



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

**Criminal Appeal 53 & 54 of 2006(Consolidated)**

**FRANCIS MIRINGI MACHARIA.....1<sup>ST</sup> APPELLANT**

**JOSEPH NGUGI MBUGUA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**FRANCIS MIRINGI MACHARIA** and **JOSEPH NGUGI MBUGUA** (the Appellants) were charged with two counts of capital robbery and one count of being in possession of a fire arm without a Fire Arms Certificate contrary to **Section 4(1)** as read with **Section 3(2)(a)** of the **Fire Arms Act**. They pleaded not guilty to the charges but upon trial before the Senior Resident magistrate at Nakuru they were conviction on all the counts. On the first two counts they were sentenced to death and on the third count they were sentenced to seven (7) years imprisonment. They

have appealed to this court against both the conviction and sentence. When the appeal came before us for hearing on the 5<sup>th</sup> June 2008, we allowed it *ex tempore* and reserved our reasons to a later date. We now wish to give the reasons.

Both the investigation and the prosecution of the case giving raise to these appeals are baffling. In count one the Appellants were charged that on the night of 11<sup>th</sup> and 12<sup>th</sup> June 2003, at Nyota bar in Rongai Trading Centre in Nakuru District within Rift Valley Province with others not before court while armed with dangerous weapons namely homemade guns and daggers they robbed Reuben Mwere Nchama of one TV set, one CD player, wooden speakers, assorted beers, assorted cigarettes, sodas, a photo album and cash of Kshs.18,000/- all valued at Kshs.44,725/- and at or immediately before or immediately after the time such robbery they threatened to use actual violence to the said Reuben Nchama. In count two they were charged that during the same night and at the same place they robbed Kimeko Kiptoo of a pair of sports shoes, a jacket, one wrist watch, a wallet containing his ID card and Kshs.1,000/- all valued at Kshs.7,700/- and at or immediately before or immediately after the time of such robbery they threatened to use actual violence to the said Kimeko Kiptoo. Most of the stolen items were found not far form the scene of robbery in motor vehicle registration number KAH 046H. Instead of producing them, the police decided to produce their photographs. The complainant in count one was not even called as a witness. On count three the police did not bother to examine the homemade gun to confirm whether or not it was a Fire Arm within the meaning of the Fire Arms Act. Faced with the challenge on these points Mr. Njogu, learned state counsel, had no choice but to concede the appeal, in our view rightly so.

These were not perishable items. There is no reason why these items were not produced as exhibits. Even if they were perishable the prosecution should have arranged to have them formally produced and released to the complainant.

In the circumstances we allow this appeal set aside the conviction and order that the Appellants be set free forthwith unless otherwise lawfully held.

DATED and delivered at Nakuru this 4<sup>th</sup> day of July, 2008.

**D. K. MARAGA**

**JUDGE**

**M. MUGO**

**JUDGE**