



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL 133 OF 2001**

**APPELLATE SIDE**

**THOMAS KIPLAGAT KIBET ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal against the conviction and sentence of the Honourable Principal  
Magistrate Ms. Lucy Gitari on 14.11.2001 in Eldoret CM.CR. Case No. 1837 of 1998)**

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

The Kenya Commercial Bank Limited operates mobile banks in Kenya. One of such mobile banks was in operation in the Keiyo District of the Rift Valley during the year 1998, and it would appear that the Bank had made arrangements for escort security with the Administration Police Officers who were stationed in the District Commissioner's offices in Keiyo District.

On 5/6/1998, three employees of the bank left its branch at Iten for Kabarnet in a Land rover 110. They were accompanied by two Administration Police Officers one of whom was PW1. The money was placed in a locked safe, which was placed at the rear of the vehicle where 2 of the bank employees and the second Administration Police officer sat. PW1 sat in the front cabin with the driver, (PW4) and the other bank employee (PW3).

They served customers at several points while on their way to Kabarnet and left their last point at noon, and as the driver slowed down at a bridge at 'Nursery trees', they were ambushed by armed robbers. The Administration Police Officer who was seating at the back was shot. He succumbed to his injuries later before he could be treated at Kapsowar Hospital. The others scattered and fled from the scene.

PW1 went to Kapsowar Station and managed to get Police Officers who accompanied him to the scene an hour after the robbery, where they found that the safe had been broken into, and except for documents which were scatted over the scene, all the money was missing.

Thomas Kiplagat Kibett and Julius Kilimo Yaptum were arrested and were later charged with the offence of that robbery with violence, the particulars of which were that, *"On the 5th day of June 1998 along Kapsowar/Chesoi road in Marakwet District within Rift Valley Province jointly with others not before court, while armed with dangerous weapons namely two AK 47 assault rifles robbed David Bett Kiplangat of cash Kshs. 1,662,940/- an employee of KCB Iten and at or immediately before or immediately after the time of such robbery shot dead administration police constable Moses Mariau."*

After a full trial in which the prosecution called sixteen witnesses, the two accused were convicted and accordingly sentenced to suffer death. Julius Kilimo Yaptum who was the second accused died on

6/12/2003.

Thomas Kiplagat Kibett whom we shall now refer to as “the appellant” has now preferred this appeal which he based on several grounds, but mainly that he was not positively identified, and that the charge against him was not proven beyond reasonable doubt. We have as is expected of us, decided to consider and reevaluate the evidence on record bearing in mind the fact that, it being his first appeal, we are mandated with the task of drawing our own conclusions in the case, and to establish whether the prosecution was able to pass the mandatory test, of proving it’s case beyond reasonable doubt.

It is evident that none of the 3 bank employees, their driver or even PW1 were able to give descriptive details of their assailants. All that they could describe was the clothes which their assailant wore at the material time, yet according to PW1, as soon as they visited the scene with police men from Kapsowar, the OCS Kapsowar who had accompanied them ordered PW1 and his colleagues from the bank, to go straight back to the Police Station; and further that later on, at 7 p.m. the OCS brought with him two suspects one of whom was already dead.

In our opinion, it would be interesting to know how the Police Officer knew who to trail, especially in view of the fact that PW1 and his colleagues had not even described their assailants. Indeed PW2 who led to the arrest of this appellant conceded during cross- examination that those who reported the robbery never mentioned or described their assailants, and also that at the time, and place where the appellant was arrested, none of the victims were present. It is also clear that the appellant was arrested 20 to 30 kilometers away from the scene, and that no money was recovered at time of arrest.

It has not escaped our attention that when PW8 took his statement under enquiry on 7/6/1998, he noted that the appellant had fresh wounds, and it was his evidence that this appellant had been arrested on 6/6/1998 at 6 a.m., which in itself reveals a lot, for it contradicted the evidence of PW1 and the OCS Kapsowar (PW7) who claimed that the appellant was arrested before 7 p.m. on 5/6/1998. Could the Police have been dealing with a different person? This particular doubt casts serious doubts as to the real identity of the robbers for not having been able to identify their assailants, the most prudent thing would have been for the police to conduct identification parades, yet none were conducted. The fact that none were conducted, can only lead to one conclusion; that the identification was not positive and therefore, there were serious unexplained issues in the prosecution case to warrant a conviction, which fact was complicated further when the appellant retracted his confession.

We find that the learned trial Magistrate misdirected herself, and ignored the evidence on record when she found that *“the identification of the accused during the robbery by the witnesses is reliable as circumstances favored a positive identification. Witnesses were cross-examined and there was nothing in that testimony to show that the identification was not proper. Witnesses at the scene of the robbery gave a proper account of how they identified the accused persons. .... the circumstances favored a positive identification”*, After which she proceeded to rely on their confessionary statements.

It was, in our minds wrong for the learned trial magistrate to assume that the retracted statement corroborated the evidence for the prosecution, in a case where identification was never proven and it thus remained very doubtful. Needless to state, the fact that it took more that 12 hours to extract that statement, from the appellant who was visibly badly injured, should have sent warning signals to the magistrate whose only logical conclusion should have been that it was extracted unlawfully and should not have been relied upon.

Based on our above findings, we conclude that there was no evidence to link this appellant with the offence and we do in the circumstances allow this appeal, quash the conviction and set aside the sentence.

The appellant should be released forthwith unless otherwise held in lawful custody.

**Dated and delivered at Eldoret this 4th day of October 2005.**

**JEANNE GACHECHE**

**Judge**

**GEORGE DULU**  
**Ag.Judge**

Delivered in the presence of:

Miss Oundo for the state

Mr. Kigamwa for the appellant

Appellant