



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**  
**Criminal Appeal 138 of 2006**  
**BETWEEN**

**FRANCIS MWAURA MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Kimaru, JJ) dated 23<sup>rd</sup> March, 2006*

**In**

**H.C.C.R.A. NO. 46 OF 2002)**

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**JUDGMENT OF THE COURT**

**Francis Mwaura Mwangi**, the appellant herein, was tried and convicted on three counts charging him with robbery with violence contrary to **section 296 (2)** of the Penal Code. It was alleged in those charges that on the night of 27<sup>th</sup> July, 2001, the appellant together with a group of people who were said to be over ten attacked various persons at Gitare shopping centre and that in the process violently robbed Isaac Ndungu Gekaga (count one) Stanley Njoroge Mwangi (count two) and James Thungu (count three) of various amounts of money and other shop goods. Various witnesses such as the three complainants and several others testified before the trial Magistrate that they knew the appellant well and even knew his nickname “*Blackie*”. They said they saw him during the robberies and that they immediately gave his name to the police. The only police officer who testified in the matter was Corporal Alex Ngewa (PW7). He merely produced a copy of the OB entry in which the appellant’s name “*Blackie*” was given. The witnesses said they had been able to recognize the appellant through torch-lights which the robbers themselves had. If this evidence was true, the name of the appellant was given to the police during the day following the night of the robbery, i.e. 27<sup>th</sup> July, 2001. Yet the appellant was not arrested until around 23<sup>rd</sup> November, 2001, nearly four months from the date of the commission of the offence. In his sketchy judgment (two typed pages) the trial Magistrate appeared to have believed that it was Corporal Alex who arrested the appellant. The Magistrate said:-

*“----- PW7 was the arresting officer. -----.”*

That was not correct. That witness never said anywhere that it was him who arrested the appellant. He started his evidence by saying:-

*“----- I testified last time -----.”*

We have gone through the entire record but we are unable to find any other place where he testified previously in this particular case. PW1 was Isaac Ndungu; PW2 was Stanley Mwangi Njoroge; PW3 was James Mungai Ndungu; PW4 was James Ndung’u Nderitu while PW5 was Beth Wanjiku, the wife of Stanley Mwangi Njoroge. Lastly, PW6 was Peter Kihumbe. Then came Corporal Alex as PW7. If

he had previously testified as he stated he (Alex) must have done so in another case where another person was charged in connection with the same offences. The charges against the appellant stated that he had committed the offences jointly with another person already before court. That other person appears to have been arrested immediately after the offences and was being referred to during the trial of the appellant as the convicted person. It may well be that it was that person whom Corporal Alex arrested.

Alex did not say he arrested the appellant. If he had said so, we would expect to see in the record why it took him nearly four months to arrest the appellant who was said to be well known to the witnesses and whose name was given to the police immediately the witnesses reported to the police. Mr. Kanyi Nguni, learned counsel for the appellant, submitted before the court that the prosecution had failed to call a vital witness, namely the arresting officer. Mr. Nguni asked what had led the arresting officer into apprehending the appellant and why he had taken so long before arresting the appellant. Counsel relied on this Court's decision in **EDWIN WAFULA KEYA VS. REPUBLIC, [2005] eKLR** at Eldoret where the Court, dealing with a similar situation, stated thus:-

*“----- . None of the officers who arrested the appellant was brought to testify and explain why they had arrested the appellant some two months after the robbery. Was the appellant arrested because the officers had been given the description ‘light-skinned and tall?’----- . True, the appellant was identified at an identification parade conducted by Chief Inspector Alfred Etyang on 22<sup>nd</sup> February, 2001 but we note that this was nearly two months after the robbery and the prosecution totally failed to explain what it was that led police officers to arrest the appellant. In the circumstances of this case we think that at least one of the arresting officers ought to have been called to testify and that was the stand the Court took in the case of **JAMES MUCHENE KAMBO VS. REPUBLIC**, Criminal Appeal No. 68 of 2003 (unreported) where the robbery took place on 15<sup>th</sup> April, 1995, and Kambo was arrested on 16<sup>th</sup> May, 1995; there was nothing to show how the officer who arrested him had been able to connect him with the offence of 15<sup>th</sup> April, 1995 and the arresting officer failed to come and testify. ----”*

In the two cases cited, the question was how the arresting officers were able to connect the persons they arrested with the offences as the witnesses did not know them by name. That is not the position in the appeal now under consideration.

In this appeal, the witnesses said they knew the appellant well and immediately gave his nickname “Blackie” to the police. Yet it took the police nearly four months to arrest him and no explanation at all was forthcoming as to why that was so. The officer who arrested him did not come to explain how he had connected him with the name “Blackie” and why it had taken him so long to arrest him. We are not to be understood to be saying that in each and every case, the arresting officer must come and testify. Each situation must be considered and determined on its own circumstances. The appellant said he was merely arrested in a police swoop and he did not know why he had been arrested. He denied being involved in the robberies and the prosecution was under a duty to leave no loose ends which can lead to reasonable doubt being raised. Neither the trial Magistrate in his brief judgment, nor the two learned Judges on first appeal, dealt with any of these issues.

We accordingly allow the appeal, quash each of the three convictions, set aside the sentence of death and order that the appellant be released from prison unless otherwise lawfully held. Those shall be the orders of the Court.

Dated and delivered at Nakuru this 28<sup>th</sup> day of May, 2010.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**