

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 332 of 2003

**(From Original Conviction and Sentence in Criminal Case No. 2104 of 2002 of the
Senior Resident Magistrate's Court at Kwale L.N. Mbatia, SRM)**

JOHN MUSYIMI MUTUA Alis
MACHO

WAMBUA MUTIE APPELLANTS

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

JOHN MUSYIMI MUTUA alias MACHO and WAMBUA MUTIE were with another tried and convicted of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. They have appealed against both the conviction and sentence.

The learned Assistant Deputy Public Prosecutor did not support the conviction on the grounds that the identification of the Appellants after a period of over two years was not proper. She also submitted that two witnesses P.W.1 and P.W.2 alleged that they identified both the Appellants when there is no evidence to show that any parade was conducted for the second Appellant. The two witnesses also contradicted themselves and their evidence cannot therefore be relied upon.

We have ourselves examined the lower court record and agree with the Assistant Deputy Public Prosecutor that the Appellants' convictions are not safe and cannot therefore be allowed to stand. Apart from the fact that the identification parade was held over two years after the robbery, the witnesses had not given the description of the robbers to the police at the time of making the report immediately after the robbery.

The witnesses also alleged that they identified both the Appellants when there was no evidence to show that identification parades were conducted for both Appellants. P.W.4 testified that he conducted a parade for the first Appellant only. What is more is that the second Appellant, Wambua Mutie was in prison at Shimo La Tewa on the date of the alleged robbery and cannot therefore have participated in the robbery of P.W.1.

For these reasons the convictions of the Appellants cannot be allowed to stand. We therefore allow their appeals, quash the conviction and set aside the sentence. The Appellants shall be released forthwith unless otherwise lawfully held.

DATED and delivered this 14th day of December 2004.

J. KHAMINWA

JUDGE

D.K. MARAGA

AG. JUDGE