



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO. 140 & 141 OF 2007**  
**(CONSOLIDATED)**

**(Being an appeal from original conviction and sentence of the SRM's court  
at Migori in criminal case No. 12 of 2007 - Ezra O. Awino, PM)**

**BETWEEN**

**SAMUEL KEBOKA MWITA ..... 1<sup>ST</sup> APPELLANT**

**JOHNES MARWA KIBECH ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellants were convicted on two counts of robbery with violence contrary to **section 296 (1)** of the **Penal Code**. It was alleged that on 16<sup>th</sup> December 2006 at Ntimaru trading centre in Kuria District within Nyanza Province jointly with others not before court, while armed with dangerous weapons namely a gun, pangas and iron bars robbed **Mariba Daudi** and **Francisca Mariba** of cash and other items. They were sentenced to eight years' imprisonment.

Being dissatisfied with the said conviction and sentence, they preferred appeals to this court. With their approval the two appeals were consolidated.

**Samuel Kebura Mwitais** the 1<sup>st</sup> appellant while **Johnes Marwa Kibech** is the 2<sup>nd</sup> appellant. In their respective petitions of appeal, the appellants faulted the learned trial magistrate for convicting them in the absence of sufficient evidence. They also stated that their respective defences were not given due consideration.

The appellants canvassed their appeals by way of written submissions which I have duly considered.

Mr. Gitonga, State Counsel, appeared for the respondent and opposed the appeals. He submitted that sufficient evidence was adduced before the trial court. It was evidence of recognition of the appellants by the complainants.

This being the first appellate court, it is mandated to examine afresh the evidence that was tendered before the trial court, evaluate the same and reach its own conclusion. I will briefly do so.

**Arney Mariba, PW1**, testified that on 16<sup>th</sup> December, 2006 at about 1.00 a.m. he was sleeping inside his house together with his wife, **Francisca Wambura, PW2**. The door was hit open and three people entered. One of the intruders was a young brown man and the other two had covered their faces. He identified one of the assailants as the 1<sup>st</sup> appellant who had an iron rod. The assailants beat him up while demanding for money. They took Kshs. 26,000/=, a jacket, trouser, utensils and other items. The complainant further stated that the 1<sup>st</sup> appellant beat PW2 with the iron rod. There was a lantern lamp in the house and the three assailants had torches. The complainant said he was to identify the robbers. The robbery took about 15 minutes.

After the robbers left PW1 reported the incident at Ntimaru police station. The police went to the scene and recovered some slippers. Thereafter the complainant was told that the appellants had been arrested in connection with the robbery. He alleged that he was able to identify the 1<sup>st</sup> appellant as a mason who was staying in the town and who had visited him three times in the course of his work. PW1 said that the 2<sup>nd</sup> appellant is a neighbour living about 60 meters away.

PW2 corroborated the evidence of PW1 in all material aspects. She also alleged that she recognized the two appellants.

**Police Constable Nelson Koiben, PW3**, who was attached to Ntitaru police station was one of the officers who went to the scene after the robbery. He said that PW1 and PW2 gave them the names of the appellants and one **Mvundias** the people who attacked and robbed them. Thereafter on 26<sup>th</sup> December 2006 the 1<sup>st</sup> appellant was spotted at Ntitaru market and arrested. He led them to arrest the 2<sup>nd</sup> appellant on the same day.

In cross examination, the witness said that PW1 and PW2 did not give the names of the two appellants. He further stated that it was PW1 who spotted the 1<sup>st</sup> appellant on 26<sup>th</sup> December 2006 and then reported to the police. After they arrested him they proceeded to his house, conducted a search but recovered nothing. He denied that he had any affair with the wife of the 1<sup>st</sup> appellant and also denied having taken any money from the 1<sup>st</sup> appellant.

**Police Constable Henry Wanyonyi, PW4**, was the Investigating Officer. He was one of the police officers who arrested the appellants. He said that the 1<sup>st</sup> appellant was arrested on 24<sup>th</sup> December 2006 and the second one was arrested on 26<sup>th</sup> December 2006.

In cross examination by the 1<sup>st</sup> appellant, PW4 said that PW1 had identified him by his name. He denied the 1<sup>st</sup> appellant's suggestion that PW3 had an affair with his wife.

When the appellants requested for production of the Occurrence Book from Ntitaru police station, the same was availed to court and the names of the appellants were not recorded therein.

In his defence, the 1<sup>st</sup> appellant stated that on the day of his arrest the police had alleged that his wife was selling illicit brew. He further alleged that PW3 took Kshs. 13,820/= from him. He admitted that he is a mason but denied having committed the offence.

The 2<sup>nd</sup> appellant stated that he was arrested on 27<sup>th</sup> December 2006 and denied any knowledge of the alleged robbery.

The learned trial magistrate held that the appellants had been properly recognized by the two complainants. He stated that there was sufficient light to enable the complainants recognize the appellants. However, I think the evidence of recognition was insufficient. PW1 had told the court that of the three people who entered his house, one was a young man and the other two had covered their faces. Then he went on to say that one of the assailants was the 1<sup>st</sup> appellant. He did not tell the court at what point the 1<sup>st</sup> appellant uncovered his face so that it was visible. If the two assailants had covered their faces then it was not possible for the complainants to see and recognize them. In any event, the only source of light in the complainant's house was a lantern lamp. The court was not told how bright it was. Although the robbers were said to have had torches, the complainants did not state that the torch light was flashed on the faces of the appellants to enable them see and recognize them.

But more importantly, the complainants alleged that they gave the names of the appellants to the police. PW1 said that he named the appellants in his statements. The statements were however not produced before the court. The Occurrence Book did not have the names of the appellants. PW3 said that the complainant did not give the names of their assailants. In the circumstances, there was no sufficient evidence pointing to identification or recognition of the appellants by the complainants.

I am of the view that the appellants' conviction was not safe. Consequently, I allow these appeals, quash the conviction and set aside the sentence that was handed down by the trial court. The appellants are set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 22<sup>ND</sup> DAY OF JULY, 2010.**

**D. MUSINGA**

**JUDGE.**

**22/7/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the State

Appellants present

**Court:** Judgment delivered in open court on 22<sup>nd</sup> July, 2010.

**D. MUSINGA**

**JUDGE.**