



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 747 of 2000**

**From original conviction(s) and Sentence(s) in Criminal Case No. 13 of 2000 of the Resident Magistrate’s Court at Kikuyu (Mrs. Ongeri -SRM)**

**JAMES LUSENO GAMWE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**JAMES LUSENO GAMWE** was charged with **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge were: -

*“On the 9<sup>th</sup> day of April 2000 at Kinoo Village in Kiambu District within Central Province, jointly with others not before court, being armed with dangerous weapons namely iron bars, robbed ZABLON ANYONJE ESIKADA one jacket, one cap, a bunch of keys, one T-shirt, one trouser, a pair of shoes and Kshs.500/- all valued at Kshs.2,000/- and at immediately before or immediately after the time of such robbery used actual violence to the said ZABLON ANYONJE ESIKADA.”*

The Appellant pleaded guilty to the charge and on conviction was sentenced to death as by law prescribed. He was aggrieved with the manner in which the plea was taken and therefore lodged this appeal. In his petition of appeal, the Appellant has raised four grounds which we have summarized as;

One that the learned trial magistrate erred in law and fact in convicting the Appellant of a capital charge without warning him of the penalty of death if convicted.

Two that the learned trial magistrate erred in law and fact in convicting the Appellant without confirming whether he was of a sound mind.

**MRS. GAKOBO**, learned counsel for the State opposed the appeal and submitted that the plea of guilty was unequivocal and ought not to be challenged. On the second issue raised, learned counsel submitted that the learned trial magistrate was under no obligation to confirm the Appellant’s state of mind and that from the record, there was no such need.

We have carefully considered this appeal, grounds of appeal raised and the submissions of the learned State Counsel. It is true that the record indicates that the Appellant was convicted after admitting the charge and after pleading guilty to the facts as were led to the Court by the prosecution. We produce those facts hereunder.

*“PW1: the facts are that on 9/6/2000 at 9.00 p.m. at Kinoo Village, the Complainant alighted from a matatu and started walking home. He was confronted by 3 men including accused. They were armed with iron bars. They got hold of him and dropped him.*

*He was hit with an iron bar. The accused and the others not before court, his jacket, a T-shirt, one underwear, a bunch of keys and a pair of shoes whose total value is Kshs.2000 including Kshs.500 cash.*

*They ran away and left the Complainant. The Complainant reported at Kinoo. He was issued with P3 went and was treated and discharged.*

*Investigations started on 15/4/2000. The brother of the Complainant saw the accused wearing a jacket which the Complainant was robbed. The Complainant’s brother mobilized people who arrested accused. He was taken to Kabete Police Station and transferred to Kikuyu Police Station where the accused was charged.”*

The facts given demonstrate that the Complainant was knocked down by 3 men who included the Appellant and that he was hit on the head with an iron bar. The Complainant was injured and after reporting the matter to the Police and being issued with a P3 form, he was treated in hospital. The record lists certain items and their value without stating to whom they belonged to or showing what happened to those things. It merely states: -

*“The accused and others not before court, his jacket, a T-shirt one underwear, a punch of keys and a pair of shoes whose total value is Kshs.2000 including Kshs. 500cash. They ran away and left the Complainant.”*

We thought that it was a topographical error and that may be something was left out from the record. So we referred to the original hand written draft. We confirmed that indeed the two records are identical word for word.

Having considered these facts we are convinced that they did not disclose the offence charged. The only offence disclosed is **COMMON ASSAULT** contrary to **Section 250** of the **Penal Code**. Even the offence of Assault causing actual bodily harm contrary to Section 251 of the Penal was not supported by those facts as no P3 form to prove the charge was adduced in court. The charge of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** could not be sustained as the facts do not disclose that anything was stolen from the Complainant.

For these reasons we do not wish to go into the issues raised by the Appellant in his appeal. Instead we quash the conviction for the charge of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and substitute the conviction for the offence of common assault contrary to **Section 250** of the **Penal Code**. We set aside the sentence of death and in substitution thereof sentence the Appellant on one year imprisonment. The Appellant has been in prison since his conviction on 26<sup>th</sup> April 2000 a period of six years and 2 months. Surely he has served more than sufficient sentence for the offence of common assault and he should be set free forthwith.

The upshot of this appeal is that the conviction for **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the penal code is quashed and substituted with a conviction for **COMMON ASSAULT** contrary to **Section 250** of the **Penal Code**. The sentence of death is set aside and in substitution the court finds he has served more than sufficient sentence. We order that the Appellant be set free unless he is otherwise lawfully held.

Dated at Nairobi this 6<sup>th</sup> day of May 2006.

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Mrs. Gakobo for State

CC: Tabitha

.....

**LESIT, J.**

**JUDGE**

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**M.S.A. MAKHANDIA**

**JUDGE**