



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

**Criminal Appeal 74 of 2005**

1. Criminal Law
2. Criminal Appeal
3. Subject of subordinate court case

**Charge**

**Count I**

Robbery with violence contrary to **Section 296(2)** of the Penal Code.

**Count II**

Assault causing actual bodily harm.

**Count in the alternative** for one accused only (*No. 2*)

Handling stolen goods contrary to **Section 322(2)** of the Penal Code.

- b) Total of six accused person.
- c) Plea not guilty entered
- d) Trial

‘Accused 1,4,5,6 & 7 acquitted of all charges due to lack of evidence’.

- e) Accused 2 and 3 found guilty and convicted on the offence of Robbery with violence contrary to **Section 296(2)** of the penal code.
- f) Sentence Death

4. **On Appeal**

- i) Appellant 1 and 2, original accused 2 and 3 with others attacked the complainant and robbed her of her purse and Kshs. 211,000/=
- ii) Four ran away
- iii) Chase given, persons disappeared
- iv) The persons found later and arrested and charged with offence
- v) On Appeal, 2<sup>nd</sup> accused and 3<sup>rd</sup> accused appellant took issue with the identification parade.
- vi) Identification of appellant questioned.

5. **In reply by state**

- i) The identification was sound

6. **Held**

- i) Evidence before Court
  - ii) Insufficient
- Appellant 1 and 2 acquitted

7. **Case Law**

**R V Turnbull & others (1976) all ER 549**

8. **Advocate**

B.L. Kivihya Senior State Counsel instructed by the Attorney General for the Republic/Respondent  
Appellant 1 and 2 in person

**Consolidated with Criminal Appeal No. 75 of 2005**

**RICHARD KIPYEGON ROTICH .....APPELLANT NO.1**

*Original Accused No.3*

**BENARD KIPROTICH KURGAT ..... APPELLANT NO. 2**

*Original Accused No.2*

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(An Appeal arising from the original conviction and sentence in the principal magistrate's court cr. case 2674/2004 and 3699/04 of Ag. Kiburu ESQ SRM delivered on the 7<sup>th</sup> August, 2005 at Kericho)*

**JUDGMENT**

**I: Background**

1. A business lady, the complainant in the subordinate court was seated in a motor vehicle on 14<sup>th</sup> May, 2004 at about 6.30a.m. She was accompanied by a driver PW2. They were awaiting an Eldoret Express bus of 7.00a.m that the complainant was making queries of. She was informed the bus would arrive at 7.10a.m. The two were at the Caltex Petrol Station at Kericho.
2. An attempt was made by newspaper vendor to sell her news papers which she declined.
3. She had in her possession a handbag containing Kshs. 211,000/= used in her business together with others.
4. One person came and held her by her collar and took her hand bag. PW2 attempted to give chase.
5. That same day or thereabout a total of six accused were arrested and charged with two counts

**Count I**

*Robbery with violence contrary to section 296(2) of the Penal Code.*

**Particulars of offence being**

*On 14<sup>th</sup> May, 2004 at Caltex Petrol Station Kericho Township in Kericho District within the Rift Valley Province jointly with others not before the court while armed with dangerous weapons namely a firearm and simi robbed Esther Wanja of Kshs. 211,000/=, one hand bag, one mobile phone make Motorola T190, national identification card, a bunch of keys, one torch make Tiger head brand, one note book and assortment of Barclays Bank documents all valued at Kshs. 220,000/- the property of Esther Wanja and at or immediately before or immediately after such robbery ... used actual violence against the said Esther Wanja.*

## **Count II**

*Assault causing actual bodily harm contrary to Section 251 of the Penal Code.*

### **Particulars of offence**

*On 14<sup>th</sup> May, 2004 at Caltex Petrol Station Kericho Township in Kericho District within the Rift Valley Province jointly with others not before court unlawfully assaulted Patrick Muiruri thereby occasioning him actual bodily harm.*

Alternative Count for Richard Kipyegon Rotich only original accused No. 3.

Handling stolen goods contrary to **Section 322(2)** of the Penal Code.

### **Particulars of offence**

*On 14<sup>th</sup> May, 2004 at Kwa Michael Estate Kericho Township in Kericho District within Rift Valley Province otherwise that in the course of stealing dishonestly retained one torch make Tiger head brand knowing or having reason to believe it to be stolen good.*

6. Cases against the six were consolidated. A plea of not guilty was duly entered.
7. After trial all the original accused person apart from the two appellant were acquitted and discharged of the offence before them.
8. The two appellants were found guilty and convicted on the first count of Robbery with violence contrary to **Section 296(2)** of the Penal Code. On the other counts they were found not guilty.
9. Both were sentence to death on the 7<sup>th</sup> August, 2004.
10. Not being satisfied with the conviction and sentence they appealed to this High court of Kenya at Kericho.

## **II: Appeal**

11. The evidence before the subordinate courts discloses how the complainant's bag was stolen from her whilst she was in a vehicle and robbed by four persons. Violence was used.
12. The assailants fled. An attempt to arrest them was made. Witnesses came to give evidence how they thought the six accused were the ones who were involved in the robbery. To this end, those arrested were subject to identification parade. One of the original accused was not. This is the reasons why the original four accused were acquitted. The two appellant on the other hand were clearly identified by PW1 and PW2 appellant No 1 original accused No. 3 and by PW2 appellant No. 2 original accused No. 2.
13. The appellants abandoned their advocate in the subordinate court and filed amended Memorandum of Appeal.
14. Appellant No. 1 took issues with the identification parade. He also took issues that his defences that take an alibi defence was not considered under Section 169(1) of the Criminal Procedure Code.

15. Appellant No. 2 likewise took issue of the identification parade. It meant that he was convicted on the evidence of the testimony of a single witness.
16. There were contradictions raised.
17. The state argued that there was sufficient evidence to show that the two were identified. He supported the conviction and sentence.

### **III: Findings**

18. The bases of the conviction against the two appellant was that of the identification parade. Although the trial magistrate found the identification parade against the other four original accused wanting and accepted their explanation, he did find that the appellants were correctly identified and relied on the case law of

**Republic V Turnbull**

**(1976) 3 all ER 549** on the guidelines laid for identification and as relied on the same principal in

**Reuben Taabu & others**

v

**Republic**

**Nrb Cr.A. 480, 208 and 209 of 1978**

19. As in this case the identification was conducted on the same day and in broad day light in an open place with the witnesses having an opportunity to have faced the assailant face to face.
20. It is this courts opinion that where as the identification parade was conducted, the prosecution must nonetheless prove its case beyond any reasonable doubt.
21. The appellant 1 and 2 are said to have run away. All the witness at whatever stage lost sight of the robbers.
22. It would have been safe if the robbers/appellants were chased by others, arrested then subjected to an identification parade. An alibi evidence should be considered.
23. The chain of event was broken. The prosecution therefore required to fill this gap by either taking finger prints of for example the vehicle to prove the appellants are one and the same persons who were the robbers.

24.

The conviction is unsafe. The appellant convictions are quashed and the sentence of Death set aside. They are at liberty unless otherwise lawfully held.

25. (We commend the trial magistrate for a well conducted trial and recording of proceeding).

**DATED** this 3<sup>rd</sup> day of December, 2009 at **KERICHO**

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**M.A. ANG'AWA**

**JUDGE**

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**M.G. MUGO**

**JUDGE**

**Advocates**

B.L. Kivihya Senior State Counsel instructed by the Attorney General for the Republic/Respondent  
Appellant 1 and 2 in person