

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 234 of 2005

CHARLES KARUGA WAHOME.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal against the conviction and sentence of Martha Mutuku, Resident

Magistrate, in the Resident Magistrate's Criminal Case No. 416 of 2003 at Mukurwe-ini)

JUDGMENT

The Appellant was convicted before the lower court for robbery contrary to *Section 296(1)* of the Penal Code. On being convicted the lower court sentenced him to two years imprisonment. He was aggrieved by his conviction and his sentence and therefore preferred an appeal before this Court. When the appeal came for hearing the State Counsel conceded to the appeal on the basis that some of the witnesses during the lower Court's trial were not sworn when they gave evidence. The State Counsel also was of the view that the identification of the Appellant was unsatisfactory since it was at night. The Appellant's counsel submitted in favour of the appeal and stated that the Complainant's identification of the Appellant was indeed unsatisfactory. Further the Appellant's Counsel submitted that it took the Complainant five days to report the incident to the police. In respect of the Appellant's alibi evidence his counsel stated that it was ignored by the Court.

I have perused the proceedings of the lower court. Indeed it is correct that some of the witnesses, that is, P.W. 1 to P.W.4, were not sworn when they gave their evidence. The law requires that evidence tendered before Court is given by a witness who has been sworn. The Court is of the view that the trial at the lower court was vitiated by the lack of sworn testimony of the witnesses that gave evidence against him. On that basis alone the conviction against the Appellant cannot stand and is accordingly quashed and his sentence is set aside. State Counsel did not address the court on whether the Appellant should be retried. I have, however, considered the evidence tendered before the lower court and I am of the view that in particular the evidence of P.W.1 was not satisfactory in respect of the identification of the Appellant. P.W.1 stated that the Appellant was someone he used to see at Mukurwe-ini District Hospital as a guard. On the day of the robbery he said that the torch that he had lit on him and she identified him. She did not say whether the light of the torch shone on the face of the Appellant. In examination of that evidence of identification, I am of the view that it is not satisfactory to uphold a conviction against the Appellant. It is also note-worthy that the prosecution did not tender evidence of identification parade by the Complainant. The incident occurred at 2.00 a.m. In view of that unsatisfactory evidence by the prosecution I am of the view that the Appellant should not be retried. Accordingly the court does hereby set the Appellant free unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 28th day of September 2007.

MARY KASANGO

JUDGE