



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

**AT NYERI**

**Criminal Appeal 74 of 2004**

**DAVID MWANGI MITHAMO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal against conviction and sentence of the judgement of 5<sup>th</sup> January 2004 of Lucy Gitari – Principal Magistrate in criminal case no.382 of 2003 - Kerugoya Magistrate’s Court)*

**JUDGEMENT**

The appellant was convicted of robbery with violence c/sec. 296(2) of the Penal Code by the lower court. He has now filed this appeal against the conviction and sentence.

The prosecution’s evidence is that while PW1 on the night of 16<sup>th</sup> – 17<sup>th</sup> February, 2003 was asleep in his house with his wife and children he heard the door being hit with a stone. He then heard people who were in the house ordering him to sleep. They said that they wanted his wife who had money which she obtained from the sale of 4 bags of rice. They said the money was Kshs.10,000/=. They began to beat his wife with sticks and panga and as a consequence she gave them a skirt which had Kshs.9,000/=. He began to search for more money but could not get it. One of them took a radio, a torch, a panga and a jacket. They then went to the children’s room and whilst they were threatening them, PW1 jumped out of the house through the window. He found two people outside. There was a bright moonlight. He was able to identify one among them called Mwangi who is his neighbour. That person he identified is the appellant. This appellant did not enter the house. On seeing the appellant in the compound, the appellant with another man began to run. PW1 chased the other person. When he followed him the appellant dropped a torch. PW1 screamed and the neighbour came and went ahead of the appellant. The robber began to threaten the neighbour with a panga. PW1 did not give up but he continued following him. He then dropped the radio and was arrested by the people who had answered the call.

On being cross examined PW1 said that he knows the appellant and has known him since he was a child. He said that when he jumped outside he identified the appellant and also his uncle. He reported this to the police and the police on going to the appellant’s home found that he had disappeared. It was only later that the appellant was spotted by the complainant’s brother in Kutus town.

PW2, wife of the complainant, confirmed that on the night of 16<sup>th</sup>/17<sup>th</sup> January, 2003 at about 2.00 a.m. whilst sleeping she heard the door suddenly hit with a stone and it opened. When people entered the house they asked her for the proceeds of the rice and she gave them a skirt which had Kshs.9,810/=. They asked for more and began to beat her and cut her left leg with a panga. They took a radio, panga, torch and a jacket. She confirmed that her husband followed the robbers. She later saw a mob of people coming who had arrested one of the men. That person under arrest said that they had been informed about the money by the appellant. The appellant was found to be missing from his home when people looked for him. PW2 said that as she sold the rice on Saturday the appellant stood by as she was paid. On being cross examined PW2 said that her husband who had chased the robbers on coming back home said that he had seen the 2<sup>nd</sup> accused that is the appellant herein. The husband said that the man looked like Mwangi. On being re-examined PW2 said that her husband said he saw like he “identified Mwangi”.

PW3 and 4 said that it was the appellant's co-accused who identified the other man as Mwangi. PW4 said that the description given by PW1 made him to conclude that it was the appellant. PW5 is the brother of PW1, He had been told by PW1 about the robbery and he had been told that the appellant had gone missing after the robbery. He was requested to assist in tracing the appellant On 24<sup>th</sup> May 2003, PW5 saw the appellant together with another person. He stopped him and he took him to Milimani police post. PW5 reported the robbery at that police post. The appellant was arrested. PW6 the police officer who received the report of the robbery said that on that night he was the officer on duty. He received the report at 4.00 a.m. He went to the scene and arrested one of the accused. It was not until two months later that PW1 reported another suspect of the robbery that is the appellant. The trial court found the appellant with a case to answer. The appellant in his defence said that on that night he had heard screams. He did not get out of the house because he was sick. The following day he did not go anywhere. On the date that he was arrested he had left home to go to hospital for treatment. He was stopped by PW5 and requested to go to the police station. He went with him where he was arrested for the present offence.

As stated before the lower court convicted the appellant and sentenced him to death. The only evidence against the appellant was of a single identifying witness. This evidence of identification was under unfavourable circumstances. Before such evidence can be relied on the court has to treat such evidence with the greatest care and the evidence must be absolutely water tight. See the cases of *Kamau v Republic (1975) EA 139* and *Kiarie v Republic (1984) KLR 739*. PW1 in his evidence said that there was a bright moonlight. He was not led by prosecution to state how far he could see with that light. He was also not led to say how far the appellant was when he identified him. In fact the evidence of PW1 is one of recognition. The fact that that evidence was of recognition did not absolve the trial court regarding warning itself of the dangers of basing its conviction on that evidence. It ought to be noted that the learned magistrate stated in her judgement that the complainants, that is PW1 and 2 identified the appellant. That was not supported by the evidence before court. The evidence before court was that PW1 said he identified the appellant. On returning to the homestead he told PW2 that it was as though he recognized the appellant. PW1 did not report this recognition to the police until two months later. We find that there is high possibility of PW1 being in error in his identification of the appellant. It is also possible that he was basing his identification on the confession of the appellant's co-accused. Confession implicating a co-accused can be admissible as provided by section 32 (1) of the Evidence Act. That Section provides as follows:-

**“When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession”.**

PW1 said that the confession of the appellant's co-accused implicated the appellant. On the other hand PW3 said that the co-accused described a person who is usually in the company of the appellant. Those two inconsistencies together with unsatisfactory identification or recognition by PW1 lead us to find that the prosecution did not prove its case against the appellant beyond a reasonable doubt. Accordingly we find that the appeal does succeed and we do hereby allow the appellant's appeal and we do quash the appellant's conviction and set aside his sentence. The appellant shall be set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 4th day of October, 2007.

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**