



**IN THE COURT OF APPEAL**  
**AT NYERI**

**CRIMINAL APPEAL 63 OF 2004**

**SOLOMON MWANGI KINYUA.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma & Ombija, JJ) dated 13.8.03***

**in**

**H.C.CR.A. NO. 24 OF 2001)**

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**JUDGMENT OF THE COURT**

*SOLOMON MWANGI KINYUA*, the appellant, was tried and convicted by the Principal Magistrate at Kerugoya on four counts of robbery with violence contrary to *section 296(2)* of the Penal Code and sentenced to death.

The appellant lodged an appeal to the High Court of Kenya at Nyeri (*Juma and Ombija, JJ*) but by its judgment delivered on 15<sup>th</sup> April, 2003, the appeal was dismissed. This is the appellant's second and final appeal.

This, therefore, being a second appeal only matters of law fall for consideration pursuant to *Section 361* of the Criminal Procedure Code. The first issue raised by the appellant in his home-made grounds of appeal and argued on his behalf by his counsel *Mr. Kingóri* is that the first appellate court did not subject the evidence relating to identification to exhaustive examination and that had it done so, it would have found that it was dock identification, unreliable, not positive and incapable of sustaining a conviction. The second issue is that the alleged confession in a charge and caution statement ought not to have been considered in that it had been retracted in the trial court and was not available to the first appellate court and to this Court.

We now turn to consider these points of law raised before us. We reiterate that it is, indeed, the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld – see *OKENO V. R. [1972] E.A. 32*.

We pose: Can it be justifiably argued that in the instant appeal the first appellate court failed in its duty? With great respect we would think so.

The evidence tendered before the trial court showed that during the night of 5<sup>th</sup> July, 2000, several homesteads within Kimunye village of Kirima Location were raided by a gang of robbers. The gang was armed with pangas and had torches. It stole property and injured people. The police were alerted and they rushed to the scene. They accosted the gang and shot dead one of its members. Most of the witnesses identified the dead man as the ring leader. It also appeared that several members of the gang were shot and wounded by the police. A search within local clinics netted the appellant who was seeking treatment for a bullet wound. However, his identification by two witnesses *Anne Wairimu (PW1)* and *Michael Muturi (PW2)* was dock identification

The appellant in his defence testified that the wound he sustained on his left cheek was through beatings by members of the public who falsely framed him up as a robber and beat him for nothing. He denied that it was a bullet wound. It is significant that no medical evidence was called to show the type of wound the appellant had suffered.

We have carefully considered the evidence on record. The short judgment of the first appellate court cannot stand as a critical analysis of the evidence as to whether the appellant was positively identified as one of the members of the gang that raided Kimunye village during the fateful night. Moreover, the so-called confession was not availed to the first appellate court.

We think that the convictions of the appellant are unsafe and we do not uphold them.

We note that the learned state counsel, *Mr. Orinda*, does not support the appeal and in our view, rightly so.

The appeal is allowed. The convictions are quashed and the sentence of death is set aside. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

*DATED and DELIVERED at NYERI this 3<sup>rd</sup> day of November, 2006.*

*P.K. TUNOI*

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*JUDGE OF APPEAL*

*E.O. O'KUBASU*

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*JUDGE OF APPEAL*

*E.M. GITHINJI*

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*JUDGE OF APPEAL*

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

DEPUTY REGISTRAR