



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

**Criminal Appeal 304 of 2007**

**MALI MALI MUIYERE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Nanyuki in Criminal Case No.1977 of 2006 dated 9<sup>th</sup> |October 2007 by Ndungu H. N. (Miss), Ag. Senior Principal Magistrate)***

**JUDGMENT**

MALI MALI OLE MOIYARE, the appellant, herein was tried on a charge of robbery with violence contrary to *Section 296 (2)* of the Penal Code. The particulars of the charge were that on the 5<sup>th</sup> day of October 2006, at Nanyuki Township in Laikipia District within Rift valley Province, jointly with others not before Court, robbed LESINTAN KILOKU cash Ksh.35,000/= and at or immediately before or immediately after the time of such robbery wounded the said Lesintan Kiloku. Upon undergoing a full trial the Appellant was convicted and sentenced to suffer death. He was dissatisfied hence he preferred this appeal.

On appeal the Appellant put forward the following grounds in his amended Petition of Appeal:

1. *That the learned trial magistrate erred in both law and facts when she convicted me in this case while relying with the evidence of identification by recognition made by a single identifying witness P.W. 1 without her considering that circumstances that was prevailed during the robbery was never conclusive as no one witnessed the robbery.*
2. *That the learned trial magistrate gravely erred in both law and in facts when she convicted me while relying with the contradicted evidence that was being adduced by the prosecution witnesses.*
3. *That further she erred in both law and facts when she convicted me still in not considering that the prosecution's side never availed the vital witnesses and same that I was convicted on a defective charge sheet.*
4. *That the learned trial magistrate erred in law and facts when she rejected my defence without not explaining proper reasons for its rejection and thus failed to explain proper reasons for its*

*rejection and thus violated the law provision under Section 169 (1) of the Criminal Procedure Code.*

When the appeal came up for hearing before us, the Appellant was granted leave to file and rely on written submissions. Mr. Makura, the learned State Counsel, opposed the appeal. He was of the opinion that there was ample evidence which placed the Appellant at the scene of crime and that the offence was committed in broad day light.

This being the first appellate court, we are enjoined to re-evaluate the entire evidence and come to our own conclusion but bearing in mind that we had no advantage of observing the demeanor of the witnesses as they testified. The prosecution's case is buttressed by the evidence of five (5) witnesses whereas the Appellant testified and summoned the evidence of one independent witness. Lesitan Kiloku (P. W. 1), the Complainant and Leiyen Meshame (P. W. 3) told the trial acting Senior Principal Magistrate that on 4<sup>th</sup> October 2006, they both went to Nanyuki where they sold two cows belonging to the Complainant at Ksh.40,000/=. The duo opted to spend the night at Lenana Lodge, Nanyuki. In the evening the duo spent their time taking miraa at a bar located within the same premises. Shortly the Appellant, a person not well known to the Complainant (P. W. 1), but well known to P. W. 3, appeared and joined them. The Appellant is said to have requested P. W. 1 and P. W. 3 for Miraa and for some accommodation to spend the night.

On 5<sup>th</sup> day of October, 2006, the Appellant is said to have offered to take the Complainant (P. W. 1) to a place where the Complainant would buy cheap posho meal. As P. W. 1 and the Appellant left to buy the posho meal, P. W. 3 was left at the stage to take care of the luggage. On the way, P. W. 1 said the Appellant produced a club (rungu) which he used to hit him on the head whereupon he fell down unconscious. Mr. Onorio, a clinical officer who examined the Complainant produced a medical report which established the injuries suffered by P. W. 1. When the complainant regained his conscience, he found Ksh.35,000/= missing from his coat. P. W. 3 heard screams next to the posho mill. He then rushed to see what was happening. He said he found P. W. 1 lying unconscious while bleeding from the nose and the temple area of the head. He picked up P. W. 1 and took him to hospital. P. W. 1 and P. W. 3 reported the incident to the Police. P.C. Gabriel Leipere recorded the report in the Occurrence Book of 5<sup>th</sup> October 2006 at Nanyuki Police Station. P. W. 1 spotted the Appellant on 11<sup>th</sup> October 2006 at Doldol stage upon which he reported to P. C. Daniel Lolopiro (P. W. 2) who in turn arrested him. The Appellant on his part denied the offence. He told the trial magistrate that he was a retired assistant chief and that he was arrested while he was on his way to pursue his retirement benefits. The Appellant claimed he did not know P. W. 1 and P. W. 3.

We have considered the grounds put forward and the written submissions made by the Appellant. It is the submission of the Appellant that the learned Senior Principal Magistrate erred when she convicted him on the basis of a single identifying witness without taking into account the conditions for identification. We have carefully considered this ground. There is no doubt that the incident took place in broad day light. P. W. 1 had spent more than 10 hours with the Appellant chewing miraa. The Appellant was introduced to P. W. 1 by P. W. 3 who was well known to the Appellant. We believe the evidence of P. W. 1 and P. W. 3 that the Appellant had escorted the Complainant (P. W. 1) to buy cheap posho meal. We are satisfied that the learned Senior Principal Magistrate properly received the evidence of P. W. 1 as a single identifying witness upon warning herself. We are also unable to fault her on the manner she received the evidence. We are convinced that the Appellant was

placed at the scene of crime. Having come to the conclusion that the Appellant was with P. W. 1 and P. W. 3 the night of 4<sup>th</sup> October 2006 and the morning of 5<sup>th</sup> October 2006, we hold that the Appellant's conduct of disappearing after escorting P. W. 1 is consistent with the behaviour of a person with guilt conscience. We believe the Complainant told the truth. We are also satisfied that the learned Senior Principal Magistrate considered the Appellant's defence and properly rejected the same. We are also satisfied that the ingredients of robbery with violence were proved. There was evidence that the Appellant hit the Complainant using a club thus causing serious injuries. The evidence tendered showed that the Appellant immediately before the robbery struck the Complainant by using a rung.

In the end we are satisfied that the Appellant was convicted on sound evidence. The defence of alibi was displaced by the evidence tendered by the prosecution. We see no merit in the appeal. We dismiss it in its entirety.

*Dated and delivered this 13<sup>th</sup> day of January 2010.*

**J. K. SERGON**  
**JUDGE**

**M. S. A. MAKHANDIA**  
**JUDGE**

In open court in the presence of the appellant and in the presence of Mr. Makura Learned  
State Counsel.

**J. K. SERGON**  
**JUDGE**