



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

**Criminal Appeal 306 of 2004**

**IBRAHIM MUNGAI WAITHERA .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***[From original conviction and sentence in Criminal Case No.1495 of 2003 of the Chief Magistrate's court at Nakuru – H.M. NYAGA – SRM]***

**JUDGMENT OF THE COURT**

The appellant was charged with three counts of robbery with violence contrary to section 296(2) of the penal code.

The particulars of the charge stated that on the 25<sup>th</sup> day of June, 2003 at Njokerio Estate Njoro in Nakuru District of the Rift Valley Province jointly with others not before court being armed with offensive weapons namely: axes and rungunus robbed **John Ndirangu Kirote** one jacket valued at **Kshs.2000/=** and cash money **4000/=** all valued **kshs.6000/=** and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **John Ndirangu Kirote**.

On the 2<sup>nd</sup> count he is charged with robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the charge stated that on the 25<sup>th</sup> day of June, 2003 at Jokerio Estate Njoro in Nakuru District of the Rift Valley Province, jointly with others not before court being armed with offensive weapons namely: axes and rungunus robbed **Annah Wangechi Ndirangu** cash money **kshs1700/=**. and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Annah Wangechi Ndirangu**.

On the 3<sup>rd</sup> count he is charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the charge stated that on the 25<sup>th</sup> day of June, 2003 at Jokerio Estate Njoro in Nakuru District of the Rift Valley Province, jointly with others not before court, being armed with offensive weapons namely: axes and rungunus robbed **Alice Wanjiku Kuria** cash money **kshs.400/=** and at or immediately before or immediately after the time of such robbery, used actual violence to the said **Alice Wanjiku Kuria**.

The appellant pleaded not guilty to all the charges and after a full trial was found guilty of the three counts of robbery with violence and was accordingly convicted and sentenced to suffer the mandatory death sentence.

Being aggrieved by the conviction and sentence the appellant has appealed and challenged the evidence of identification which was not supported by the evidence of the investigating officer. The appellant also faulted the conviction on the grounds that there was insufficient and contradictory evidence by the prosecution witnesses. The appellant is also dissatisfied with the fact that the trial magistrate rejected his defence and no reasons were given for such rejection. On the facts of the state, the learned state counsel **Mr. Mugambi** did not oppose this appeal on the grounds that the trial in this case was conducted by a different magistrate from the one who wrote the judgment and the provisions of section 200 of the CPC were not complied with. Secondly, there was no evidence by the investigating officer.

This being a first appeal, this court is mandated to consider the evidence and re-evaluate the entire evidence and judgment of the trial court and arrive at its own independent determination on whether to uphold the conviction of the appellant. In so doing, this court should bear in mind that it never saw or heard the witnesses and give due regard to that aspect. See the case of **Njoroge Vs Republic [1987]KLR page 90**. We therefore briefly set out the summary of that judgment before the trial court that led to the conviction and sentence of the appellant.

On the 29<sup>th</sup> day of June, 2003 at Jokerio Estate, Njoro in Nakuru there was a spate or robberies. An estimated gang of about 8 robbers broke into the household of **John Ndirangu Kirote, [PW1]**. It was about 2 a.m. in the night. They terrorized the family and they stole money a total **kshs.6000/-** from **PW1**. However, **PW1** was not able to identify the attackers, the same gang of robber broke into the house of **Anne Wangechi Ndirangu [PW2]**. She is the daughter in-law of **PW1**. They harassed **PW2** and her husband. They viciously attacked **Alice Wanjiku Kuria (PW3)** who was spending a night in the same house with **PW2** and robbed her of her money. **PW3** was taken to Egerton University Health centre where she was treated by **Dr. Peter Opiyo [PW4]** for the injuries she sustained from the said attack. **PW4** produced in court the P3 form and he classified the injuries sustained by **PW3** as **harm**. **John Karanja Ndirangu PW5** also a son of **PW1** testified that when he heard the gang had broken into his father's compound, he climbed in the ceiling and he could see the robber in the compound. He said he was able to identify the appellant from the torches that the robbers were using during the robbery and more so because he recognized the appellant whom he knew as a tout working at the bus stage. **PW2** and **PW3** also testified that they were called at Njoro police station three days after the robbery incident and they were able to identify the appellant as one of the attackers.

In this case however, the police did not adduce evidence of the investigating officer or the officer who conducted the identification parade. We note from the judgment of the trial court that the trial magistrate cautioned himself on the dangers on relying on the evidence of identification of an accused person especially when the circumstances of identification can be said to have been difficult. In this case the robbery took place at night in a village and the only light that the prosecution said helped them to identify the attackers was by the torch used by the same attackers. **PW2, PW3** testified that they were called at an identification parade at Njoro Police Station. However, the prosecution did not call the parade officer and even the investigating officer was not called as a witness. The police ought to have produced these evidence to prove that a proper identification parade was conducted and having failed to do so, the conviction based on the evidence of identification is unsafe. See the case of **Abwao & another Vs Republic 2003 KLR** where the court of appeal held as follows:

- 1. It would be improper to place a number of suspects in one single parade hence there was full justification in the contention that the police ought to have produced evidence in respect of identification parade(s).***
- 2. In view of what the Court found about the evidence of identification in this matter, the conviction of the appellants was unsafe.***

The second ground of appeal is that the evidence in this matter was recorded by a magistrate who ceased

to exercise jurisdiction and after several adjournments by several other magistrate, the judgment herein was written by a different magistrate who relied on the evidence recorded by the previous magistrates. The provisions of **section 200 (3)** of the **CPC** were not complied with as the records of the proceedings do not show that the appellant was given an opportunity to decide whether to call any of the witnesses or to proceed with the matter from where it was left. Indeed that is why the state conceded to this appeal and rightly so as the provisions in the said section in mandatory terms. This court has also considered the appellant has been in lawful custody from April, 2003 that is a period of over four years and in the circumstances a re-trial would not serve the interest of justice.

In the circumstances, we allow the appeal, quash the conviction and sentence imposed on the appellant. The appellant is set at liberty unless otherwise lawfully held.

Judgment read and signed today this 24th day of May, 2007.

**M. KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**