



IN THE COURT OF APPEAL

AT ELDORET

CORAM: TUNOI, O’KUBASU & WAKI, J.J.A.

CRIMINAL APPEAL 153 OF 2004

BETWEEN

FRANCIS WANYONYI NGUTUKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

***(Appeal from a judgment of the High Court of Kenya at Kitale (Dulu, J)
dated 18th March, 2004 in H.C.C.R.A. NO. 152 OF 2002)***

JUDGMENT OF THE COURT

The appellant **FRANCIS WANYONYI NGUTUKU** was after trial convicted of robbery contrary to **Section 296(1)** of the Penal Code and sentenced to five years imprisonment together with six strokes of the cane and hard labour by the Senior Resident Magistrate, Kitale, on 26th June, 2002. His first appeal to the High Court of Kenya at Eldoret, *Dulu, Ag. J*, however, enhanced the conviction by substituting it with one under **Section 296(2)** of the Penal Code and imposed the sentence of death. This is the appellant’s second appeal.

At about 1.00 a.m. during the night of 6th and 7th January, 2001, the complainant **John Otwane (PW.1)** and his wife **Janet (PW.2)** were asleep in their house at Grassland Farm in Trans Nzoia District when a gang of about five armed men forcibly broke the door and entered their house. It viciously attacked the couple and robbed them of property. It is **PW.1’s** evidence that a hurricane lamp was on and he was able to identify the appellant as a member of the gang. The appellant was **PW.1’s** neighbour and was locally known as “*Macho Nne*” because he usually wore spectacles but he did not have them during the fateful night. However, **PW.1’s** wife **Janet** contradicted her husband’s evidence by testifying that she did not see the appellant in the gang.

The appellant in his defence denied the commission of the offence charged and set up an *alibi*.

Apparently there was no other evidence incriminating the appellant apart from that of **PW.1**, who is in real sense a single identifying witness.

When the appeal was called to hearing, the learned Principal State Counsel Mr. Omutelema informed us that the State did not support the conviction because the main witnesses contradicted themselves; and moreover *Mr. Omutelema*, contended there was no positive identification. With respect we agree.

Further, we note, that the first appellate court failed to heed the directions set out in **OKENO VS. R [1972] E.A. 32** by failing to reconsider the evidence, to evaluate it and draw its own conclusions in deciding whether the judgment of the trial court should be upheld.

In the result, we think that the appellant's conviction is unsafe and it must follow that the appeal is hereby allowed. We quash the conviction recorded against the appellant, set aside the sentence of death and order that he be set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED at ELDORET this 23rd day of September, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR