



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**(CORAM: GICHERU, LAKHA & OWUOR, J.J.A)**  
**CRIMINAL APPEAL NO. 61 OF 2002**  
**BETWEEN**

**MICHAEL MBURU NJONJO .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at**

**Mombasa (Mr. Justice Onyancha & Khaminwa, Comm. of  
Assize) dated 4th March, 2002**

**in**

**H.C.Cr. Appeal No. 83 of 2000)**

\*\*\*\*\*

**JUDGMENT OF THE COURT:**

**JUDGMENT OF THE COURT:**

This appeal turns on the identification of the appellant as one of the robbers who on the night of 15th and 16th May, 1999 at Bombolulu village in Mombasa while armed with pangas robbed **WALTER ONGORO OYONDI (P.W.1)** of a Sanyo Television Set, a Phillips Radio Cassette Player, a BMX bicycle, a Calculator, a Weighing Machine besides other assorted shop goods and cash in the sum of K.Shs. 6,000/=. In the course of the robbery, **P.W.1** was hit several times on the head with the flat side of the panga. Adjacent to the scene of the robbery which was a shop wherein **P.W.1** operated some business, were two 4 feet fluorescent tubes security light at Bombolulu workshop. According to **P.W.1**, the area leading out of the scene of the robbery was well-lit. After the robbery, **P.W.1** and one of his workers - **DAVID KAMAZA (P.W.2)** - saw the robbers leave the scene with the stolen goods through the well-lit area adjacent to Bombolulu workshop. According to the two prosecution witnesses, they identified the appellant in the light referred to above as they knew him well since he frequented the room of a girl next to their room. Neither of these two witnesses testified as to what features made them identify the appellant. Indeed, in testifying that he recognised the appellant as someone he had been seeing around, **P.W.1** did not in the least outline the basis of his recognition of the appellant nor did **P.W.2**. By the two prosecution witnesses barely saying that they identified the appellant without more, a sense of incertitude pervades the case for the prosecution against the appellant. Indeed, this kind of evidence does not inspire confidence in sustaining a conviction for the offence of capital robbery under **section 296(2) of the Penal Code** .

Besides, as the identification of the appellant is alleged to have taken place as the robbers left the scene of the robbery in which case it is unclear whether the robbers were facing the two prosecution witnesses as

they left, it is doubtful whether reliance on the bare statements of the two prosecution witnesses as to the identification of the appellant may not occasion a failure of justice. Indeed, as was correctly stated by counsel for the appellant, Mr. Ngombo, in his submissions to this Court at the hearing of this appeal on 22nd January, 2003, it would appear that there was insufficient investigation in the case against the appellant and his prosecution was casual. Hence the inadequacy of the identification evidence against him.

From what has fallen from our lips, we think that the appellant's conviction was unsafe and in the result we allow his appeal, quash his conviction for the offence of robbery contrary to **section 296(2) of the Penal Code** , set aside his death sentence and order that he be set at liberty forthwith unless held in custody for any other lawful cause.

**Dated and delivered at Mombasa this 24th day of January, 2003.**

**J.E. GICHERU**

.....

**JUDGE OF APPEAL**

**A.A. LAKHA**

.....

**JUDGE OF APPEAL**

**E. OWUOR**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR