



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA OF KISII**

Criminal Appeal 32 of 2007

ZABLON NYANDIGISI GEKONE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Senior Resident Magistrate's Court Nyamira Criminal Case No.1280 of 2005 by L. Komingoi – S.R.M)

JUDGMENT

The appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code but was convicted of robbery contrary to section 296(1) of the Penal Code. The particulars of the offence were that on 25th September, 2005 at Kebirigo Market in Nyamira District, jointly with others who were his co-accused, they robbed one Henry Aranda of cash Kshs.4, 800/=, one Mobile phone, a torch and a cap, all valued at Kshs.9, 460/- and at or immediately before or immediately after the time of the robbery used actual violence to the said Henry Aranda. The appellant and his accomplices were also accused of robbing Richard Orutwa of Kshs.100/- and Zebedeo Okemwa Machuki Kshs.1, 200/= on the same date as in count one.

After a full trial, the appellant was convicted in two counts and sentenced to five years' imprisonment in each. The sentences were to run concurrently.

The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. The record of appeal shows that the appellant was arrested on 26th September, 2005 but was arraigned in court on 17th October, 2005. No reason was given by the prosecution for holding the appellant beyond the fourteen (14) days' period.

The brief facts of the case before the trial court were that on 26th September, 2005 at about 8.40 p.m, **Henry Aranda, PW1**, and **Richard Orutwa** were going home. On reaching a place called Viongozi Centre, they met three people who ordered the complainants to lie down. PW2 was robbed of Kshs.4, 800/= and a mobile phone. The complainants made a report to some administration police officers at Kebirigo. The administration police officers accompanied the complainants to the scene using a taxi. When they reached there, the vehicle was attacked and as a result the police opened fire and one of the robbers was shot.

James Onsongo Momanyi, PW3, the taxi driver, and **APC Jeremiah Nyakundi, PW6**, corroborated the evidence of PW1 in all material aspects. PW6 identified the person whom they shot on his left leg and left fingers as the appellant. The robbers ran away after the said incident. On the following day administration police got information from members of the public that two people had locked themselves in a house.

One of them was said to be injured and they wanted to hire a taxi to take them to Sotik. The police went and surrounded the said house. When they gained entry, they found the appellant with a bandage on the left leg. One finger was also cut off and two of his upper teeth were missing. The two people were arrested and taken to Nyamira Police station.

Zebedeo Okemwa Machuki, PW5, also testified how he was robbed of money and a mobile phone on the material night at the same place.

In his defence, the appellant alleged that on 26th September, 2005 police officers went to his home and asked him if he knew who had committed a robbery at Kebirigo the previous night. He said that he had no idea. One of the police officers then hit him with a gun on the mouth and he lost two teeth. He was also shot on the left leg and hand. Later he was taken to Nyamira Police Station. He denied having committed the said robberies.

The trial court considered the appellant's defence and rightly rejected the same. There was overwhelming evidence that he was shot by police officers at the scene of the crime. That was sufficient proof that he was one of the people who robbed the complainants herein. His conviction was therefore justified.

That notwithstanding, it is not in dispute that the appellant's constitutional right as guaranteed by **section 72(3) of the Constitution** was violated. No explanation was offered by either the prosecutor before the trial court or the learned Senior Principal State Counsel during the hearing of this appeal. In **ALBANUS MWASIA MUTUA VS REPUBLIC**

Criminal Appeal No.120 of 2004 at Nairobi (unreported), the Court of Appeal held that:

*“... unexplained violation of a Constitutional right
will normally result in an acquittal irrespective of
the nature and strength of evidence which may
be adduced in support of the charge.”*

In light of the above, I acquit the appellant of the charges for which he was convicted. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISII this 26th Day of June, 2008

D. MUSINGA

JUDGE

Delivered in the open court in the presence of:

Appellant

Mr. Kemo, Senior Principal State Counsel for the Republic.

D. MUSINGA

JUDGE