



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CRIMINAL APPEAL 115 OF 2005**

**BENJAMIN YEGO ::::::::::::::::::::::::::::::: APPELLANT.**

**VERSUS**

**REPUBLIC ::::::::::::::::::::::::::::::: RESPONDENT.**

*(Being an appeal from the original conviction and sentence of W.A. Juma – SPM in Criminal Case No. 53 of 2005 delivered on 14<sup>th</sup> October, 2005 at Kitale.)*

**J U D G M E N T.**

The appellant, **BENJAMIN YEGO KIPKORIR** was convicted by the Senior Principal Magistrate Kitale for the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code. Particulars were that on 20<sup>th</sup> March, 2003 at Bonde Trading Centre within Trans Nzoia District, jointly with others not before the court while being armed with dangerous weapons namely a rifle and rungus, robbed **CHARLES KAMAU** Ksh. 100,000/= and at or immediately before or immediately after the said robbery killed Charles Kamau. On conviction he was sentenced to death and has appealed to this court against the conviction and sentence.

The prosecution case was that on the night of 26<sup>th</sup> march, 2003 at 3 a.m. the deceased, Charles Kamau was asleep with his wife **ELIZABETH WANJIKU KAMAU** (PW1) in their house in Bonde, Cherang’ani. PW1 told court that she heard someone call out “Kamau, Kamau” from outside. She said she recognized the voice as that of the appellant to whom she had been selling milk. The people outside ordered them to open the door or they will go inside by force. PW1 and her husband started screaming. Shots were fired through the window which was wooden. The deceased was hit by a bullet and he fell down. The thugs broke the door and went inside. They demanded money from PW1. There was Ksh. 100,000/= in a box and they took it. Those who were in the house were three.

After the robbers left PW1 realised that the deceased was bleeding profusely. She looked for a vehicle to take him to hospital. Unfortunately he died when they reached Mount Elgon. Post Mortem examination was done on the body by DR. MESHACK LIRU (PW4) ON 28<sup>th</sup> March, 2003. He confirmed the deceased died out of bullet wounds which entered through the back and exited in the front. The bullet shattered the lungs and the spleen which led to massive bleeding.

**MARY NYAKUTHI THIONGO (PW2)** the mother of PW1 told court that sometimes in

November, 2003 she met with the appellant who was alone. Appellant was talking to himself and she heard him say: ***“Me, I am known all over, the first case I finished at Kachibora and when I killed son of Gathii where was he taken.”*** She did not report to police but later the same day he was arrested. She later recorded a statement with the police.

Appellant was arrested. PW3 **JOSEPH KIPROP KENA** told the court that he was arrested by some people in November, 2003 after he fought with a girl though **P.C. STEPHEN MURAGE** (PW5) said it was in 2004.

Appellant in his unsworn defence denied the offence. He said he was not involved in the robbery. The morning after the incident he went to the home of the deceased to get milk. He found many people there and he was informed the deceased was shot dead.

There are 11 grounds of appeal. Mr. Chebii who represented the appellant only told the court that he was relying on those grounds entirely. On the other hand Mr. Mutoku the learned state counsel told the court that he was conceding to the appeal as there was no proper identification of the appellant. He said that PW1 said he only identified the appellant from his voice. This, he said was not proper identification. As for the evidence of PW2 he said that it had no nexus with the robbery. She only said she heard appellant say he killed son of Gathii. There was no evidence that the said son of Gathii was one and the same with the deceased in this case **CHARLES KAMAU**.

This being the first appellate court we had the onus of evaluating the evidence and come to our own conclusion. This we have carefully done and we quite concur with the state counsel that the conviction was unsafe and not supported by the evidence on record. PW1 clearly said she did not identify anybody during the robbery. Her evidence that she recognize the voice of the appellant cannot be believed. She said she knew the appellant. There was evidence that after arrest an identification parade was held in which the appellant appeared yet PW1 said that she did not identify him during the parade. There was no evidence that she gave the name of the appellant to the police at the first opportunity. The appellant was arrested and charged well over an year after the said robbery. There was no evidence that he had gone into hiding all that time. Clearly the witness did not identify him as one of the attackers. There was no explanation why he was not arrested and charged promptly after the robbery if indeed PW1 had identified him. Her evidence on the issue of identification was not plausible and the learned trial magistrate erred in relying on it to convict the appellant.

The evidence of PW2 **MARY NYAKUTHI THIONGO** was also not of any help to the issue of identification. She was not at the scene of the robbery. The only thing she said was that over an year after the incident she heard the appellant say he killed son of Gathii. He allegedly was talking to himself which is very strange and leaves one wondering if he was in proper mental status. PW2 did not report what she heard to the police until appellant was arrested. Further as Mr. Mutoku submitted there was no nexus shown between **“son of Gathii”** and Charles Kamau who was killed during the robbery. PW1 the wife of the deceased and PW2 his mother-in-law did not tell the court that the deceased was a son of Gathii. It was therefore erroneous for the trial court to assume and conclude son of Gathii was Charles Kamau. That should have come out clearly in evidence but this was not so. The court should not have gone on a speculation mission.

Thus though there is no dispute that the robbery took place and that the robbers were armed with dangerous weapons and did in fact use violence which led to the death of Charles Kamau, the evidence on record falls far too short on issue of identification. There were real doubts as to whether appellant was identified as one of the robbers and the trial court should have given the benefits of those doubts to the appellant. If she did so she would have found the appellant not guilty and would have acquitted him.

The upshot of the above therefore is that we find the conviction was not proper as there was no evidence. We allow the appeal, quash the conviction and set aside the death sentence imposed on the appellant. Appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kitale this 25<sup>th</sup> day of October, 2007.

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K. BAUNI.

JUDGE.

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**F.A. OCHIENG.**

**JUDGE.**