



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 335 of 2006**

**JAMES KULOBA WALISHE.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.4981 of 2005 of the Chief Magistrate's Court at Kibera by Mrs. Wasilwa – P.M.)*

**JUDGEMENT**

The appellant **James Kuloba Walishe** was charged with five counts of robbery with violence contrary to section 296(2) of the Penal code. After full trial he was convicted in respect of counts 2, 4 and 5 and sentenced to suffer death on each count. The evidence of PW2 the complainant in respect of count 2 is that he was robbed of several items on the material night by a large group of robbers who had terrorized Githembe village in Riruta area. He says that two weeks after the robbery he was alerted by his wife that one of the robbers had been arrested and taken to the chief's office at Kawangware. He went to Kawangware chief's office and identified the appellant as one of his attackers.

PW3, the complainant in respect of count 4 also confirms that the subject robbery took place on 7<sup>th</sup> June 2005 at around 1 a.m. He stated that he lost several items valued at Kshs.40,000/=. In his evidence he says that he was informed that the appellant was arrested as one of the persons who had committed robbery on the material night. And that he was told by his wife that the appellant was one of the attackers who had earlier robbed them. He confirms that he did not know the appellant before and that he saw the appellant at Kawagware's chief's camp. He also confirmed that nothing was found on the appellant.

PW5 **Edith Lungalo** was the complainant in respect of count 5. And in her evidence she confirms that Githembe village was attacked on the material night of 7<sup>th</sup> June 2005 at around 1 a.m. As a result of that robbery she lost several items valued at Kshs.16,000/=. She says she did not know the robbers and that after two weeks she had been told that the appellant had been arrested and that she did not participate in any identification parade.

In this case we do not understand the basis of the appellant's conviction on all the three counts since none of the witnesses made a prior report that the appellant was one of the attackers. There is no evidence to show that the complainants in counts 2, 4 and 5 made a report to the police after the robbery that they were able to recognize one of the attackers. Equally there is no evidence to show that the description of the appellant was given to the police by any of the victims of the robbery at the time the first report was made to the police. We have noted that the prosecution did not call the person who arrested the appellant in order for us to understand why the appellant was arrested. All the prosecution witnesses confirmed that they did not arrest or participate in the arrest of the appellant. In their evidence before court PW2, PW3, PW4 and PW5 stated that they found the appellant at Kawangware chief's office having been arrested by other persons. The arresting of the appellant and the circumstances that led to his arrest is very difficult to discern from the evidence tendered by the prosecution.

We also have no evidence to show that the police conducted an identification parade where the appellant was identified by the complainants in count 2, 4 and 5 or by any witness. We therefore, do not

understand how the appellant could be connected and/or linked to the robbery that took place on 7<sup>th</sup> day of June 2005 at Githembe village in Riruta area. We think the trial court committed grave mistake in convicting the appellant on the disjointed evidence of the prosecution which does not meet the threshold of prove beyond reasonable doubt. In the circumstances we think the conviction of the appellant is unsafe. We therefore cannot sustain. In the premises we allow the appeal, quash the conviction and set aside the sentence.

**Dated, signed and delivered at Nairobi** this 13<sup>th</sup> day of November, 2008.

**J. B. OJWANG            M. WARSAME**

**JUDGE            JUDGE**