



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NYERI  
CORAM: OMOLO, GITHINJI & WAKI, J.J.A  
Criminal Appeal 263 of 2002  
BETWEEN

DAVID NJUGUNA NJOROGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

Appeal from a judgment of the High Court of Kenya at Nyeri (Juma & Mitey, JJ) dated 31.7.2002

in

H.C.C.R.A. NO. 147 OF 2001)

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JUDGMENT OF THE COURT

**DAVID NJUGUNA NJOROGE**, the appellant herein, was tried and convicted by a Senior Resident Magistrate at Nyeri on one count of robbery with violence contrary to section 296(2) of the Penal Code, and upon the conviction, he was sentenced to death as is the mandatory requirement of the law. The particulars of the charge on which he was convicted were that on 24th December, 2000 at Karatina Township in Nyeri District, Central Province, while armed with dangerous weapons namely knives and iron bars, the appellant, jointly with two other persons who were tried with him, robbed **WILSON WAIGWA MWANGI** of Shs.210/- and that during the robbery, they used actual violence against **Waigwa Mwangi**. The two other people who were tried with the appellant were acquitted by the magistrate. The appellant then appealed to the High Court, but that court dismissed his appeal by its judgment dated and delivered on 31st July, 2002. The appellant now appeals to this Court and this being a second appeal, only matters of law can be considered by us.

The only issue of law which his counsel *Mr. Njuguna Kimani* raised before us was the ever-recurrent issue of identification. The robbery upon the complainant **Wilson Waigwa Mwangi (P.W.1)** took place on 23rd December, 2000 at about 11 p.m. when the complainant and **Hellen Njoki Karia (P.W.2)** were walking to their respective houses at Muthua Estate in Karatina. On the way they were attacked by a group of three persons and according to the two witnesses, the only means of lighting at the scene of the robbery was from torches which the robbers themselves had and which, "in their stupidity" the robbers kept flashing at each other. According to the witnesses, the appellant removed Shs.210/= from the pocket of the complainant and it was during the process of so removing the money that the other robbers were flashing their torches upon the appellant. The complainant did not specify from which of his pockets the money was being removed and as *Mr. Orinda*, the Senior State Counsel conceded on behalf of the **Republic**, the complainant did not say which part or parts of the body of the appellant the torch light was being directed. **P.W.2.** said she was also robbed of Shs.100/= but no such charge was brought against the appellant and his confederates.

**Peter Maina Kinyua (P.W.3.)** had at around 10.30 p.m. been attacked within the same vicinity but was apparently not robbed of anything. According to Peter he had hit one of the attackers with a jerrican containing petrol and when the appellant was subsequently arrested within the area of the attack the appellant had upon him the smell of petrol. **P.W.1.** and **P.W.2.** were present when the appellant was arrested; none of them ever told the Magistrate about the appellant smelling of petrol when he was arrested. The appellant was taken to Karatina Police Station that night where he was handed over to Police Constable Dennis Odhiambo (P.W.4) who was apparently with **Police Constable John Githinji (P.W.5).** None of these officers mentioned the issue of petrol. Again according to **P.W.5.,** it was a **Constable Karisia** who searched the appellant's pocket and recovered Shs.210/=. But this witness also said in cross-examination by the first accused who was acquitted that it was the first accused from whom Shs.210/= was recovered. **P.W.4** for his part said:-

**“----- we searched him and recovered Kshs.210/=. It was in 200/- note and 10 shillings coin-----“**

**P.C. Karisia** was not called to testify, so there remains some lingering doubt as to whether the Shs.210/= was found with the appellant or with the first accused as **P.W.5.** told the first accused in cross-examination. The appellant's unsworn version of the story was that he was arrested at the scene while walking to his home and it is clear that among the people who arrested him was **P.W.3** who was obviously driving his vehicle and stopped when they came upon the appellant.

Neither the trial magistrate nor the learned Judges on the first appeal ever attempted to resolve these doubts. Had they attempted to do so, they may well have come to the conclusion that upon finding the appellant at the scene of the robbery, these witnesses simply assumed that he must be one of the people who had attacked them and arrested him as they did. The two courts below should have attempted to resolve some of these doubts, one way or the other. In this appeal, we can only resolve them in favour of the appellant. We do so with the result that we allow the appeal, quash the conviction, set aside the sentence of death and order that the appellant be released from prison forthwith unless he is held for some other lawful cause. We so order.

**DATED and DELIVERED at NYERI this 20th day of May, 2005.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

**I certify that this is**

**a true copy of the original.**

**DEPUTY REGISTRAR**

