



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO 60 OF 2009**

**BONIFACE NDEGWA MATHENGE.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from the judgment of Hon E.J. Osoro Senior Resident Magistrate in Nyeri Cr. Case No. 266 of 2008)*

**JUDGMENT**

1. The appellant BONIFACE NDEGWA MATHENGE was charged with the offence of robbery with violence contrary to section 296(2) of the Penal code the particulars of which were that on 10th March 2008 at Ruringu Estate in Nyeri District within Central Province while armed with a dangerous weapon namely a panga robbed CECILIA WANGECHI KARIUKI of a mobile phone make Nokia 112 valued at Ksh.2300 and cash Ksh. 50 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said CECILIA WANGECHI KARIUKI.
2. He pleaded not guilty was tried convicted and sentenced to suffer death. Being dissatisfied with the said conviction and sentence he filed this appeal.
3. When the appeal came up for hearing before us the appellant filed an amended grounds of appeal and written submissions which he relied upon and in which he stated that he was convicted on the strength of a single identifying witness which was not safe and that his constitutional right to be taken to court within 24 hours was violated in that he was arrested on 10th February 2008 but taken to court on 14th March 2008.
4. Miss Maundu for the state conceded to the appeal on the basis that the conviction was not safe since there was consistent in the evidence of P.W.1 and P.W.2 and that no members of the public who arrested the appellant was called to testify.
5. We must point out that we are not duty bound to allow the appeal simply because the state has conceded to the same but must analysed the evidence tendered at the trial to come to our own conclusions.
6. It was submitted by the appellant that his identification was mistaken and the evidence of recovery doubtful and note that the P.W.4 in her evidence in chief stated that it was 6 am when she was coming from the shop having bought bread when she heard a voice from behind and on turning saw a person having raised a panga and ordered her to give him her phone which she did together with Kshs. 300/=.
7. The man started running away and she followed him screaming and she was followed by members

- of the public who arrested the appellant 200 metres away and started to beat him. The appellant then allegedly led them to a fence nearby and showed P.W.1 where he had hidden the phone. The question to our mind is, if P.W.1 was moving after the appellant as stated and that he was arrested 200 meters away at what time did he hide the phone at the fence as alleged.
8. We have also noted that the evidence of PW.2 Cpl Paul Kibenui the arresting officer stated that the alleged stolen items were with the members of the public who were never called as witness. We have also looked at the defence of the appellant that he heard the complainant scream and he rushed to see what was wrong to which she said she had been robbed only for him to be attacked by the mob.
  9. We therefore agree with Miss Maundu that the appellant was not properly identified by the complainant as the robber and find that his conviction was not safe.
  10. We further find that the appellant constitutional right to be taken to court within 14 days was violated and that no reason was offered by the prosecution to explain a delay of one (1) month which we consider inordinate
  11. For these reasons we allow the appeal herein set aside the conviction and quash the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

**Dated signed and delivered this 13th day of February 2014.**

**J. WAKIAGA**

**JUDGE**

**A. OMBWAYO**

**JUDGE**

**Court: Judgment read in open court in the presence of the appellant and Mr. Njue for the state.**

**J. WAKIAGA**

**JUDGE**

**A. OMBWAYO**

**JUDGE**