



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**

**Criminal Appeal 7 of 2004**

**MICHAEL OWUOR OGANDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nairobi (Justices Onyancha & Kubo) dated 31<sup>st</sup> July, 2003*

*in*

*H.C.C.R.A. NO. 1299 of 2000)*

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**JUDGMENT OF THE COURT**

**MICHAEL OWUOR OGANDA**, the appellant herein, was convicted by the Senior Principal Magistrate, Kiambu, on 16<sup>th</sup> October, 2000 on two counts of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. His first appeal to the High Court of Kenya at Nairobi (*Onyancha and Kubo JJ*) was dismissed on 31<sup>st</sup> July, 2003 and hence this is a second and final appeal.

The only question in this appeal of any substance is whether the appellant was properly identified as a member of the gang of four robbers which violently robbed **Daniel Mwangi Mbugua**, the deceased, of a pair of shoes and **Godfrey Muniu** of cash and in the course of the robbery caused the death of the deceased.

The prosecution presented the following brief facts before the trial court. **Godfrey Muniu (PW1)**, at the material time, lived at Thogoto. On the fateful day he, his wife and one **David Ngugi** went to drink at Wendo bar in Kikuyu Township from about 9:00 p.m. to midnight. As they left the bar they and other revelers sought a lift in a GK motor vehicle. Though others were dropped at their respective homes, PW1 and the deceased proceeded to Soul Pub for more drinks where they consumed more beer until 3:00 a.m. when the owner of the bar forced them out. On their way home, at about 50 metres from the bar they were attacked by a group of about four people. The gang was armed with runigus and pangas. PW1 was cut on the head sustaining serious injuries. However, he managed to overpower the group, freed himself, jumped over a fence and ran away. The deceased was unfortunate. He was hit on the head and fell down beside the road. He subsequently succumbed to his injuries.

In convicting the appellant, the trial magistrate held:-

***“The court notes that there is only one eye witness in this case that is PW1. This is so because he was only with the deceased when they were attacked. .... He told the court that there was light at the scene from buildings besides the road and also from the full moon.”***

The first appellate court appears not to have clearly re-evaluated the evidence especially the fact that PW1 was the sole witness of the attack during the night. It is not clear whether the moon was full and bright; and, further, there is no evidence that the electricity lights on the verandah of Soul Pub could shed sufficient light 50 metres away.

It is worthy of note that the appellant was the watchman of Soul Pub.

The learned State Counsel does not support the conviction on the ground that there was no proper identification of the appellant and that the conviction is unsafe. With respect we agree with him.

Upon our consideration of the whole evidence on record, we think that it would not be safe to allow the convictions to stand. Consequently, we allow the appeal. We quash the convictions and set aside the sentence of death imposed on him. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nairobi this 3<sup>rd</sup> day of November, 2006.***

***P.K. TUNOI***

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***JUDGE OF APPEAL***

***P.N. WAKI***

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***JUDGE OF APPEAL***

***W.S. DEVERELL***

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***JUDGE OF APPEAL***

***I certify that this is a***

***true copy of the original.***

**DEPUTY REGISTRAR**