**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 284 of 2003**

**GEORGE THUITA KIMANI……...…….…….…….APPELLANT**

***Versus***

**REPUBLIC……...……..……RESPONDENT**

**CRIMINAL APPEAL NO. 285 OF 2003**

**MARTIN MWANGI KIMANI…….....……..…APPELLANT**

***Versus***

**REPUBLIC…….....…….RESPONDENT**

***(Being appeal against conviction and sentence by G. K. Mwaura, S.R.M., in the Senior Principal Magistrate's Criminal Case No. 6 of 2003 at Muranga)***

**JUDGMENT**

When this appeal came up for hearing a decision was made by the court to consolidate Cr. App. No. 284 and 285 of 2003. As a consequence of that consolidation it was decided that the lead file would be Cr. App. No. 284 of 2003. The first appellant is therefore **GEORGE THUITA KIMANI** whilst the second appellant is **MARTIN MWANGI KIMANI.** Before the appellants' counsel could address the court the state informed the court that it was conceding to the appeal in respect of George Thuita Kimani the First Appellant. The State Counsel submitted that the said appellant was merely arrested and that the reason for his arrest fails to come out clearly in the evidence. That the arresting officer failed to state if the said appellant was identified and if so by whom. The State, however, would oppose the appeal in respect of Martin Mwangi Kimani. The appellants' counsel Mr. Macharia in his submissions stated that the first appellant was indeed arrested and the reasons for his arrest were not given. He therefore submitted that there was travesty of justice. In respect of the second appellant counsel argued that his identification was not proper and that the doctrine of recent possession was misapplied. He further submitted that during the taking of the appellants plea prosecution was led by sergeant Gitau and accordingly the said sergeant being an unqualified person as per *Section 85(2)* of the Criminal Procedure Code, the subsequent trial should be considered as a nullity. In respect of the identification of the second appellant he stated that P.W.1 did not mention how close he was at the time of being robbed to the house where there was light. He therefore stated that the identification of the Appellant is doubtful. Counsel relied on the case of **GIKONYO KURUMA -V- THE REPUBLIC** and **MBURU MBUGUA -V- THE REPUBLIC KLR (1980)** in support of his submission**.** In those cases the court considered how to treat the evidence of a single identifying witness. Further the Appellant's counsel faulted the reliance made by the trial court on the finding of the complainant's wrist watch which was found under a mattress. The evidence of the police officer who accompanied the second appellant was that the watch was found under the mattress which belonged to the second appellant.

This court being the first appellate court is expected to exhaustively examine the evidence of the trial court and in so doing this court may come up with its own decision based on the evidence herein. See case No. **OKENO -V- REPUBLIC [1972] E.A. 32**.

The evidence of P.W.1 was that he was an employee of Muranga G. K. Prison. On the material date i.e. 31st December 2002 at 8 p.m he left his house to go to work. He reported at his place of work and then came back to his home. On his way ahead of him he saw three men coming towards him. When they met one of the men caught him by the jacket then pulled him down. He was then joined by two men who began to strangle him with a stick across his neck and to beat him using a stone. It was then that they took his jacket, his shoes and his wallet containing 800/-. They then ran away. P.W.1 said that he reported the matter to the police then went for treatment. On the following day on his way to the shop he saw one of the three men who had robbed him and he said that he recognized him. He gave his name as Martin Kimani. It has to be noted at this juncture that although the typed proceedings have stated that he saw Maina Kimani, the original record clearly shows that he said that it was Martin Kimani. It also has to be noted that on the night that the robbery took place P.W.1 said that the robbery took place close to a house that had security light. On the day he recognized the second appellant he stated that he together with other prison wardens got hold of the Appellant and on the police being called they came and took the Appellant to his house where the watch of P.W.1 was found beneath the mattress. The second appellant, on being asked about the watch stated that the watch was given to him by the first appellant. P.W.1 in respect of the first and second appellant stated that they were his neighbours and they were known to him. On being cross examined by the first appellant P.W.1 stated that both the appellants were well known to him and that in the past they had assisted him to take water to his house. He further stated that it was the second appellant who strangled him. The other evidence given at the trial was of the police officer who accompanied the second appellant where they were able to recover P.W.1's watch from underneath a mattress. Further there was the evidence of a warden at Muranga GK prison who telephoned the police officers to inform them that the second appellant had been arrested by P.W.1. There was also the evidence of the clinical officer who treated P.W.1 after the robbery.

In re-examining and re-evaluating the evidence of the trial court, we find that there is doubt in respect of the identification by P.W.1 of both appellants. P.W.1 began by saying that he saw three men. He did not at that stage say that he knew who they were. He further gave details of the robbery that occurred. Even at this stage he did not say that he recognized any of the assailants. He further stated that he made a report at the police station but again he failed to say that he knew the assailants. It is not until the following day that he said on his way to the shop that he saw the second appellant and proceeded to get hold of him with the assistance of another warden. The doubt that we have with regard to identification is because if indeed is correct as P.W.1 stated that the appellants were very well known to him, were his neighbours and had previously assisted him to take water to his house then it is not understood why P.W.1 in making his report to the police did not disclose this fact and if indeed he did so, why the police did not arrest the appellant since their place of residence was known to P.W.1. Even in considering the evidence tendered at the trial court, it does seem that the issue of recognition of the appellants came later in P.W.1's evidence rather than at the beginning. He stated that it was the following day after the robbery that he saw one of the three men who robbed him. This is the second appellant. At that stage he did not mention the first appellant and it was not until the second appellant said that the watch was given to him by the first appellant that P.W.1 said he knew the first appellant and that he was a brother to the second appellant. Indeed it is pertinent to note that it was not until P.W.1 was cross-examined that he said that he recognized the first appellant as the one who strangled him. In exercising the doubt with regards to the identification of recognition of the appellants, we find that such doubt can only be exercised in favour of the appellants. We therefore are doubtful that the appellants were in any way involved in the robbery of P.W.1. In this regard we find that the prosecution failed to prove its case beyond reasonable doubt in respect of the charge that was before the court that is, robbery with violence. We therefore are of the view that the appeal lodged by the appellants should and does indeed succeed and accordingly we do hereby allow the appeal, quash the convictions and set aside the sentences. We order that unless the appellants are lawfully held they should forthwith be set free from prison.

***Dated and delivered at Nyeri this 11th day of May 2007.***

**MARY KASANGO**

**JUDGE**