



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CRIMINAL APPEAL 67 OF 2005**

**GABRIEL VITINYU MUSAMBAYI ===== APPELLANT**

**V E R S U S**

**REPUBLIC ===== RESPONDENT**

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

The Appellants, **GABRIEL VITINYU MUSAMBAI** was convicted by Kakamega Principal Magistrate Mr. S. M. Kibunja in a charge of robbery with violence contrary to S.296 (2) of the Penal Code and given the death mandatory sentence. He was jointly charged with three others who were acquitted under S.215 of the Criminal Procedure Code.

The Appellant has now appealed in this court against conviction and sentence. In his grounds of appeal, the appellant avers that identification was not properly done to justify a conviction; that the prosecution's evidence was contradictory and that he was not arrested with any exhibits in his possession.

The learned State Counsel opposed the appeal. He argued that the evidence of PW3 who was the single identifying witness was sufficient. PW3 knew the Appellant who was a neighbour and he struggled with him during the incident for about ten (10) minutes and managed to remove the mask the appellant was wearing on his face. PW3 also ripped of the sleeve of the appellant's jacket which jacket was produced in evidence. PW4, PW5 and PW7 corroborated the evidence of PW3 according to the State counsel.

In the lower court, PW3 the complainant told the court:

***“On 19.12.2003 at 9 p.m., I was in my house with my wife Josephine and grandchildren watching the T.V. when a group of people came into my house. The first one came and cut me on the head ordering me to lie down. As he had come from behind, I turned and saw the person was wearing a black mask. I held his face to remove the mask and know who he was. I removed the mask after a struggle and recognized the person was Vitinyu the 1<sup>st</sup> accused in the dock. I have known him for about 10 years and I had given him casual work at one time. His home is ½ km from my home.”***

PW3 goes on to say that he disarmed the 1<sup>st</sup> accused of his panga and afterwards the robbers left. The 1<sup>st</sup> accused left behind the sleeve of his jacket which PW3 had torn off. He said he had scratched the first accused with his long nails on the left cheek.

On cross-examination by the appellant, PW3 said that he had known the appellant for over 15 years. He also said that he did not mention the name of the accused to the police when he reported the matter.

It beats common sense why PW3 having known the appellant for over 15 years as he said could not give his name to the police when he made the report or when he recorded his statement.

PW4, an employee of PW3 was in the same house with his employer. He said he recognized appellant whom he knew because PW3 used to give him casual work.

PW5, the wife of PW3 also said she saw and recognized the appellant whom she knew because he used to do casual work for them.

Both PW4 and PW5 did not mention the name of the accused in their statements.

The witnesses said there was electric light in the sitting room and they were able to identify their attackers.

PW4 the Assistant Chief of the area visited the scene the following morning. He said he recovered a jacket with one sleeve missing in the banana plantation. He was told by a son of PW3 known as Vikiru that the jacket belongs to the appellant. The said Vikiru was not called as a witness.

This is a case of recognition and not identification. The key witnesses said they had known the appellant for over ten years.

In a case like this one, it would be expected that each of the witnesses PW3, PW4 and PW5 on reporting the case to the police and on recording their statements should have given the name of the appellant whom they so well knew and had recognized at the material time. The failure to do so would only lead to a conclusion that none of them recognized or saw the appellant at the scene of robbery. The information to the police regarding the name and particulars of the accused would have worked in favour of the witnesses who are members of one family. In our considered opinion, the withholding of such vital information from the police and giving it in court with such glaring emphasis would mean that it was an afterthought to invoke the name of the appellant.

PW8, the Investigating Officer lied to the court when he said that the name of the appellant was given to him by the witnesses as he recorded the statements. The said statements were read in court during cross-examination by the appellant and none of them had the name of the accused.

It is our finding that the magistrate in the lower court wrongly found that the complainant, PW4 and PW5 had recognized the accused person. The conviction of the appellant in the lower court was based on the wrong analysis of the evidence before the court.

A charge under S. 296 (2) of the Penal Code cannot be sustained without satisfactory identification or recognition of the suspect.

For the above reasons, we find that the magistrate erred in relying on the contradictory and dishonest evidence of the alleged recognition.

We therefore find that the appeal is merited and allow it accordingly. The conviction and sentence of the lower court are hereby quashed and set aside respectively.

The Appellant is hereby set at liberty unless otherwise lawfully held.

***Judgement dated, Signed and delivered at Kakamega on the 21<sup>st</sup> day of May, 2009 in the presence of the two appellants and the learned State counsel, Mr. Daniel Karuri.***

**FLORENCE N. MUCHEMI      SAID J. CHITEMBWE**

JUDGE

JUDGE