



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

**CRIMINAL APPEAL 5 OF 2003**

**WILLIAM MAALIM SHIVEKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Cr. Case No. 2075 of 2002**

**by Mr. C. D. Nyamwea, Senior Resident Magistrate – Nyeri)**

**JUDGMENT**

The appellant William Maalim Shiveka was tried and convicted by the Senior Resident Magistrate Nyeri for the offence of Attempted Robbery with violence contrary to section 297(2) of the Penal Code. He was sentenced to the mandatory death sentence. Being dissatisfied, He has now appealed against his conviction and sentence contending inter alia, that the trial magistrate erred in convicting him because:

The charge against him was not proved to the required standard evidence of recognition by the complainant was not satisfactory as there was no initial report made to the police or neighbours. The evidence of the complainant and his wife lacked corroboration.

Appellants alibi defence was improperly reflected.

Learned Principal State Counsel Mr. Orinda has conceded the appeal. He explains that the appellants conviction hinged on a report and description made by the complainant and his wife but that there was no evidence of any such report on description laid before the court and that the arresting officer talked of another officer having visited the scene but that this officer was not called to testify.

We have carefully reconsidered and evaluated the evidence which was laid before the trial magistrate. While it is apparent that the complainant Loice Wangechi Mureithi and her husband Charles Mureithi were on the night of 24th August, 2002 accosted by a gang of robbers who attempted to rob them, the issue before the trial magistrate was whether the prosecution had proved beyond reasonable doubt that the appellant who was arrested 4 days after the incident was one of the robbers.

From the evidence of the complainant's husband the incident took barely two minutes.

Although the security lights were on, the complainant and her husband only had a fleeting glance at the robbers through the car windows.

The complainant and her husband claimed that they recognized the appellant during the robbery. However as pointed out by the Principal State Counsel, there was no evidence that the complainant and her husband identified the Appellant in their first report to the police, either by name or by description.

Secondly, although the complainant and her husband claimed to have recognized the appellant as they had previously seen him, they did not adequately explain the circumstances in which they had previously come into contact with the Appellant prior to the robbery and what special reasons they had to make them recognize him.

For the above reasons we do not find that the identification of the Appellant by the complainant and her husband was water-tight such as to form the basis of a conviction.

We concur with Learned principal State Counsel that the appellants conviction was not safe. His appeal must therefore succeed. Accordingly we hereby allow his appeal, quash his conviction and set aside the sentence imposed on him. The appellant shall therefore be set free unless otherwise lawfully held.

Dated signed and delivered this 28th day of October, 2005.

**J. M. KHAMONI**

**JUDGE**

**H.M. OKWENGU**

**JUDGE**