



**REPUBLIC OF KENYA.**  
**IN THE HIGH COURT OF KENYA AT KITALE.**  
**APPELLATE SIDE.**  
**CRIMINAL APPEAL NO. 36 OF 2003.**

**SAMMY KIMAIYO KIMUTAI :::::::::::::::::::: APPELLANT.**

**VERSUS**

**REPUBLIC :::::::::::::::::::: RESPONDENT.**

**(Being an appeal against the judgment of the SPM'S court in Criminal Case No.2514/2002 by D.K. Gichuki (Esq.,) – SRM delivered on 6th May, 2003 in Kitale)**

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

This is an appeal by Sammy Kimaiyo Kimutai against convictions on the following 7 counts.

Count 1:- Robbery with violence, contrary to section 296(2) of the penal code in that on the 25th May, 2002 at Bonde Trading Centre Cherangani in Trans Nzoia District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely AK.47 rifle and whips, robbed LIMET AGOYA MOSALE cash Ksh. 4,550/= and National Star radio all valued Ksh. 2,550/= the property of LINET AGOYA MOSALE and at or immediately before or immediately after the time of such robbery used actual violence to the said LINET AGOYA MOSALE.

COUNT 2:- Robbery with violence contrary to section 296(2) of the penal code in that on the 25th day of May, 2002 at Bonde Trading Centre Cherangani in Trans Nzoia District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely AK.47 rifle and whips, robbed GODFREY WEKESA and at or immediately before or immediately after the time of such robbery used actual violence to the said GODFREY WEKESA.

COUNT 3:- Robbery with violence, contrary to section 296(2) of the penal code in that on the 25th May, 2002 at Bonde Trading Centre Cherangani in Trans Nzoia District of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely AK.47 rifle, and whips, robbed JOSEPH KAMAU MBANYA cash Ksh. 380/= the property of JOSEPH KAMAU MBANYA at or immediately before or immediately after the time of such robbery used actual violence to the said JOSEPH KAMAU MBANYA.

COUNT 4:- Robbery with violence, contrary to section 296(2) of the penal code in that on the 25th May, 2002 at Bonde Trading Centre in Cherangani in Trans Nzoia District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely AK. 47 rifle and whips robbed ALLAN EGUNZA rovel wrist watch valued Ksh. 350/=, the property of ALLAN EGUNZA and at or immediately before or immediately after the time of such robbery used actual violence to the said ALLAN EGUNZA.

COUNT 5:- Robbery with violence, contrary to section 296(2) of the penal code in that on the night of 25th and 26th May, 2002 along Makutano – Mbangara road Cherangani in Trans Nzoia District the Rift

Valley Province, jointly with others not before court while armed with dangerous weapon namely AK.47 rifle and whips, robbed GEOFFREY GACHIE WABURI cash Ksh. 2,000/=, Avon bicycle frame Number 946628, Jacket and shirt all valued Ksh. 7,195/=, the property of GEOFFREY GACHIE WABURI and at or immediately before or immediately after the time of such robbery used actual violence to the said GEOFFREY GACHIE WABURI.

COUNT 6:- Robbery with violence, contrary to section 296(2) of the penal code in that on the night of 25th May, 2002 at Mbangara shop Cherangani in Trans Nzoia District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely AK.47 rifle and whips, robbed PETER KAMAU MBANGARA and at or immediately before or immediately after that time of such robbery used actual violence to the said PETER KAMAU MBANGARA.

COUNT 7:- Robbery with violence, contrary to section 296(2) of the penal code in that on the night of 25th and 26th May, 2002 at Kapsara Mutundu Farm Cherangani, in Trans Nzoia District of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely AK.47 rifle and whips, robbed LEONARD KURIA KIMANI Sony radio, calculator, weighing machine, wall clock, suit, two 'T' shirt, panga and 4 small handbags all valued Ksh. 12,920/= the property of LEONARD KURIA KIMANI and at or immediately before or immediately after the time of such robbery used actual violence to the said LEONARD KURIA KIMANI.

He was also alternatively charged with the offence of handling stolen goods contrary to section 322 (2) of the Penal Code.

Though he had originally been charged with 2 others in counts 1, 2, 3, and 4, his co-accused were all acquitted after the court found that the prosecution had not established a prima facie case against them.

In his amended petition, he bases his appeal on the grounds that the circumstances that prevailed at the material time were not favourable to positive identification, that the trial magistrate relied on a confession which he had retracted as he had not made it voluntarily, and also that his defence was rejected for no cogent reasons.

As is expected of us, we have had to re-evaluate the evidence that was adduced before the trial court of course without the benefit of scrutinising the demeanour of all the witnesses.

We have noted that none of those who were victims of the several attacks that night, were able to recognize any of their assailants, for none had seen them before, and the conditions were not conducive for positive identification as not only were the areas dark, the assailants had instilled a lot of fear on their victims. This then meant that it was imperative that the learned trial magistrate satisfy himself, beyond reasonable doubt that the witnesses had been able to identify their assailants positively. In instances such as this one, it was of utmost importance that an identification parade be conducted with a view to ensuring that the victims are able to identify their assailants in the proper manner, yet, no parade was conducted in the matter. That, in our opinion was a grave error of omission, especially given the fact that it would appear that no investigations were carried out at least to ensure that the prosecution case was foolproof. Even if investigations had been carried out, the findings remained a secret for the officer who actually investigated the case was never called to give evidence, again, a major lapse in the prosecution evidence.

We find that PW1 who claimed to be one of the investigating officers, only recounted how he received several exhibits which had been recovered from Cherangani with the relevant file and how he later went with the appellant to Bonde market for purposes of having the complainants identify their goods. We fail to understand under what provisions of the law, PW1 a Police Constable, could take an accused along with him together with the exhibits, to a market place where the victims were supposed to go and identify their property. Admittedly a police officer can take a suspect along for purposes of carrying out an investigation but that cannot and should never include circumstances where a suspect is exposed or shall we say 'paraded' for all and sundry in a market place together with the exhibits.

There can be no doubts in our mind that the victims would of necessity and convenience associate the

