



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Appeal 276 of 2006

(From original conviction and sentence in Criminal Case No.3492 of 2004 of the Principal Magistrate's court at Nyahururu – T. M. MWANGI, SRM)

JOSIAH KAMANGA NDARE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

JOSIAH KAMANGA NDARE, the appellant, was charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge against him were that on 14th August 2004 at Nyahururu Township in Laikipia District within Rift Valley Province jointly with others not before court and while armed with dangerous weapons namely a pistol they robbed Samuel Thiongo Mwangi of cash Kshs.9,300/- and at or immediately before or immediately after the time of such robbery they applied actual violence on the said Samuel Thiongo Mwangi. He pleaded not guilty but upon hearing before the Senior Resident Magistrate at Nyahururu he was convicted and sentenced to death. He has appealed to this court against both that conviction and sentence.

In his written submissions, the appellant raised two main points. First, he contended that the circumstances at the scene were not favourable for a positive identification because the intensity of the light was not stated. Secondly, he argued that he did not follow the proceedings as the trial was conducted in English and it was not translated into his mother tongue.

On his part Mr. Gumo, the Assistant Deputy Public Prosecutor, dismissed the appellant's contention by contending that this was a case of recognition as opposed to mere identification. He said the scene was well lit with electrical light from two surrounding petrol stations. In the circumstances he urged us to dismiss this appeal in its entirety.

We have carefully read the lower court record. The intensity of the light from the two petrol stations was not stated. Besides that it is not clear how far the robbers were from the petrol station for the witnesses to have been able to see them. When the complainant reported the robbery he did not give any description of the appellant to the police or say that he could be able to identify him. We also find it difficult to understand why the complainant and PW2 did not rush into the petrol station and scream for help. Taking all these into account and the fact that the robbery incident hardly took five minutes we are in doubt as to the appellant's identification.

It is settled trite law that in criminal proceedings every accused person is entitled to the interpretation of the proceedings into a language he or she understands and that has to be shown on the record. In this case we note from the record that the language in which the proceedings were conducted is not stated. That was a grave omission and as an appellate court we cannot be sure that the appellant understood the proceedings against him.

For these reasons we find that the appellant's conviction cannot be allowed to stand. Consequently we allow this appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 26th day of November, 2009.

D. K. MARAGA

JUDGE.

M. G. MUGO

JUDGE.