang took off when they saw PW2's motor vehicle. PW2 testified that he was able to identify both the appellant and the complainant by the headlights of his motor vehicle. Both the complainant and PW2 identified the appellant by his nickname "Mbararo". Indeed PW2 called out the nickname of the appellant when he drove into the scene. The appellant denied the evidence adduced by the prosecution witnesses to the effect that he was at the scene during the robbery incident. He gave an alibi defence. He testified that he was sick in his house at the time it is alleged that the robbery incident took place.

Upon re-evaluation of the evidence that was adduced, it was clear to the court that the prosecution indeed established to the required standard of proof beyond any reasonable doubt that the appellant was identified at the scene of the robbery. In our considered view, that evidence was of recognition. The complainant and PW2 knew the appellant prior to the robbery incident. They knew him even by name. They identified him by name at the scene of the robbery. No evidence was adduced to suggest that there could have existed a grudge between the appellant the complainant that could have motivated the complainant to falsely accuse the appellant of the crime. The ingredient to establish the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** was proved. The appellant, in company of others, while armed with dangerous and offensive weapons, robbed the complainant of KShs.3000/= cash, his identity card and his Post bank book, and in the course of the robbery injured the complainant. The alibi defence was rightly rejected by the trial court as having no strength to dent the otherwise strong evident adduced by the prosecution. We too are of the same opinion.

The upshot of the above reasons is that the appellant's appeal lacks merit and is hereby dismissed. The conviction and sentence of the trial magistrate's court is hereby upheld.

It is so ordered.

**DELIVERED and DATED at KAKAMEGA this 7<sup>th</sup> day of December 2011**

**L. KIMARU**  
**J U D G E**

**B. THURANIRA JADEN**  
**J U D - G E**