REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 17 of 2003
(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 2170 of 2002 –R. KIRUI)

WILLIAM KIPRONO ROTICH……...……APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

JUDGMENT OF THE COURT

The appellant, William Kiprono Rotich, was charged with two counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charges were that on the 26th and 27th of July 2002 at Kamara village, Molo, the appellant jointly with another not before the court whilst armed with a dangerous weapon namely a knife, robbed Jeremiah Kiplagat Sigei of Kshs 50 on each of the said dates and at the time of such robbery threatened to use personal violence on the said Jeremiah Kiplagat Sigei.The appellant was further charged with the offence of attempted robbery contrary to **Section 297(2) of the Penal Code**. The particulars of the offence were that on the 28th of July 2002 at Kamara village, Molo, the appellant jointly with others not before court while armed with a knife attempted to rob Jeremiah Kiplangat Sigei of money and immediately at the time of such attempted robbery threatened to use actual violence to the said Jeremiah Kiplangat Sigei. The appellant pleaded not guilty to all the charges. After a full trial, the appellant was found guilty as charged on the three counts. He was duly convicted and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence. He has appealed to this court against the said conviction and sentence.

In his petition of appeal, the appellant raised five grounds of appeal faulting the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted based on the sole evidence of the complainant who had a grudge against him which resulted from a fight between the appellant and the complainant's brother one Samuel Langat. The appellant was aggrieved that the prosecution had not produced the police Occurance Book which could have established the existence of the grudge as the incident had been reported to the police. The appellant faulted the trial magistrate for failing to consider the complainant's evidence to the effect that the appellant had taken breakfast with the complainant a day after the alleged robbery incident. The appellant was further aggrieved that the trial magistrate had failed to consider clear evidence that the charges against him were trumped up.

At the hearing of the appeal, the appellant, with the leave of the court presented to this court written submissions in support of his appeal. In the said submissions the appellant made a strong case to have his appeal allowed, the conviction quashed and the sentence imposed set aside. Mr Koech, Learned State Counsel, on the other hand, made oral submissions urging this court to uphold the conviction and the sentence of the trial magistrate. We shall give reasons for our judgment after briefly setting out the facts of this case.

The complainant in this case Jeremiah Kiplagat Sigei (PW1) testified that he was confronted by the appellant and robbed twice in a span of two days, that is, on the 26th and the 27th of July 2002. The complainant further testified that the appellant attempted to rob him on the 28th of July 2002. In all these incidences, the complainant testified that the appellant was armed with a knife and threatened to stab him

if he did not give him money. In the first incident the complainant testified that he spoke with the appellant for some time. The appellant was known to the complainant. It was the complainant's testimony that the appellant told him to give him money or else the appellant threatened to injure him. The complainant did not have any money in his possession at the time. He pleaded with PW3 Samuel Koech to give him the money so that he could be released by the appellant. PW3 gave the complainant Kshs 50 which he gave to the appellant. The appellant then allowed him to leave the scene.

In the second incident (*that is the one that took place on the 27th of July 2005*) the complainant testified that the appellant went to his home as he was taking breakfast. The complainant invited the appellant to take a cup of tea. The appellant accepted the offer of a cup of tea. Thereafter the complainant states that the appellant again unleashed a knife and told the complainant to give him money. The complainant again told the appellant that he did not have money. He called his wife PW2 Recho Chepkoech and asked her to give the appellant the sum of Kshs 50/=. PW2 complied with the request and gave the said sum to the appellant. In the third instance, the complainant testified that he was confronted (*on the 28th of July 2005*) while he was walking home from his place of work. This time when the appellant threatened him with a knife the complainant responded in kind. He unsheathed a sword and used it to slap the appellant on his left arm and neck. The complainant testified that the appellant ran away after he had screamed for help from the members of the public.

PW5 Police Constable Augustine Cheruiyot arrested the appellant on the night of the 4th and 5th September 2002 after he was informed by the members of the public that the appellant was masquarading as a police officer. PW5 arrested the appellant and took him to Molo Police Station with a view of having him charged with the offence of impersonating a public officer. PW5 later received information from Mau Summit Police Station that the appellant was required at the said police station as a report had been made that the appellant had been involved in a robbery. PW5 handed over the appellant to the Mau Summit Police. PW4 Corporal Martin Kipkemoi of Mau Summit Police Station testified that the complainant in this case made a report to him that he had been robbed twice by the appellant. He booked the report and later received information that the appellant had been arrested by the police based at Molo Police Station. He had the appellant brought to Mau Summit Police Station and later charged with the robbery offences.

When the appellant was put on his defence, he denied that he had been involved in the robberies. He testified that he was surprised after his arrest that he was charged with the robbery offences. He attributed the genesis of his problems to the fact that on the night of his arrest he had disagreed with some police officers who had claimed that he had bought beers inorder to entice their wives from their homes. Initially he was to be charged with the offence of impersonation but was later shocked when he was charged with the robbery offences. He denied that he was involved in the said robberies and the attempted robbery.

This is a first appeal. As the first appellate court, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate and reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its determination, this court has to put in mind the fact that it neither saw nor heard the witnesses. **(See Njoroge –versus- Republic [1987] KLR 19)**. Having carefully evaluated the evidence adduced before the trial magistrate and also having considered the submissions made before us by the appellant and the State, the issue for determination by this court is whether on the evidence adduced by the prosecution, the charges laid against the appellant were proved beyond any reasonable doubt.

In this regard, the evidence adduced by the complainant in this case is critical. Our re-evaluation of the said evidence clearly show that the appellant and the complainant were people who were known to each other. Infact they appear to have been living in the same area. The complainant testified that the complainant robbed him twice and attempted to rob him once. In the first instance, the complainant testified that the complainant accosted him on the way as he was walking from his place of work to his home. Although he did not have any money at the time, the complainant borrowed the sum of Kshs 50 from PW3 and gave it to the appellant. During the second incident the appellant is said to have gone to the house of the complainant in the morning. He was invited by the complainant to take a cup of tea with him. The appellant accepted the invitation. Thereafter the complainant testified that the appellant

threatened him with a knife after which he asked his wife (PW2) to give the appellant the sum of Kshs 50. During both incidences, after the appellant was given the sum of Kshs 50, he went on his way without further ado. The evidence of the complainant as to the fact that he was threatened and later forced to part with the sum of Kshs 50 on each occasion was corroborated by the evidence of PW2 and PW3.

Having re-evaluated the said evidence adduced by the complainant, does it prove the charge of robbery with violence envisaged by **Section 296(2) of the Penal Code?** We do not think so. In the first instance it is apparent that the appellant demanded money from the complainant confident that the complainant would give him the money. Although the complainant did not have any money in his person, he borrowed the sum of Kshs 50 from PW3 and gave it to the appellant. In the circumstances of the first charge the offence of robbery with violence was obviously not proved. The complainant was not robbed by the appellant but rather he borrowed money from his friend PW3 so that he could give to the appellant. Thereafter the appellant appeared satisfied and went on his way.

In the second instance, the appellant visited the complainant in his homestead in the morning. The complainant invited him to take a cup of tea. The appellant accepted the invitation and took the cup of tea. Thereafter the complainant claimed that the appellant threatened him with a knife after which he asked his wife (PW2) to give the appellant the sum of Kshs 50/= upon which the appellant left the complainant's homestead. After carefully re-evaluating the evidence adduced, we find it hard to believe that a person who is said to have just robbed another could be invited to take tea in the house of the said complainant a day after the robbery incident. The correct evaluation of the evidence is that the appellant and the complainant were acquintances who knew each other very well. Whatever could have motivated the complainant to make the allegations that he had been robbed by the appellant cannot be gleaned from the proceedings of the trial magistrate.

However the submission by the appellant that the complainant made the allegation of robbery against him because of a grudge that resulted from a fight involving the appellant and the complainant's brother, cannot be ruled out. The narration of the events that took place during the material period as told by the complainant does not add up. One would expect that a victim of robbery would report the incident of the robbery immediately after the occurance of the robbery incident. In this case, the complainant made no report to the police even after allegedly being robbed at knife point on two occasions. In both occasions, the complainant conveniently did not have cash in his person and was therefore obliged to borrow money first from his friend (PW3) and in the second instance from his wife (PW2) so as to give to the appellant.

Our re-evaluation of the evidence clearly points to the fact that the complainant contrived evidence against the appellant by conveniently choosing persons who would give favourable testimony on his behalf. The complainant obviously set his mind on having the appellant incarcerated for a long time. The arrest of the appellant by the police on another alleged crime offered the complainant a golden opportunity to put into place his scheme to have the appellant removed permanently from the local scene. The subsequent allegation that the appellant had attempted to rob him for a third time should be seen in this light.

Having carefully evaluated the evidence we do hold that the prosecution failed to prove its case on the charge of robbery with violence as against the appellant. An essential ingredient of the charge of robbery with violence contrary to **Section 296(2) of the Penal Code** was not proved. The prosecution did not establish that there was any robbery that took place. Nothing was stolen from the complainant. The two alleged robbery instances explained by the complainant clearly show that the complainant gave the sum of Kshs 50/= to the appellant on his own accord. It is inconceivable that the complainant could have invited the appellant to have a cup of tea in his house a day after the appellant had robbed him. That would amount to extending the concept of hospitality too far.

We find it in the circumstances unnecessary to consider the defence offered by the appellant. We find his appeal to have merit as a consequence of which we allow the said appeal, quash his conviction and set aside the sentence imposed. The appellant is ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 18th day of November 2005.

MUGA APONDI
JUDGE

L. KIMARU
JUDGE