



REPUBLIC OF KENYA

IN THE COURT OF APPEAL  
AT NAKURU

CORAM: TUNOI, GITHINJI, JJ.A & DEVERELL, AG.J.A.

CRIMINAL APPEAL NO. 23 OF 2003

BETWEEN

DAVID MUTUA NDUNG’U.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

& Ondeyo, JJ) dated 7

th

January, 2003

in

H.C.CR.A. NO. 237 OF 1998)

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JUDGMENT OF THE COURT

**DAVID MUTUA NDUNGU** , the appellant, has appealed to this Court from the judgment of the High Court of Kenya at Nakuru (*Ondeyo and Visram JJ*) dated 7th January, 2003. By that judgment the High Court dismissed his appeal to that court and confirmed the conviction and sentence of death which had been recorded against him by the then Principal Magistrate of Nyahururu Mrs. *W. Karanja*. The magistrate had tried and convicted him on a charge of robbery with violence contrary to *section 296(2)* of the Penal Code.

In or about 1996 the complainant *John Kiragu (PW1)* operated a butchery at Shamata. On 24th October, 1996 at about 8.30 a.m. he set out for Kirima to look for a cow for slaughter. He carried with him a rope and Shs.18,700/=. While walking through the forest just before Kirima he was accosted by two armed and hooded persons who had covered their faces with “Lessos”. They ordered him to stop and one of the attackers whom he identified as the appellant snatched the rope from him and tied him in the legs, through the thighs.

One of the assailants threatened to cut him but he pleaded with him not to harm him. *PW1* was pulled deeper into the forest where he was tied in the hands to a tree. When he resisted *PW1* was hit severally with a backside of the panga sustaining some injuries. The appellant then ransacked *PW1*’s pockets and took away Shs.18,500/=. *PW1* was rescued two or three hours later when his screams attracted the attention of Peter Waweru (*PW2*), a farmer who was going to his shamba. *PW1* rushed to a nearby Police

base where he reported the incident. Cpl. Kiptoo (PW3) testified:-

***“I am attached to Shamata police patrol base. On 24/10/96 I was at the patrol base on duty. The others had gone outside on duty because it was examination time. One John Wanjohi came and made a robbery report. He said he was robbed of 18,700/=. He had bruises on his neck and so I gave him a note to attend treatment.***

***He told me that he was able to identify one Mutua .”***

and also:-

***“Complainant made the report around 11.00 a.m. He told me he knew the robbers well. He said that one of them who he saw well was Mutua.” The appellant testified that he woke up at 6.30 a.m. as usual on the material day. He milked his cows and took the milk to the dairy. He returned home at 7.30 a.m. He continued:- “At 8.00 a.m. I went to the shamba to harvest potatoes. At 9.00 a.m. one John Kamau came. He told me he had met with the complainant in this case. He told me he wanted us to go and rob him of money since he knew he was going to buy cows. I refused. He went and left me doing my work.”***

However, at 11.00 a.m. the appellant went to the shops to buy cigarettes. He saw PW1 with a group of people. They surrounded him and beat him. They then led him to the Police patrol base. He denied the commission of the offence. In convicting the appellant, the trial magistrate said as follows:-

***“As far as accused 1 is concerned, the complainant said he knew him very well. He was somebody he knew before and so he actually recognized him. When he went to the police post, he reported that he was robbed by accused 1 and others who he said he had not seen very clearly. He had therefore no doubt in his mind about accused 1. The fact that he gave his name to PW3 when reporting the matter clearly shows that it was not an afterthought.”***

The first appellate court in upholding the conviction stated

***. “We do not think that the trial magistrate fell into error in arriving at this conclusion. The robbery took place in broad daylight. The complainant’s attackers were not strangers to him. He gave the name of the appellant to the police when he first reported the incident. The appellant implicated other persons in the crime. He even said that before the incident, he had been approached by one John Kamau to participate in the robbery of the complainant. When he saw the complainant and other persons at Shamata town, he started running away. Why would one do this? Taking all these matters into account, it emerges beyond any shadow of doubt that the appellant was guilty as charged. We, in the circumstances, do not see any sufficient ground to interfere with the trial magistrate’s finding on that question. We, therefore, uphold the trial magistrate’s finding on conviction”***

The appellant complains and Mr. Gor, his learned counsel, contended that the trial and the first appellate courts erred in law in relying on the purported recognition by PW1 without considering the prevailing circumstances surrounding the attack. He further submitted that the first appellate court failed to fulfill its mandate of critically evaluating the evidence on record to determine whether the conviction was safe or not. This Court, aware of its role as a second appellate court, cannot upset concurrent findings of fact by the two courts below unless satisfied that the findings of fact were based on misdirections of such a nature that it is reasonably probable that without them the appellant could not have been convicted – See **KARINGO V REPUBLIC [1982] KLR 213.**

The incident took place during broad daylight. The complainant (PW1) stated unequivocally that he recognized the appellant and gave his name to the Police as soon as he was rescued. Cpl. Kiptoo (PW3) confirmed having been given the name of the appellant who clearly admitted before the trial court of having knowledge of the impending robbery upon the complainant. This evidence considered as a whole is

sufficient to conclude that the appellant was correctly identified by **PW1** as one of the two members of the gang that attacked and robbed him that fateful morning. We think therefore that the appellant was properly convicted. In the circumstances, we uphold the conviction. This appeal fails and is ordered dismissed.

DATED and DELIVERED at NAKURU this 25 th day of February, 2005.

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**W.S. DEVERELL**

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**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**