



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 684 OF 1996**  
**(From Original conviction and Sentence in Criminal Case No. 127 of 1996 of  
the Principal Magistrate's Court at Kiambu: R.K. Mwangi Esq.)**

**PETER KAMENYA KAMAU.....APPELLANT**  
**Versus**  
**REPUBLIC.....RESPONDENT**

**Coram: Osiero J.**  
**Ondeyo J.**  
**Appellants - unrepresented - present**  
**Mr. Ondari - State Counsel for the State**  
**Mr. Onduma - Court Clerk**

**JUDGMENT**

The appellant was charged and convicted with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death. His appeal to this court is against both conviction and sentence.

Briefly, the prosecution case was that on the 24.12.95 at about 5 p.m. the complainant in company of PW3 was travelling from Rongai to Quarry village. PW1 was carrying a handbag containing cash Sh. 3,000/-. On the way they met 6 men who were leaning against the wall of a house which was under construction. One of them was the appellant who said that the handbag the complainant was carrying had some money. Those men were not armed. One of the men hit PW1 with a stone and she fell down. The handbag was snatched from her. PW3 shouted for help. PW2 who was on his way to Quarry village heard the screams by PW3 and when he looked he saw the 6 men running towards his direction. The appellant was carrying a handbag in his hand. He got hold of him but as they struggled one of the other thugs came and snatched the handbag away and disappeared with it. But the appellant was not so lucky. He was arrested after a brief chase by PW2 in broad daylight and escorted to the police. The chase and arrest were witnessed by PW3.

The appellant denied any involvement in the robbery and said that on the material day he was talking with the sister of the complainant who was his girlfriend and the complainant was not happy that her sister was talking with him. The complainant started quarrelling with her sister. Later on the complainant's husband arrived with another man who claimed that the complainant's sister was his girlfriend and they started beating him. He was rescued by another man and was escorted to the police station. The conviction of the appellant was based entirely on evidence of identification by 3 witnesses which the appellant has challenged on the grounds set out in his petition. In essence his main complaint is that the learned trial magistrate erred in law and in fact in holding that he was positively identified by PW1, PW2 and PW3 whose evidence was contradictory and inconsistent. What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases must be examined carefully to minimise the danger of a miscarriage of justice. Whenever the case against an accused person depends

wholly or to a certain extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.

In the present case the appellant was positively identified by PW2 and PW3. He was arrested after a very brief chase after the commission of the offence and in broad day light. We hold that there could be no mistaken identity.

The appellant was in company of five men at the time the robbery. He threw a stone which hit the complainant who fell down and lost consciousness. This is her evidence which is corroborated by that of PW3. There is no legal requirement that she must prove that during the robbery she suffered any injuries. In order to appreciate properly what acts constitute an offence under Section 296(2) one must consider the Sub-section in conjunction with Section 295 which defines the word, " robbery". The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at, or immediately before or immediately after, to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296(2) which we give below. Anyone of which, if proved, will constitute the offence under Sub-section (2) of Section 296:

***(1) If the offender is armed with any dangerous or offensive weapon or instrument, or***

***(2) If he is in company with one or more other person or persons, or***

***(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other violence to any person.***

In the case of Johana Ndungu -Vs. Republic Criminal Appeal No. 116 of 1995, (unreported) the Court of Appeal observed:

***"In the same manner, in the second set of circumstances, if it is shown and accepted by the court that at the time of the robbery, the offender is in company with one or more person or persons, then the offence under Sub-section (2) of Section 296 is proved and a conviction thereunder must follow"***

. In this appeal the evidence in the lower court proved that the appellant was in company of five other people at the time of the robbery, and one of them took the handbag from the appellant who had been arrested by PW2, and ran away with it. That fact alone, of having been in company of five people proved an offence under Section 296(2).

We are in agreement with the court below and we find that on the evidence in that court, the defence of the appellant cannot be true and the same was rightly rejected by the lower court.

Consequently, we dismiss the appeal against conviction. A conviction under Section 296 (2) attracts a mandatory death sentence. The appellant was sentenced to death. The sentence was lawful and does not call for our interference. We dismiss the appeal against sentence as well.

It is so ordered.

Dated, delivered and signed at Nairobi this 23rd day of July, 1998.

**J.L.A. OSIEMO**

**JUDGE**

**23.7.1996**

**S.C. ONDEYO**

**JUDGE**

**23.7.1996**