



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: OMOLO, GITHINJI & WAKI JJA**

**CRIMINAL APPEAL 43 OF 2004**

**BETWEEN**

**EDWIN WAFULA KEYA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from judgment of the High Court of Kenya at Kitale (Gacheche  
& Dulu JJ) dated 22 nd***

***January, 2004***

***in***

***H.C. CR. APPEAL NO. 26 OF 2002)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

On the recorded evidence, we have no hesitation in saying that the conviction recorded against Edwin Wafula Keya, the appellant herein, on the charge of robbery with violence contrary to **section 296(2)** of the Penal Code was unsafe and ought not to be allowed to stand. The robbery in the house of Rosemary Mulanda (PW 2) took place at around 1a.m when Rosemary was in her house with, among others, her daughter Rebecca Mulunda (**PW 3**) who was in another room. The robbery was during the night of 24th December, 2000. Rosemary and her daughter said the appellant was one of the two people who broke into their house and robbed Rosemary. The appellant was carrying a lantern and Rosemary described him as being “light –skinned and tall’. Neither Rosemary nor Rebecca had seen the appellant before. The description “light-skinned and tall” was given to Police Constable David Mutai (**PW 6**) who visited Rosemary’s house after he had received a telephone call. According to Constable Mutai, CID Officers arrested various suspects in February, 2001 and it appears the appellant was among those who was so arrested. Mutai was not in the arresting party and he did not name any of the CID officers who arrested the appellant. In his unsworn statement, the appellant said he was arrested at Moi’s Bridge by three officers, one of whom had a grudge against him.He was taken to Kitale Police Station and the officer who had a grudge against him threatened him that he (the officer) would have him charged with capital robbery under **section 296 (2)** of the Penal Code. None of the officers who arrested the appellant was brought to testify and explain why they had arrested the appellant some two months after the robbery.

Was the appellant arrested because the officers had been given the description, “light-skinned and tall”? David Mutai did not say he had given the description of the appellant to any of the officers and the appellant was not found with any of the items stolen from the house of Rosemary. True, the appellant was identified at an identification parade conducted by Chief Inspector Alfred Etyang on 22nd February, 2001 but we note that this was nearly two months after the robbery and the prosecution totally failed to explain what it was that led police officers to arrest the appellant. In the circumstances of this case we think that at least one of the arresting officers ought to have been called to testify and that was the stand the Court took in the case of **JAMES MUCHENE KAMBO V REPUBLIC Criminal Appeal NO 68 of 2003 (unreported)** where the robbery took place on 15th April, 1995 and Kambo was arrested on 16th May 1995; there was nothing to show how the officer who arrested him had been able to connect him with the offence of 15th April, 1995 and, the arresting officer failed to come and testify. The Court allowed the appeal though it went on to point out, as we would also do in this appeal, that there is no law to the effect that in every case the arresting officer must come and testify. Such cases are confined to their peculiar facts and circumstances. In our view, the failure to call all or any of the three police officers who arrested the appellant some two months after the offence left an unbridgeable gap in the prosecution’s case and the appellant must have the benefit of that gap. Accordingly, we allow the appellant’s appeal, quash the conviction recorded against him, set aside the sentence of death and order that he be released from prison forthwith unless he be held for some other lawful cause. We so order.

**Dated and delivered at Eldoret this 23rd day of September 2005.**

**R. S. C. OMOLO**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**