



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

**CRIMINAL APPEAL NO. 154 OF 1999**

***CONSOLIDATED WITH***

**CRIMINAL APPEALS NO. 155, 156 AND 157 OF 1999**

(From Original Conviction and Sentence in Criminal Case No.  
1596 of 1997 of the S.R.M.'s Court at Molo) – F. MAKORI  
OMENTA – S. R. M.

**JOHN GITAU MUGWEMA.....1ST APPELLANT**

**SIMON MWAURA MAINA.....2ND APPELLANT**

**PETER KARIUKI KAMAU.....3RD APPELLANT**

**JOSEPH KIMEMEI MUIGAI.....4TH APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The Appellants were charged with the offence of robbery with violence Contrary to Section 296 (2) of the Penal Code.

The particulars of the charge are that on the 2nd December 1997 at Tayari, Molo within Nakuru District the Appellants jointly with others not before Court robbed Lawrence Kirinya a Police Certificate of Appointment and at or immediately before or immediately after the time of such robbery used personal violence to the said Lawrence Kirinya and thereby wounded him. The 1st Appellant was further charged with a second count of being in unlawful possession of Government Stores Contrary to Section 324 (2) of the Penal Code. The particulars of the said charge were that on the same day and at the same place he was found in possession of Government Stores namely Police Certificate of Appointment of Police Constable Lawrence Kirinya in contravention of the said Act. The Appellants when arraigned before the trial Magistrate pleaded not guilty to the charge. After a full trial all the Appellants were found guilty as charged in respect of the first count. The 1st Appellant was found guilty in respect of the second count. The Appellants were sentenced to the mandatory death sentence in respect of the first count. The 1st Appellant was sentenced to serve a term of one-year imprisonment in respect of count two. The Appellants were aggrieved by the conviction and sentence and have appealed to this Court against the said conviction and sentence.

In their respective Petitions of Appeals, the Appellants have presented more or less similar grounds of Appeal. The Appellants faulted the decision of the trial Magistrate in convicting them on uncorroborated circumstantial evidence. They further contended that the trial Magistrate erred in law in convicting them

on insufficient evidence; that the trial Magistrate erred in not considering their defence before arriving at the said decision convicting them; that (in respect of the 2nd and the 4th Appellants) the trial Magistrate erred in sentencing them to death even though they were aged below sixteen years; and finally that the trial Magistrate erred in convicting them whereas the evidence adduced by the Prosecution did not connect them to the offence.

At the hearing of the Appeal, the Appeals of the four Appellants which were filed separately were ordered consolidated and heard as one. Mr. Mutuku Learned State Counsel did not support the conviction and sentence of the 2nd, 3rd and 4th Appellants. He submitted that their Appeals should therefore be allowed. Mr. Mutuku however urged the Court to dismiss the Appeal filed by the 1st Appellant, John Gitau Mugwema. He supported his conviction and sentence. On his part the 1st Appellant presented, with leave of the Court, Written Submissions in support of his Appeal. He prayed that his Appeal be allowed. The other three Appellants naturally supported the position taken by the Learned State Counsel and did not have anything to add.

The facts of this case briefly stated are that on the 2nd of December 1997 at about 10.00 p.m. the Complainant PW 1 Police Constable Lawrence Kirinya was walking from Molo Police Station to his residence at Tayari Estate. He was with a colleague, George Kimkung. It was dark. He did not have a torch or any light. Along the way they were accosted by a group of men who stopped them. When PW 1 asked what the men wanted, he was hit on the head with an iron bar and fell down. He lost consciousness. He regained consciousness only to discover that the men had ran away. He further discovered that his wallet had been stolen. The wallet contained his Certificate of Appointment, Identity Card and other documents. He went to hospital, was treated and discharged. A P3 form was issued to him by the Police. It was filled at the hospital. Some of the items that had been stolen from him like the Identity Card was recovered near a stream the following day. His Certificate of Appointment was recovered on 13th of December 1997 from a suspect who was later identified to him as the 1st Appellant. PW 1 did not identify his attackers during the incident whereby he PW 2 PC George Kimkung testified that he was with PW 1 on the material night when PW 1 was attacked and hit on the head with an iron bar. PW 2 confronted the men using as umbrella. The men ran away. PW 2 did not identify PW 1's assailants. PW 3 Police Constable Joseph Okumu received information from an informer on the 10th of December 1997. The time was about 7.00 a.m. PW 3 had been informed of the hideout of robbers who had been terrorising *wananchi* at Molo Township. PW 3 with Corporal Kirui proceeded to the house of the 1st Appellant. They did not find him. They were directed to Molo Forest where they managed to arrest the 2nd Appellant who on interrogation took them to the house of the 3rd and 4th Appellants. Later the 1st Appellant was arrested by Corporal Kirui. When the 1st Appellant was brought to the Molo Police Station he was searched by PW 3 and from the left pocket of his coat, the Certificate of Appointment of PW 1 was recovered. PW 4 Corporal Patrick Kirui was directed to the house of the 1st Appellant where he managed to arrest him.

He testified that the Certificate of Appointment of PW 1 was recovered from the coat pocket of the 1st Appellant. PW 5 Inspector John Leshimpiro took the charge and cautionary statement of the 3rd Appellant wherein the 3rd Appellant admitted to the charge of robbery with violence. The said statement was repudiated by the 3rd Appellant but was admitted in evidence after a trial within a trial. When the Appellants were put on their defence, the 1st Appellant denied involvement in the commission of robbery. It was his testimony that he was framed up by PW 3 Police Constable Okumu because he wanted to conceal the fact that he had stolen money from him. The 1st Appellant further testified that the Certificate of Appointment of PW 1 was planted on him to connect him with the offence. The 2nd, 3rd and 4th Appellants denied involvement in the robbery. They testified that they were arrested while on their normal daily activities. They narrated the circumstances of their arrest and were of the view that they had been wrongly and mistakenly connected with the robbery and the assault of PW 1.

The High Court as the first Appellate Court in Criminal Cases is mandated to re-examine the evidence adduced before the trial Magistrate, re-evaluate and re-assess the same and reach its own independent determination whether or not to uphold the conviction of the Appellant. The High Court in reaching its decision has to put in mind the fact that it did not see the witnesses as they gave their testimony and therefore cannot give any finding on the demeanour of the witnesses. The High Court is also required to

consider in its decision the grounds of Appeal put forward by the Appellant. (see **Ekeno – versus- Republic [1972] E. A. 32**). In the instant case, the issues for determination by this Court is whether or not the Appellants were involved in the robbery and the assault of the Complainant. The other issue for determination is whether the Prosecution adduced evidence that proved beyond any reasonable doubt that it was indeed the Appellants and no other persons who assaulted and robbed the Complainant. PW 1 and PW 2 were walking from Molo Police Station to their residence at Tayari Estate. They were accosted by a group of men on the path between the two locations. PW 1 was hit on the head with an iron bar as a consequence of which he lost consciousness. He came to consciousness when the said gang had already fled having been scared away by PW 2. Both witnesses said that it was dark. They were unable to identify any of the attackers. PW 1 discovered that he had lost his wallet which was in his pocket. The wallet contained his Certificate of Appointment, Identity Card, Voter’s Card and other documents. PW 1 reported the matter to the Police. He also sought treatment on the following day, some of the documents which had been robbed from PW 1 was recovered by children near a stream.

Eight days later, acting on information, the Police were able to arrest the Appellants. The 1st Appellant upon being searched by PW 3, the Certificate of Appointment was found in the inner left pocket. PW 5 took a charge and cautionary statement from the 3rd Accused, Peter Kariuki Kamau and when asked if he committed the offence, the 3rd Appellant was said to have replied “*Ni kweli kabisa*” (It is very true). The 3rd Appellant retracted the statement during the hearing of the case before the trial Magistrate. After a trial-within-a trial the said confession was admitted in evidence. On re-evaluation of the evidence adduced before the trial Magistrate, it is clear that two pieces of evidence were relied upon by the trial Magistrate to connect the Appellants to the robbery and thereafter convict them; the evidence of the recovery of the Certificate of Appointment from the pocket of the 1st Appellant and the confession of the 3rd Appellant.

The other evidence that was relied on by the trial Court to convict the Appellant is the alleged confession of the 2nd, 3rd and 4th Appellants who stated that the 1st Appellant was their ringleader. When the 1st Appellant was put on his defence he testified that the Certificate of Appointment was planted on him by PW 3 after he demanded to be given back the money that had been taken from him by PW 3. It was his evidence that he had been framed up. On re-assessment on their entire evidence adduced by the Prosecution, it is evident that the Appellants were tenuously connected with the robbery. There was no direct evidence connecting the Appellants to the robbery. PW 1 and PW 2 did not see the robbers as it was at night. They could not therefore identify them. The evidence of the alleged confession by the other three Appellants that the 1st Appellant was their gang leader to PW 3 and PW 4 cannot be admitted in evidence. The said confessions were not made to a Police Officer of the rank of an Inspector as required by the law.

PW 3 was a Police Constable whilst PW 4 was a Corporal. The trial Magistrate thus erred in relying on this evidence. The charge and cautionary statement which was admitted after a trial within a trial whereby the 3rd Appellant admitted to the charge of robbery with violence, could only be relied on to convict the Appellants if there was other corroborative evidence. The 3rd Appellant is said to have stated in his confession “*Ni kweli kabisa*” (It is very true). This sentence cannot be said to amount to a confession. There was no explanation of the circumstances of the said robbery by the 3rd Appellant. In the absence of a detailed explanation by the 3rd Appellant in the charge and cautionary statement, this Court is unable to re-examine the said statement to determine whether the confession could be said to have a ring of truth in it. (see **Tuwamoi –versus- Republic [1967] E.A. 58**). Once the confession was retracted, the said evidence lacked any probative value. The explanation given by the 1st Appellant that the Certificate of Appointment was planted on him to frame him upon the charge of robbery with violence taken in the context of the evidence adduced by the Prosecution in this case, is thus plausible. It cannot be ruled out that the Police zealously sought to have the Appellants guilty as the case involved one of their colleagues. At the hearing of this Appeal, Mr. Mutuku, Learned State Counsel conceded to the Appeals of the 2nd, 3rd and 4th Appellants. It is the finding of this Court that the said concession was well advised. In the circumstances therefore and for the reasons stated above, the Appellants Appeals are hereby allowed. We have considered the ground of Appeal put forward by the 2nd and the 3rd Appellant that they were sentenced to death when they were under the age of eighteen as the same is superfluous in view of our finding allowing their appeal on conviction. Their convictions are quashed, and the sentences imposed by

the trial Magistrate set aside. The Appellants are consequently set at liberty unless otherwise lawfully held.

**DATED at NAKURU this 26th day of May 2004.**

**D. K. MUSINGA**

**AG. JUDGE**

**L. KIMARU**

**AG. JUDGE**