



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

**Criminal Appeal 338 of 2002**

**DAVID MURIITHI NDUNGU ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Appeal from original Judgment and Conviction in Chief Magistrate's Court at Nyeri  
in Criminal Case No. 4300 of 2001 dated 25th  
June 2002 by Mr. C. D. Nyamweya –  
S.R.M. – Nyeri)**

**Criminal Appeal 109 of 2003**

**PETER NDERITU KIONDO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**Appeal from original Judgment and Conviction in Chief Magistrate's Court at Nyeri  
in Criminal Case No. 4300 of 2001 dated 25th  
June 2002 by Mr. C. D. Nyamweya –  
S.R.M. – Nyeri)**

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

David Muriithi Ndungu (hereinafter referred to as the 1st appellant) is the appellant in High Court Criminal Case No. 338 of 2002, whilst Peter Nderitu Kiondo (hereinafter referred to as the 2nd appellant) is the appellant in High Court Criminal Case No. 109 of 2003.

The two appellants together with one Joseph Maina Ngatia (hereinafter referred to as Co-Accused) were tried before the Senior Resident Magistrate's Court Nyeri for the offence of Robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on the 27th day of November 2001 at Thome village in Laikipia District within the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely a toy pistol and simi they robbed Catherine Wamuyu Mararo of a motor-vehicle Registration No. KAM 286Y a Datsun Nissan, a wrist watch make Rado, mobile phone make Sagem, motor vehicle radio and cash Kshs.5,800/= all valued at Kshs.827,800/= and at or immediately before or immediately after the time of such robbery used actual violence to Anthony Mwangi Ngatia.

The Co-Accused also faced an alternative charge of Handling stolen goods contrary to section 322 (2) of the Penal Code, it being alleged that he dishonestly received or retained one wrist watch make rado

knowing or having reasons to believe it to be stolen. During the trial the evidence for the prosecution was briefly as follows:

On 27th November 2001, Catherine Wamuyu Mararo (P.w.1) who is a distributor of wines and spirits was in her motor-vehicle KAM 286Y a Nissan Datsun traveling from Matanya shopping center towards Ngangiro. The vehicle was being driven by her driver Anthony Mwangi Ngatia (P.W.2). The 2nd Appellant pretending to be a drunk man walked across the road forcing P.W.2 to stop the vehicle. The 2nd Appellant immediately whipped out a pistol and with the assistance of the 1st Appellant robbed P.W.1 of Kshs.5,800/= and a mobile phone. P.W.1 & 2 were forced into the boot of the vehicle which was driven upto a place where it got stuck in the mud. P.W.2 was then forced to drive the vehicle upto the farm of one Simon Weru where the two men got off the vehicle having also taken the car radio and P.W.1's rado wrist watch. P.W.1 called her husband David Mararo Waigwa (P.W.3) who reported the matter to Kiganjo police station as a result of which the flying squad from Karatina were contacted and P.C. Joseph Kariuki proceeded to the scene of the robbery. He made inquiries and received information which led to the arrest of the 1st appellant. Upon interrogation the 1st appellant implicated the 2nd appellant. The 2nd appellant was also arrested and upon interrogation, led P.C. Kariuki and other officers to a fence near his house where he produced a toy pistol in a green polythene bag. He also led the officers to the Co-Accused from whom the complainant's wrist watch was recovered. The Co-Accused was also arrested. P.W.2 who was injured during the robbery was later examined by a clinical officer Paul Njroge Waweru (P.W.4) who found him with a cut on the upper lip and bruises on the back. P.W.4 filed and signed a P3 form to this effect. The 3 appellants were subsequently charged as aforestated.

In his defence the 2nd appellant explained how he was arrested from his place of work. He was questioned about a person called Mureithi but he did not know the person. He was taken to his house which was searched. He was then taken to Karatina police station where he was charged with the offence of Robbery. He denied committing the offence and claimed that he did not even know the complainant.

The 1st appellant explained that he was arrested from his house in Matanya. His house was searched and he was asked for documents for his T.V. and a water pump. He was taken to Karatina police station where he was later charged. He denied operating any pool table or running away upon seeing the police officers.

The Co-Accused explained that he operates a Bar at Ichuga. On 28th September 2001 a customer whom he identified as the 2nd appellant went to the Bar and ordered 4 beers which he took when asked for money he claimed he was waiting for someone and that he himself had no money. He offered the Co-Accused a Rado watch and the Co-Accused kept it. On 30th November 2001 the 1st appellant went to the bar in the company of police officers. The police recovered the watch and arrested the Co-Accused.

In his judgment the trial magistrate found that the Co-Accused had given a reasonable explanation for his possession of the stolen watch. He therefore acquitted him of both the main charge and the alternative charge. The trial magistrate found that the complainant and P.W.2 had ample time to see and identify the two appellants as the robbery took place in broad daylight. He found that the recovery of the watch fortified the evidence of P.W.1 & 2. He therefore convicted the two on the main charge of Robbery with violence and sentenced each to the mandatory death sentence.

We have on our part reconsidered and evaluated the evidence as we are obliged to do in this first appeal. It is evident that neither P.W.1 nor P.W.2 knew any of the appellants before the robbery. Although the offence took place in broad day light and the two witnesses spent some time with the robbers, the two witnesses were not called upon to identify the appellants after their arrest. Although the trial magistrate stated in his judgment that:

***“according to the investigation officer (P.C. Joseph Kariuki), they (i.e. the appellants) refused to participate in an identification parade.”***

There is no evidence from the investigation officer to support this contention. P.W.1 only talked of being called to the police station to identify her watch and the pistol. P.W.2 on the other hand testified that when he was called to the police station he saw that the 1st accused had a birth mark near the eye and a

hair cut with some funny cut. P.W.2 is the one who testified that the two appellants refused to be identified at the police station. This information however ought to have been confirmed by the police officer who organized the identification parade, but no such evidence was offered. This means that the identification of the appellants by P.W.1 & 2 was no more than dock identification which is worthless.

Moreover the evidence of P.C. Joseph Kariuki regarding the arrest of the appellants was as follows:

***“There around, I talked to one person and I inquired whether he had seen the vehicle in that area. I learnt that 3 people were seen in the area, that he knew one person. The informer disclosed the name of the person he knew as Muriithi who operated a pool table at Wanaruona center. I was directed to Wanaruona. I inquired about the owner of the pool table and I learnt that the owner of the pool table had ran off the window when he saw us. I and my fellow officers went back to Naru Moru where we stayed until midnight. Some minutes after midnight we went to Mare area with our informer and we were led to Muriithi’s house where I arrested him .....”***

The above shows that P.C. Joseph Kariuki relied on information from an informer who was not a witness. In such a situation the information from the informer was hearsay and was inadmissible in evidence. Moreover the admission of this evidence was highly prejudicial to the appellants as it influenced the court when the appellants had no opportunity to cross examine the informer and test the veracity of the information. The proper approach would have been for P.C. Joseph Kariuki to testify as to the action he took upon receipt of the information without revealing to the court the information he received. By revealing the information, it became imperative upon P.C. Joseph Kariuki to identify the informer and produce him as a witness, failure to which the evidence of P.C. Joseph Kariuki was premised on hearsay evidence and could not be relied upon.

There was the evidence of recovery of the toy gun. Although P.W.1 & P.W.2 purported to identify it as the one used during the robbery, there was no identification mark or any other way of recognizing the toy gun as the same one. Indeed both P.w.1 & 2 gave the impression that the gun used in the robbery was a genuine gun. The identification was therefore doubtful.

The evidence concerning the recovery of the wrist-watch remains the only piece of evidence which implicates the 1st appellant. Looking at the proceedings from the lower court however, we find that the trial magistrate failed to comply with the mandatory provision of section 151 of the Criminal Procedure Code which states as follows:

***“Every witness in a criminal cause or matter shall be examined upon oath and the court before which any witness shall appear shall have full power and authority to administer the usual oath.”***

In this case the original record of proceedings from the lower court does not show whether any of the witnesses was sworn before testifying. Learned Principal State Counsel Mr. Orinda attributed this to sloppy recording of evidence. That may well be so, nevertheless section 151 of the Criminal Procedure Code is a mandatory provision which must be complied with, the court cannot just assume that the witnesses were sworn when the record does not so reveal. There was a material defect which vitiated the proceedings.

For all the aforesaid reasons we find that the conviction of the two appellants was not safe. Accordingly we allow each of the appeals, quash the convictions and set aside the sentence imposed. Each appellant shall be set free unless otherwise lawfully held.

***Dated signed and delivered this 9th day of November 2005.***

**J. M. KHAMONI**

**JUDGE**

**H. M. OKWENGU**

**JUDGE**