



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

**Criminal Appeal 140 of 2005**

**ERNEST NDUNDU KIRIBA :::::::::::::::::::: APPELLANT**

**V E R S U S**

**REPUBLIC :::::::::::::::::::: RESPONDENT**

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

The Appellant **ERNEST NDUNDU KIRIBA** was charged and convicted in a charge of robbery with violence, contrary to **section 296 (2)** of the Penal Code, by Mr. E. O. Obaga, Senior Resident Magistrate Kakamega. He was given the mandatory death sentence. He now appeals in this court on grounds of lack of identification among others. He was represented by Mr. Ondieki.

The learned State Counsel Mr. Karuri conceded to the appeal on grounds that there was no identification of the Appellant by the witnesses. He said that during the attack, PW2 and PW3 said they were with complainant when the robbery took place. It was at day time and none of the two witnesses identified the appellant. PW4, was the only witness who said that he identified the appellant. Later in his evidence, he said, he had left the shop at the time of the robbery. It is therefore not clear who robbed the complainant.

We have perused the record of the lower court. It is clear that PW4 who was regarded as the single identifying witness was not sure who committed the offence. He said in cross-examination:-

***“I did not witness the actual robbery. I went to the bank and left my colleagues behind.”***

The magistrate relied wholly on the evidence of this witness in convicting the appellant. Although he warned himself of the danger of relying on the evidence of a single identifying witness, we find that the warning was based on a worthless witness.

We, therefore, agree with the State Counsel that there was no identification in this case as required by the law. It is our finding that there was no legal basis for the conviction of the appellant in the lower court.

In effect, we quash the said conviction and set aside the sentence imposed in this regard. The Appellant is hereby set at liberty unless otherwise lawfully held.

***Dated, Delivered and Signed at Kakamega on the 20<sup>th</sup> day of May 2009 in the presence of the Appellant, the learned State Counsel and Mr. Ondieki for P.K. Kamau for Appellant.***

**FLORENCE N. MUCHEMI**

**SAID J. CHITEMBWE**

**J U D G E**

**J U D G E**