



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

**Criminal Appeal 16 & 17 of 2010**

**RUFAS KARIUKI**  
**MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from the Chief magistrate's court at Nyeri in Criminal case no. 572 of 2008)*

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 17 OF 2010**

**SIMON NDIRANGU**  
**MUTAHI.....APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from the Chief magistrate's court at Nyeri in Criminal case no. 572 of 2008)*

**JUDGMENT**

The appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the offence was that on 24th day of May 2008 at Kahiga-ini village Ihururu location in Nyeri District within Central province Jointly with others not before the court while armed with dangerous weapon namely rungus, rope and pepper robbed of Daniel Gatua Kiricho Safaricom credit cards, of Ksh. 22,591 and cash money Ksh. 137,007 all valued at Ksh. 159,658/- and at or immediately before or immediately after the time of such robbery used actual violence to the said DANIEL GATUA KIRICHO.

They were tried convicted and sentenced to suffer death.

Being aggrieved of the said conviction and sentence they both filed appeals which appeals was consolidated for purposes of trial and determination.

The first appellant who appeared in person filed an amended grounds of appeal which for the purpose of this judgment can be summarized as follows:

- a) ***The charge was defective since section 214 CPC was not complied with***
- b) ***His identification was not proper***
- c) ***Crucial witnesses were never called.***
- d) ***The prosecution case against him was not proved beyond reasonable doubt.***
- e) ***His constitutional right to fair trial within reasonable time was violated.***

The 2nd appellant was represented by Mr. Nganga advocates and the same filed petition of appeal on behalf of the said appellant on 20th April 2010 in which he raised the following grounds:

1. ***That the learned magistrate erred in law for totally failing to consider the appellant's defence in her judgment thus ignoring the tenets of the rules of natural justice.***
2. ***That the learned magistrate erred in both law and fact in failing to consider that the prosecution had totally failed to establish a case against the appellant on the required standard.***
3. ***That the learned magistrate erred in both law and fact in failing to consider that the prosecution witness' evidence was riddled with contradictions and thus totally insufficient to support a conviction.***
4. ***That the learned magistrate erred in law in failing to consider that the charge sheet was totally defective in failing to state the time in which the alleged offence was committed.***

We should point out at this stage that the appeal by the 1st appellant was conceded to by Mr. Kaigai on behalf of the state however we are not under obligation to allow the appeal on the ground that the same is conceded to by the state.

Mr. Kaigai conceded that the 1st appellant was never found with anything but was merely beaten by a mob he pointed out that the 1st appellant was able to explain himself out in his defence.

Mr. Kaigai on the other hand opposed the appeal by the second appellant and submitted that the same was found with the bag which was stolen at the time of the robbery.

My Nganga on behalf of the 2nd appellant submitted that the trial court did not consider the defence of the second appellant which was not analysed but casually dismissed.

In support of his submission he submitted that Authority of Okale vs R.

He further submitted that the prosecution failed to prove its case beyond reasonable doubt as none of the stolen items were found in possession of the said appellant.

He submitted that P.W.1 was unable to recall the number of cards he had sold and that P.W.2 admitted that he did not see the registration of the motor cycle P.W.1 was using.

He further submitted that there was contradiction between the evidence of P.W.1 and P.W.2 which contradictions were material to the prosecution case.

He further submitted that the charge sheet was defective since it did not give the time when the offence was committed contrary to section 173 (f) of the C.P.C. And that neither was the mobile phone which was produced in evidence mentioned in the charge sheet.

He submitted that the rope allegedly used on the complainant was not a dangerous weapon and neither was the 2nd appellant accompanied by anyone and therefore the element of robbery with violence were not proved.

To enable us determine the appeal herein we have taken time to analyse the evidence tendered before the trial court as herein under.

P.W.1 DANIEL GATUA KIRICHO stated that he was employed by Samaki telecoms as a sales person and that on the material day 24th May 2008 at 7.30 a.m he was at the shop to collect stocks which he distributed using a motor cycle registration number KAW 705N and that he collected cards worth Ksh. 104,761.

That while going down hill at Ihigaini at 10.30 am. In his motor bike he saw two people seated beside the road and that when they saw him they stood up and held a rope across the road. He applied emergency brakes and lost control of the motor bike and it fell down. Then he ran away with the bag which he had hanged on his neck but the men followed him and caught up with him holding him by the mouth and nose. They then put red hot pepper on to his eye and removed the bag from his neck and took his mobile phone nokia 1110 from his pocket. He raised alarm and the members of the public came to his aid arresting the robbers.

He stated that he knew both the appellants as he used to meet them along Mathari area.

Under cross examination he stated that it is the 1st appellant who ran to the other side of the road with the rope but that he was unable to tell the colour of the short he was wearing and that the two appellants were intercepted 900 meters from the scene but no money was recovered from them.

P.W.2 stated that P.W.1 told him that he had been robbed of a bag with cards and that he also lost his mobile phone and as they were talking 1st appellant whom he called a short man was arrested 300 metres from the scene and thereafter the 2nd appellant who was a small retailer within the area had also been arrested.

Under cross examination he stated that he did not see the appellants attack P.W.1.

He further stated that he was told that the bag was recovered from the 2nd appellant.

P.W.3 Peter Mwangi Nderitu testified that he intercepted the appellants who were being chased by a mob and that the 2nd appellant was carrying a black bag while the first appellant was arrested by John Ndirangu and Mathenge and that he was found with mobile phone.

P.W. 5 Francis Muricu Kamande testified that he had known the appellant herein and that they are the ones who were arrested by the mob.

P.W.8 Thomas Mwangi rearrested the appellants from the mob.

When put in their defence the 1st appellant stated that he was a business man. On the material day he took a vehicle from Nyeri to Ihururu reaching there at 9.30 a.m. He had been given an order by one Josphat Muita and as he was walking back from Njoguini to Ihururu he met a mob which accosted him allegedly that he was involved in the robbery. The 2nd appellant also stated in his sworn evidence that on his way to his place of work he met a group of people the vigilant group who asked for his identity card and since he did not have the identity card they asked him where he was going and started to beat him.

To our mind the first issue for determination is whether the appellant were positively identified by the complainant at the time of the alleged robbery? From the evidence presented before the trial court it was not possible for the complainant to identify the attackers as he was riding on motor cycle and in his evidence he suddenly saw one person cross the road putting a rope onto his path thereby causing him to fall down. He was immediately thereafter attacked and his eyes splashed with pepper. We therefore find

fault with the trial court's holding that the circumstances were favourable for positive identification.

We have also found fault with the trial magistrate's holding that the appellants were linked to the offence because they were strangers in the said area. There was no evidence tendered before the trial court to support the said holding.

We have noted that it was P.W.1 evidence that he was also robbed of cash and that the alleged robbers were arrested 300 metres from the scene of the attack and as per the evidence of P.W.3 he caught up with the said appellants who was carrying Pex No. 2 but the money was not recovered from either of the appellants. If this was true then where did the money go?

We therefore agree with the submissions by Mr. Nganga on behalf of the 2nd appellant that there were a lot of contradictions in the prosecution's case which raised a lot of doubt in the same the benefit of which should have been given to the appellant.

To our mind there is a possibility that the appellant were mistakenly arrested by the mob safe for P.W.3 who arrested the 2nd appellant no evidence was tendered as to how the 1st appellant was arrested and whether the said mobile phone was in his possession as alleged.

We are further of the considered opinion that the elements of robbery with violence was not proved in this case and are therefore of the opinion that the conviction of the appellants herein on the offence of robbery with violence was not safe.

We therefore allow the appeal herein quash the conviction and set aside the sentence and order that the appellants be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 4th day of October 2012.

**J.K. SERGON**  
**JUDGE**

**J. WAKIAGA**  
**JUDGE**  
Miss Kitoto for the State  
Rufas Kariuki Mwangi  
Simon Ndirangu Mutahi

**J.K. SERGON**  
**JUDGE**

**J. WAKIAGA**  
**JUDGE**