

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAKURU

CRIMINAL APPEAL 199 OF 1986

SAMWEL MWAURA NJIHIA.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted of robbery with violence contrary to section 296(2) of the Penal Code (before that section was amended to carry the death sentence), and sentenced to 16 years imprisonment and corporal punishment of 18 strokes. The High Court ordered 10 years imprisonment to run concurrently with the punishment for another offence.

Two aspects of this appeal, already covered by previous judgments of this court, require consideration. Mr Etyang concedes both and very fairly referred the court to the appeal of this appellant's co-accused Joel Kamitha John v Rep Criminal Appeal Nos 164 and 172 of 1984. Like Joel, the appellant was not given his right to attend the hearing of the appeal and put forward his case. The second aspect is that the identification parade was not properly carried out with a reasonable margin of choice to avoid identification by chance. In Samuel Mwaura Njihia v Rep Criminal Appeal No 13 of 1986 this court has already declared a similar parade invalid. That appeal involved this very appellant. Consequently, this court must answer both appeals in the same way, that his identification cannot be relied upon.

The appeal is allowed. The conviction of the appellant quashed, sentences set aside, and unless otherwise lawfully held, the appellant is to be set at liberty.

February 25, 1987

NYARANGI, PLATT & GACHUHI JJA