



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELATE SIDE

CRIMINAL APPEAL NO. 416 OF 1999

**From Original Conviction and Sentence in Criminal Case No. 2599 of 1997
of the Principal Magistrate's Court at Nyahururu.**

ALBERT ITOTIA KORNES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was convicted of the offence of Robbery with violence C/s 296 (2) of the Penal Code and sentenced the mandatory sentence of death. This is an appeal arising from the said conviction.

It is our duty as the first appellate court to assess the entire evidence adduced before the learned trial magistrate and come to independent conclusions. This we have done.

The complainant was robbed on the night of 17th and 18th December, 1996. There were several assailants. They were armed with pangas and swords. There was light coming from the several torches that were held by the assailants. At the time of the robbery, the appellant is said to have held a sharp panga on the neck of the complainant Pw1.

The robbers demanded money. Pw1 had Kshs. 19,000 which on demand showed where it was kept. The money was taken alongside several household and personal property. The wife of Pw1 Pw2 was present but was ordered to keep quiet and cover herself. This incident took some time but Pw1 and Pw2 were only able to identify the appellant both by appearance and voice.

The appellant was a son of their neighbour. He used to come to their shop and in fact on the night of the robbery, he had visited the shop to buy some cigarettes. Pw1 had known him for about one year while pw2 had known him for about 3 months.

Our assessment of the evidence is that there could not have been any mistaken identity Pw1 gave his name to the police when he reported the robbery and was honest enough to say he did not know the other assailants.

On the night of the attack after the robbers had left and report made to the police, complainants, and the police went to the home of the appellant but they were told he had left at 11.00pm and had not returned. The appellant disappeared and it was not until about two months later that he was arrested in Nakuru. The only inference that can be drawn from that conduct is that he knew he was being sought for

the crime he had committed.

Upon his arrest, the appellant confessed in his statement under inquiry to the police that he and others committed the offence. The statement contained peculiar details that could only be attributed to the appellant. It was retracted but correctly admitted in evidence by the learned trial magistrate. In any case it was corroborated by the independent evidence of identification by pw1 and Pw2.

The learned trial magistrate correctly rejected the defence raised by he appellant in view of the overwhelming evidence against him.

There was no injury in the whole incident and we believe it is proper that the appellant should have been convicted of the lesser charge of Robbery C/s 296(1) we accordingly substitute the conviction.

The appellant was said to be a first offender but that does not reduce the seriousness of the offence. No recoveries of the stolen money and goods were made. Severe punishment is called for.

We order that the appellant shall serve five(5) years imprisonment together with four (4) strokes of he cane. He shall be under police supervision for a period of five(5) years from the date of completion of his prison term.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of July, 2002

MBOGHOLI MSAGHA

JUDGE

G. MBITO

JUDGE