



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

**Criminal Appeal 72 of 2006, 73 of 2006 & 120 of 2006 (Consolidated)**

**SAMWEL MWAURA KINYANJUI ..... APPELLANT**

*versus*

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of L. Nyambura,*

*Senior Resident Magistrate in Senior Resident Magistrate's*

*Criminal Case No. 518 of 2005 at Kigumo)*

**Consolidated with**

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 73 OF 2006**

**JOHN MURANGA KAMAU ..... APPELLANT**

*versus*

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of L. Nyambura,*

*Senior Resident Magistrate in Senior Resident Magistrate's*

*Criminal Case No. 518 of 2005 at Kigumo)*

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 120 OF 2006

MARTIN KIMANI NDUNGU ..... APPELLANT

*versus*

REPUBLIC ..... RESPONDENT

*(Being an appeal from the conviction and sentence of L. Nyambura,*

*Senior Resident Magistrate in Senior Resident Magistrate's*

*Criminal Case No. 518 of 2005 at Kigumo)*

JUDGMENT

The appellants were charged with ***Robbery with violence contrary to section 296(2) of the Penal Code***. After trial before the lower court they were convicted as charged. First and second appellant were sentenced to suffer death as provided under the law. The third appellant was found to have been 17 years old at the time when the offence was committed was detained the president's pleasure. The appellants have preferred this appeal against conviction and sentence.

This court is duty bound to reevaluate the evidence of the lower court. That duty is succinctly set out in the case of **OKENO vs REP (1972) EA 32** in that case the court of appeal had the following to say:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958) E.A. 424.”***

PW 1 on 6<sup>th</sup> April 2005 at midnight was on his way home from Honey Pot Bar. He was in the company of PW 2. On their way they came across a corridor that was not lit but there was a beam of light coming from the adjacent building which could be seen in that corridor. They saw three persons in that corridor. The three persons according to PW 1 were known to him he therefore did not fear. He saw the first appellant whom he knew by his nickname 'Timer'. He also saw the second appellant whom he knew as Muranga. He saw the third appellant whom he knew as Kimani. He had known the three appellants for a long time because he had often seen them at Sabasaba. As they approached the three he

saw the first appellant hold his collar and push him to the wall. He hit him against the wall then stabbed him on the neck. The lower court indicated in the record that this witness showed the scar caused by that stabbing. The third appellant ransacked his pocket and stole from him ksh.500. He then was hit with a bottle which caused him to break his upper tooth. The lower court noted the broken tooth. After that robbery the three ran away. PW 1 was clear that he was able to identify them by means of beams of electricity lights from other buildings. PW 2 also confirmed that he was in the company of PW 1. They had met at the honey pot bar at 10 pm. At midnight they passed a corridor on their way home. He too confirmed that there were beams of light coming to that corridor. He also saw three men whom he knew and he named them as the first appellant Timer, the second appellant Muranga and the third appellant Kimani. He said that he had known them for a very long time. The three of them assaulted them and he recalled that the second appellant held him and kicked him in the knees. He managed to release himself and scream. He was robbed of kshs. 300. This witness also stated that apart from the electricity light there was moonlight. He first reported the incident at Sabasaba AP Post and the following day reported to Sabasaba Police Post. This witness was very emphatic that it was the second appellant who held him. PW 3 was the police officer who received the report of the robbery from PW 1 and noted that he had been injured. PW 4 was at the police post when the first report of robbery was made. Both PW 3 and 4 confirmed that the complainant indicated that they knew the persons who had robbed them. PW 5 was the Clinical Officer who examined PW1 and assessed his degree of injury as maim. In their defence all the appellants gave unsworn statement. They stated how they went about their normal business of the day that is 6<sup>th</sup> April 2005. They were arrested for an offence which they denied. First appellant denied knowing the other two appellants. We have considered the written submissions by the appellant. The recognition of the appellant was under difficult circumstance since it was at midnight at a dark corridor. The complainant's however were very clear in their evidence that the corridor had beams of light coming into it. PW 2 even said that on that night there was moonlight. This as it may be it is essential for us to warn ourselves of relying on such evidence. We are aware that witnesses may be honest but mistaken. Witnesses may make erroneous assumptions particularly if they believe that what they think is true. See case of **Joseph Leboi ole Toroke Criminal Appeal No. 204 of 1987 (Nairobi)**. PW 1 and 2 as we stated before were very consistent in their evidence that there was sufficient lighting the corridor which enabled them to identify rather recognize the appellants. The appellants were well known to them. They were also very clear on which of the robbers attacked them. PW 1 while being cross examined by second appellant stated:

***“Timer (first appellant) held me. Kimani (third appellant) ransacked me. You (second appellant) held my companion.”***

PW 2 corroborated that evidence when he stated:

***“I was held by Muranga (second appellant). He was armed but I don't know with what. He grabbed me. .... The two other assaulted PW 1”.***

The evidence of the lower court shows that PW 1 and 2 persistently told everyone from those who came to their rescue to the police to whom the report was made that it was the three appellants whom they named who attacked them. They knew their names and had often seen them in Sabasaba area. We find that we are in agreement of the finding of guilty by the lower court. We are also in agreement with the submissions of the learned state counsel Miss Ngalyuka that the lower court evidence was strong enough to sustain conviction. We therefore find that there is no merit in the appellants appeal and the same are hereby dismissed.

***DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF OCTOBER 2008***

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**