



**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL 64 OF 2005**

**WYCLIFFE KISANYA LUSIGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***Appeal from a judgment of the High Court of Kenya at Eldoret (J. Gacheche & G. Dulu, JJ) dated 31<sup>st</sup> January, 2005***

**in**

**H.C.C.R.A. NO. 10 OF 2004)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

Between 26<sup>th</sup> April, 1999 and 13<sup>th</sup> February 2004, *Wycliffe Kisanya Rusigi*, the appellant herein, was tried, convicted and sentenced to death on a charge of robbery with violence contrary to *section 296(2)* of the Penal Code. The particulars contained in that charge were that on 24<sup>th</sup> day of April, 1999 along Nandi/Hills Lessos Road near Chepkuny Secondary School in Nandi District within Rift Valley Province, while armed with dangerous or offensive weapons, namely rungus, and jointly with another not before court, the appellant robbed Wilson Kiplagat Lelei of his bicycle, five loaves of bread, one dozen cigarettes and Kshs. 200/= cash, all to the total value of Kshs. 6,800/= and at the time of the robbery the appellant wounded Wilson Kiplagat Lelei. The appellant first appeared in court before the then Mrs. Wanjiru Karanja, a Principal Magistrate (now a Judge of the High court). The magistrate recorded on that day that permission to prosecute the appellant had not been received and, therefore, no plea could be taken and none was taken from the appellant. Throughout the prolonged proceedings no plea was ever taken from the appellant. As a matter of law, no permission is required, from the Attorney General, to prosecute a person charged under *section 296(2)* of the Penal Code.

From 26<sup>th</sup> April, 1999 when the appellant first appeared in court to the 13<sup>th</sup> February, 2004 when he was sentenced to death only five witnesses testified. So the prosecution needed nearly five years to bring before the court five witnesses to testify in their case. Over half of the record is taken up by applications for adjournment, applications which the appellant objected to many times over, but which Mr. F. A. Mabele who tried him routinely granted. It is simply scandalous and trial courts must now desist from routinely granting such uncalled for adjournments.

On the merits of the appeal itself, Mr. Omutelema the learned Senior Principal State Counsel, readily conceded the appeal on the grounds that the relevant witnesses were not in a position to properly see and

recognise the appellant. He also conceded that it was not quite clear from the record how the appellant came to be arrested. We entirely agree with Mr. Omutelema and that being the view we take of the matter, we allow the appeal, quash the conviction, set aside the sentence of death and order that the appellant be released from prison forthwith unless held for some other lawful cause.

*Dated and delivered at Eldoret this 26<sup>th</sup> day of September, 2008.*

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J. ALUOCH**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**