Case Number:	Criminal Appeal 230 of 2003
Date Delivered:	20 Dec 2007
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, Emmanuel Okello O'Kubasu, John walter Onyango Otieno
Citation:	DOUGLAS MAINA GATHOGO v REPUBLIC [2007] eKLR
Advocates:	-
Case Summary:	**Criminal Practice and Procedure- Robbery with violence –second appeal** -where the appellant had been acquitted on count one and count three but conviction up held on count two-where the Judges failed to state why they thought the convictions on count one and count three were not arrived at safely and why conviction on count two was a safe one-where there was no basis for drawing a distinction between counts one and three on one hand, and count two on the other hand-failure of the High Court to perform its legal duty as a first appellate court-the state conceded that the conviction on count two which the first appeal sustained against the appellant was clearly unsupportable-whether the appeal could be allowed- section 296 (2) of the Penal Code
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-

History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 230 of 2003

DOUGLAS MAINA GATHOGO …….....……. APPELLANT

AND

REPUBLIC …….……. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya

Nairobi (Mbogholi & Mutitu, JJ) dated 7th August, 2003

IN

H.C. Cr. A. No. 388 of 1999)

****

JUDGMENT OF THE COURT

Mr. Kaigai, the learned Senior State Counsel, conceded on behalf of the Republic that the conviction on count two which the superior court, on first appeal to that court, sustained against the appellant herein, is clearly unsupportable. The appellant Douglas Maina Gathogo had been tried alone on five counts of robbery with violence contrary to section 296 (2) of the Penal Code. The Principal Magistrate at Kibera had acquitted the appellant on counts four and five and the basis of the acquittal on those counts by the Magistrate was that the persons named as complainants in the two counts had failed to come and testify in court. The learned trial Magistrate was clearly right in acquitting the appellant on the two counts. But the Magistrate had convicted him on counts one to three and sentenced him to death. He appealed to the superior court and that court, in a judgment comprised in about one and a quarter typed pages contented itself by stating as follows:-

"The appellant was convicted on three counts of Robbery with Violence contrary to section 296 (2) of the Penal Code. The Judgment appealed against was delivered on the 7th day of April 1999 by Mrs. Ondieki Esquire (sic) a Senior Principal Magistrate based at Kibera, Nairobi. Being dissatisfied with such conviction and sentence the appellant filed an appeal before the High Court. The appellant challenged his conviction and sentence arguing that his identification was not positive given the prevailing circumstances. He also argued that his conviction was based on contradictory evidence and that his defence was not given due weight.

Mr. Kivihya supported both the conviction and the sentence imposed on the complainant (sic). We have closely studied the trial Magistrate's record. It is our considered view that the appellant's conviction in respect of count one and count three was unsafely arrived at and cannot be upheld. We therefore order that the conviction in respect of count one and count three be dismissed (sic) and the death sentence set aside.

As concerns count two we are fully satisfied that the conviction therein was arrived at on safe

grounds and that the said conviction should be upheld. We also agree that the death sentence was properly arrived at. We therefore dismiss the appeal in respect of count two and uphold the death sentence. Order accordingly."

That was all that the two learned Judges of the High Court found necessary to say on charges involving the very life of the appellant. All the three robberies were allegedly committed by the appellant jointly with others in the same transaction and under the same circumstances. The learned Judges did not state any single thing as to why they thought the convictions on count one and count three were not arrived at safely. They did not give even a single reason why they thought the conviction on count two was a safe one. If the lighting in the place where the robberies took place was not adequate for positive identification of the appellant, that fact would apply to all the three charges, and we are totally unable to find the basis for drawing a distinction between counts one and three, on the one hand, and count two, on the other hand. Clearly the High Court totally failed to perform its legal duty as a first appellate court as is set out in the case of **OKENO V. REPUBLIC [1972] EA 32**. Mr. Kaigai is clearly right in not supporting the conviction of the appellant on the remaining count two. We accordingly allow the appeal, quash the conviction on count two, set aside the sentence of death and order that the appellant be released from prison forthwith unless he be held for some other lawful cause. Those shall be our orders in the appeal.

Dated and delivered at Nairobi this 20th day of December, 2007.

R.S.C. OMOLO

…….

JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.