

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NOS.17 AND 18 OF 2003

**(From original convictions and sentences of the Chief Magistrate's Court at Kisii
in Criminal Case No.45 of 2003 –L. KOMINGOI ESQ., S.R.M)**

1. WILFRED NYAKANGI OMORI

2. DAVID MOI OMORI APPELLANTS

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The two appellants were convicted by Senior Resident Magistrate Kisii for offence of Robbery with violence c/s.296 (1) Penal Code. They were each sentenced to five years imprisonment.

It had been alleged that on night of 14th and 15th December 2002 at Tabaka sub location with others not before the court they robbed Ronald Ombogo Ogutu of one Jaggery Machine and immediately before or after the robbery threatened to use actual violence.

PW1 Ronald Ogutu and PW2 Denis Nyakangi had told court they were asleep when people went and ordered them to lie down. They dismantled a jaggery machine and carried it away. PW1 & 2 said they identified both appellants. The main issue was that of identification. The robbery took place at 1 a.m. in the night. PW1 & 2 said they were able to identify the appellant as there was moonlight. The magistrate accepted this. However, I feel it would have been difficult for the two witnesses to identify the attackers. PW1 said they were asleep and were woken up. Even if there was moonlight I doubt if they could identify their attackers as they lay down. Further PW1 & PW2 did not say whether they were sleeping out in the open or in a house. I would presume it was in a building in which case it would be impossible to identify their attackers.

1st appellant is said to have been found with some parts seven days later. However PW8 P. Robert Nyabwanga who arrested him did not say what he exactly found the appellant with. There were some parts found in a river and others at a workshop. It was important he should have clearly stated what 1st appellant was found with. All in all I find that evidence of PW1 & 2 needed to be corroborated by independent evidence. There was no such corroborating evidence. It was therefore unsafe for the magistrate to base her conviction on their uncorroborated evidence. The upshot of this is that I allow the appeal and quash the conviction and set aside the sentence.

Both appellants be set at liberty unless otherwise legally held.

It is so ordered.

KABURU BAUNI

JUDGE.

5/10/04