



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**Criminal Appeal 55 of 2004**  
**Arising from Kimilili RM's Cr. Case No. 1078 of 2003**

**WYCLIFFE WANJALA WANYONYI.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

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

The appellant and two others were tried for the offence of stealing contrary to Section 279 (a) of the Penal Code. They were convicted and each sentenced to serve 5 years imprisonment. Being aggrieved the appellant preferred this appeal. The appellant enumerated seven grounds of appeal in the petition filed on 9th September 2004. The grounds may be summarised into 3. The state conceded to this appeal. Before considering the merits of the appeal I wish to set out the facts leading to this appeal.

The prosecution's case before the trial court was supported by the evidence of the complainant and the arresting officer. The complainant, Michael Wafula told the trial court that on the 24th December 2003 at 9,00 p.m. while walking along Kimilili Kibisi river he met one David Machio whom he walked together for short distance. He walked a head of him and shortly 3 people emerged and sandwiched him. One used a piece of timber to strangle him as others emptied his pockets. In the process he lost his shoes, a wrist watch, wheat flour, rice and cash in the sum of Ksh.5,000/=. He screamed and mentioned the name of David Machio who suddenly appeared and denied the accusations. The complainant claimed that David Machio mentioned the appellant as amongst those people who attacked him. The complainant claimed he was led by David Machio to the house where his goods were Kept but upon sensing danger he ran away and reported the matter to the police who arrested the appellant and his co-accuseds the next day on 25.12.2003.

P.W 2, Joseph Kariuki, gave a different account of what he was told by the complainant. He said the complainant reported the incident to the police on 25.1.2003 thus contradicting the assertion by the complainant who said he immediately went to report the incident to the Police. P.W 2, also said the appellant and his accomplices were arrested on 26.12.2003 but the complainant had alleged that they were arrested on 25.12.2003. According to P.W 2, the appellant was arrested at a bus stage yet the complainant said he was arrested in the room he found them the previous day. The appellant denied committing the offence he was charged with in his defence. He said he was arrested in Kimilili township while spreading his wheat to dry. He denied knowledge of the incident.

On appeal the appellant complained that the trial magistrate erred in convicting him on the evidence of a single identifying witness whose identification was not free from error. The appellant further argued that the evidence tendered by the prosecution were not sufficient to sustain a conviction. On the other hand the learned Senior State counsel conceded this appeal on the ground that the prosecution did not prove its case to the standard required in criminal cases.

The trial magistrate came to the conclusion that the appellant was arrested in the room he had showed the complainant. He was of the view that the evidence of the complainant were credible. The learned Resident Magistrate was of the view that the appellant cheated when he said he was arrested at Kimilili township. I have perused at the record. It is clear that the evidence of the complainant was contradicted by P.W.2, Joseph Kariuki. He told the trial court that the appellant was arrested at a bus stage in Kimilili township. This obviously lend credence to the appellant's evidence that he was arrested in Kimilili town.

This witness also contradicted the evidence of the complaint as to when the appellant was arrested. These contradictions obviously created doubt on the credibility of the complainant's evidence. It was not safe to convict the appellant on such evidence. It was a great misdirection therefore on the part of the learned trial Resident Magistrate to hold that the prosecution had proved its case to the standard of beyond reasonable doubt.

I think the learned Senior state counsel rightly conceded to this appeal. The upshot therefore is that this appeal is allowed. The conviction and sentence are quashed and set aside respectively. The appellant is set free forthwith unless lawfully held.

**DATED AND DELIVERED THIS 15th DAY OF April 2005**

**J.K. SERGON**

**JUDGE**