



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU
CORAM: OMOLO, O'KUBASU, J.J.A. & DEVERELL, AG. J.A.

CRIMINAL APPEAL NO. 68 OF 2003

BETWEEN

JAMES MUCHENE KAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Nakuru (Lady Justice Lesiit) dated 20th February 2003

in

H.C.CR.A. NO. 245 of 1999

JUDGMENT OF THE COURT

In the circumstances of this case, we are of the clear view that the prosecution's failure to call the police officer who arrested the appellant left an unbridgeable gap in the prosecution's case. We are not to be understood to be laying down any legal principle to the effect that in all prosecutions the arresting officer must be called to testify. We are dealing purely with the circumstances of this appeal. The robbery of which the appellant was convicted and sentenced to death took place in Nakuru at the shop of **Peter Wangai**, (P.W.2), on 15th April, 1999. **Elizabeth Wanjiru Waweru**, (P.W.1), was the only person in the shop and she testified that the appellant, **James Muchene Kambo**, was one of the two people who came into the shop, purported to buy a bottle of liquor from her but in the end produced guns and threatened to shoot her and robbed her of some money. Apparently there was a police officer within the vicinity of the shop and as the robbers tried to escape, a shoot-out ensued and one of the robbers was shot dead. The other robber or robbers escaped and from the evidence of Elizabeth the appellant was the one who escaped. The police officer who engaged the robbers in the gun-battle was not called to testify.

As we have said the robbery took place on 15th April 1999 ; the appellant disappeared from the scene and he was not arrested until 6th May 1999, some three weeks after the robbery. He was arrested in Nakuru and in his detailed statement made from the dock, he explained how he had left his residence in Nairobi that day, came to Nakuru to buy flamingo feathers for his business and was then surprised to be arrested and charged with the robbery. It is true **Elizabeth** identified the appellant at an identification parade on 16th May 1999, but the question still remains; who arrested the appellant in Nakuru on 6th May 1999? Why did that person arrest him, i.e. was Elizabeth there to point him out to the arresting officer? As we stated at the beginning, the arresting officer was not called to testify and these questions remain unanswered. The two court's below did not touch on them and in the circumstances, the appellant's

unsworn statement remained somewhat unrebutted. Mr.Gumo, the learned Assistant Deputy Public Prosecutor, conceded the appeal and, in our view, he was right in doing so. Accordingly, we allow the appellant's appeal, quash the conviction recorded against him, set aside the sentence of death imposed on him and order that he be released from prison forthwith unless he is held for some other lawful cause.

Dated and delivered at Nakuru this 25th day of February, 2005.

R.S.C. OMOLO

JUDGE OF APPEAL

E.O. O'KUBASU

JUDGE OF APPEAL

W.S. DEVERELL

AG. JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR