



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NYERI**

**(CORAM: OMOLO, GITHINJI & DEVERELL, J.J.A.)**

**CRIMINAL APPEAL 103 OF 2003**

BETWEEN

RICHARD MICHENI KABURU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma  
& Mitey JJ) dated 1st March, 2002**

in

**H.C.C.R.A. NO. 243 OF 1998)**

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**JUDGMENT OF THE COURT**

We respectfully agree with Mr. Orinda, learned Principal State Counsel, when he says that the conviction of the appellant Richard Micheni Kaburu was unsafe, taking into account all the relevant circumstances of the case. The attack on Senior Sergeant Maurice Odhiambo Otieno, (PW1), if there was in fact an attack, took place at night at around 11.30 p.m. When they attacked him, there was a fight and one of the attackers was seriously injured. PW1 managed to escape to the Air Force Base at Nanyuki, and in the company of Senior Sergeant Benard Were (PW3) and Senior Sergeant Ronald Obongo Onyango (PW4) they returned to the scene of the attack at about 1.30 a.m. They alleged the attackers were still at the scene and the appellant was arrested together with the man who had been seriously injured and who appears to have succumbed to his injuries. As was rightly pointed out to us by both Mr. Orinda and Mr. Mburu, the learned counsel for the appellant, it was very unlikely that the robbers would continue to be at the scene of the crime long after that so that they would be found 2 hours later by the victim of the attack.

The story given by the appellant as to why he happened to be at the scene was more likely to be true than the one put forward by the prosecution witnesses. According to the appellant, he found two men fighting over a woman and he was asked to intervene and separate the two men. He intervened, with the result that he himself was injured. PW1 had not been able to recognize any of the people who had attacked him and we think it was not right for the High Court Judges to dismiss the appellant's version of the story despite the concession by the State that the appellant's version of events looked more plausible than the version put forward by the prosecution. The learned trial magistrate dismissed the appellant's story in a judgment of just two typed pages. The learned Judges of the High Court did no better in the appellant's appeal to them. We agree that the appellant's conviction on the charge of robbery with violence under **section 296 (2)** of the Penal Code was unsafe and we accordingly allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant. We order that the appellant shall be released from prison forthwith unless he is held for some other lawful cause.

**Dated and delivered at Nyeri this 31st day of October, 2005.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**