



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

**CRIMINAL APPEAL NO. 88 OF 2003**

*(From original conviction and sentence in Criminal Case No.1145 of 2003 of the  
Principal Magistrate's Court at KERICHO – K. S. OMBAYE)*

DAVID KIPROTICH TERER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT OF THE COURT**

The appellant was convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal code. It was alleged that on the 20th day of April, 2003 along Brook Kapcheptoror road in Kericho District within Rift Valley Province jointly with others not before the court, while armed with dangerous weapons namely rungun robbed Joseph Kibet Rotich of cash Kshs.2000/= and one hat valued at Kshs.200 and immediately before or immediately after the time of such robbery used personal violence to the said Joseph Kibet Rotich.

The complainant, PW1 told the court that on 20/4/2003 at 7.30 p.m. he was going home accompanied by Samson Kemoi. They met three people standing on the roadside who greeted and followed them up. He then alleged that the appellant hit him with a stick and PW1 ran away and the assailants chased him up and PW1 fell down. He was then beaten and the appellant removed Kshs.2000/- that was in a jacket that he had worn. PW1 said that the appellant was from his home area and he clearly saw him. Later he reported the matter at Kericho Police Station.

PW2 in his very brief testimony said that on 20/4/2003 at about 7 p.m. he was going home with PW1 when they met the appellant and others. They greeted them then the appellant hit PW1. They then ran away. He said that he knew the appellant there before and that the attackers took away his hat.

PW3, a Clinical Officer at Kericho District Hospital said he examined PW1 on 22/4/2003 and he claimed to have been assaulted. According to him, PW1 had been assaulted using a blunt object and he assessed the degree of injury as harm. The P3 which he completed showed that it was issued on 22/4/2003.

PW4 an Administration Police Officer stationed at Chagaik Administration Police Camp said that on 23rd April, 2003 at 5.30 p.m., PW1 went and reported that he had been assaulted as he went home. On 24/4/2003 PW4 and his colleagues went to look for the suspect and they arrested the appellant and took him to Kericho Police Station.

The appellant through his counsel Mrs. Bett appealed against the said conviction and sentence. She faulted the trial magistrate for convicting the appellant when there were glaring contradictions in the

prosecution case. She also argued that the trial magistrate erred in law and in fact in convicting the appellant in that he gave undue weight to the prosecution case and gave very little consideration to the defence case. She further argued that the trial magistrate erred in law and in fact in convicting the appellant for robbery with violence under Section 296(2) of the Penal Code when the evidence adduced could only at best have been sufficient to prove simple robbery.

Counsel carefully took the court through the proceedings and pointed out some glaring contradictions in the evidence of the various witnesses.

While the charge sheet showed that the appellant and others were armed with dangerous weapons namely *rungus* and that they robbed PW1 of cash Kshs.2000/- and a hat, PW1 said that one of the attackers had a stick and he hit him on the head with it.

He said he reported the incident at Kericho Police Station and was given a P3. PW2 did not talk of any weapon that the appellant or his alleged accomplices had. He only said that the appellant hit PW1. He testified that they took the hat of PW1 but did not mention the issue of any money that may have been stolen from PW1.

According to PW4, PW1 reported that he had been assaulted as he walked home. The report was made on 23rd April, 2003 at 5.30 p.m. and then they went and arrested the appellant on 24th April, 2003. One wonders why it took PW1 so long to make a report if indeed he had been robbed and assaulted in the process yet he knew his assailant very well as they were from the same village. It is also instructive to note that he did not report that he was robbed. The P3 which was issued on 22nd April, 2003 (and not 23/4/2003 when it is indicated the report was made to the police) showed that PW1 was assaulted by a person known to him, it does not refer to any robbery.

There was even further contradiction when the clinical officer, PW3 testified that he examined PW1 on 22/4/2003 and he complained of having been assaulted only.

In ***IBRAHIM LEKARTELO & ANOTHER VS REPUBLIC***, Criminal Appeal No. 52 of 1999 the court of appeal refused to uphold the conviction of an appellant due to material discrepancy in the evidence of the complainant and other witnesses.

The learned state counsel, Mr. Koech conceded to the appeal, and in our view, rightly so, saying that the appellant and PW1 came from the same place and PW1 should have made a report to the police at once if indeed he had been assaulted and robbed. The time lapse was not explained at all. It was also not clear whether PW1 made his report on 22/4/2003 or 23/4/2003.

There were considerable discrepancies in the evidence given by all the prosecution witnesses and in our view it was unsafe for the trial magistrate to convict the appellant.

Given the variance in the evidence of PW1 and PW2, it is doubtful whether a charge of robbery with violence should have been preferred in the first place because it was uncertain whether the people who allegedly assaulted PW1 and stole his hat were armed at all, leave alone with dangerous weapons.

We are satisfied that the conviction and sentence to death of the appellant was not proper in law and we therefore allow the appeal, set aside the conviction and quash the sentence that had been imposed by the trial court.

The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED at Nakuru this 17th day of December, 2004.

**D. MUSINGA**

**JUDGE**

**17/12/2004**

**L. KIMARU**

**JUDGE**

**17/12/200**