



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 126 OF 2000**

(From Original Conviction and Sentence in Criminal Case No. 2119 of  
1999 of the Senior Principal Magistrate's Court at Machakos: P. C.  
Tororey Miss, on 31.10.2000)

**GERALD MUTUKU MUIA ::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT**

**Coram: J. W. Mwera J.**

**Appellant not wishing to be present**

**Orinda State Counsel for Respondent**

**C.C. Muli**

**J U D G E M E N T**

The appellant was charged with another under S.296(2) Penal Code in the lower court that on 29.6.99 at Syokimau location, Athi River Machakos, armed with dangerous weapons to wit a browning pistol robbed Dorcas Musyoki of cash plus personal property valued at Sh.2250/= and immediately before and after such robbery threatened to use actual violence against Dorcas. After trial the appellant was convicted and given seven (7) years imprisonment 3 strokes of the cane under S.296(1) Penal Code but without the 5 year mandatory supervision as mandated under S.344(a) Criminal Procedure Code.

The petition of appeal stated that there was no direct evidence by anybody who saw the appellant committing the offence and that no stolen property was found with him. That thus the state did not prove its case beyond reasonable doubt. That the sentence was harsh a married young man who was sickly. The Learned State Counsel supported saying that at about 7 p.m. when the offence took place it was still reasonably light and that the appellant was arrested on the description the complainant had given.

The evidence on record and as seen by the Learned Trial Magistrate is that the appellant with another robbed the complainant at about 7 p.m. She had seen and passed the two young men on the road before they attacked P.W.1. It was not too dark according to her and at about the time of the attack P.W.1 had seen her attackers by help of headlights of passing cars. That light also came from the nearby airport. However when the two robbed P.W.1 they fled into a bush. She proceeded home and reported the incident adding without describing features of the appellant or his clothing that P.W.1 could recognise him if she saw him again. That her brother Joshua Musyoki (P.W.2) and a neighbour called Kulia, acting on the description given 20 by P.W.1 the previous day of her assailants, arrested the appellant the following day by the road side and handed him to a local assistant chief. Again it is repeated here that P.W.1 did not describe in her evidence what she had marked of the appellant. It is noted the assistant chief did not testify. P.W.1 also said that she went to an identification parade and picked out the appellant right away. There is no evidence by whoever conducted such a parade. The local assistant chief Musembi

who did not testify is said to have brought the appellant plus his co-accused to Athi River Police Station on 7.7.99 – about a week after the alleged robbery. Now there is no evidence how the appellant’s co-accused came into the custody of the assistant chief. If there had been evidence that the appellant on interrogation led the assistant chief to his coaccused then a link would have been forged the day of the robbery to arrest and subsequent detention by the police before charges were laid in court. The proper link on identification of the appellant is lacking and indeed the diaries which were identified by P.W.1 and produced in court were not recovered from the appellant. They were found in the house of the co-accused.

On the whole the positive identification of the appellant is in doubt and the Learned Trial Magistrate was not immune to that said she:

“The allegation by P.W.1 that the said neighbour also saw the accused 1 (the appellant) and accused 2 that night .....amounts hearsay and cannot be relied upon. It is however important to note that even if this may have been a case of mistaken identity, what unfolded proved that indeed the accused persons were the ones who attacked P.W.1.” (underlining added)

From the foregoing and on the aspect of identification of the appellant, this court says that it was not positive. Conditions were not conducive and evidence has not established the aspect. However even as this court may hold a strong impression that the appellant and his mate robbed the complainant, the appeal is however allowed on the aspect of identification.

The conviction is quashed and the sentence set aside. The appellant may be set at liberty forthwith unless otherwise lawfully held.

Judgement accordingly.

Delivered on 4th June 2001.

**J. W. MWERA**

**JUDGE**