



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**

**Criminal Appeal 130 of 2005**

**PETER AYORA MASAKI ..... APPELLANT**

***VERSUS***

**REPUBLIC ..... RESPONDENT**

**(From original conviction and sentence of the Principal Magistrate's Court**

**at Nyamira in Criminal Case No.537 of 2004 – L. KOMINGOI – S.R.M)**

**JUDGMENT**

The appellant PETER AYORA MASAKI had been jointly charged with JOSHUA NYANUMBA OROKO with the offence of robbery with violence contrary to S.296(2) Penal Code. Particulars were that on the night of 22<sup>nd</sup> June 2004 at IBUCHA sub location in Nyamira District jointly with others not before the court robbed HARRISON MASAI ONDARI of one Radio and at or immediately before or immediately after the said robbery used actual violence.

The two also faced three other charges of house breaking and stealing and Kioski breaking and also an alternative charge of handling stolen property. They were both acquitted of the other three charges and Joshua Nyanumba Oroko acquitted of the offence of robbery.

The appellant however was found guilty of offence of simple robbery contrary to S.296(1) Penal Code and sentenced to serve seven years.

His appeal is against the conviction.

Mr. Orina who prosecuted the appeal told court that the trial magistrate erred on the issue of identification. He said the complainant (PW2) and his wife (PW3) had said they recognized the voice of the appellant and at the same time said they thought that they were police officers. He also took issue with the source of light which was in the house at the time. Further he said the dates indicated in the charge sheet are different from the one mentioned in evidence.

Mr. Kemo submitted that the evidence was sufficient and warranted the conviction as the appellant was properly identified.

I have considered the evidence and this being the first appellate court I too have evaluated the evidence. Indeed the complainant was attacked that night. However the learned magistrate erred on

holding that PW2 and 3 positively identified the appellant. First as submitted the two said that when their attackers ordered them to open the door they recognized the voice of the appellant whom they knew well. Yet in the same breath they said that they opened the house as they thought the people were police officers as they claimed. They very well knew that the appellant was not a police officer yet they said they thought they were police officers.

This was a material discrepancy in the evidence. The other issue is that of source of light in the house. PW2 said he had a candle in his hand and PW3 said there was a tin lamp on the table. The Court was not told how bright this light was. It is the same light PW2 and 3 said they used to see the second accused Joshua Oroko with yet the magistrate felt that they could not have been able to identify him using that light. They could not be able to identify one and not the other even if they said they knew appellant before.

The magistrate used double standards when it came to the issue of identification. This incident happened at night and proper identification was necessary. In fact when PW2 gave evidence the first time he never said there was a lamp in the house. He had said that he recognized the appellant from light of the torches the attackers had. It therefore cannot be said that the identification was watertight. The trial magistrate should have given the appellant the benefits of doubts.

In the circumstances I allow the appeal quash the conviction and set aside the sentence. Appellant be set at liberty forthwith unless otherwise lawfully held.

Dated 27<sup>th</sup> October 2006.

**KABURU BAUNI**

**JUDGE**

Delivered in presence of:

cc. Mobisa

Mr. Chirchir for State

Appellant P.I.P.

**KABURU BAUNI**

**JUDGE**