



**Gichira v Republic (Criminal Appeal 2 of 2020)
[2022] KEHC 10613 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 10613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL 2 OF 2020**

**M MUYA, J
AUGUST 4, 2022**

BETWEEN

JOHN MAINA GICHIRA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. John Maina Gichira hereinafter referred to as the appellant was convicted and sentenced to 28 years imprisonment for the offence of robbery with violence contrary to Section 296 (2) of the [Penal Code](#) on two counts.
2. The particulars on the first count are that on the 14th day of May 2018 at Nyena Sacco offices in Nyeri town within Nyeri County jointly, with another. And while armed with a pistol robbed Mercy Muthoni Wachira Kshs.234,920/= and at the time of such robbery used personal violence against Mercy Muthoni Wachira.

In the second count, the particulars are that on the 14th day of May 2018 at Nyena Sacco Offices in Nyeri town, Nyeri County, jointly with another while armed with a Pistol robbed Evelyne Wangechi Ksh 200,000/= and at the time of such robbery used personal violence against Evelyne Wangechi.
3. Being dissatisfied with the Conviction and Sentence in the two counts, the appellant lodged this appeal which is premised on the following grounds:-
4.
 1. That the learned trial magistrate erred in Law and Fact for failure to appreciate that there was no positive identification of the attacker
 2. That the learned trial magistrate erred in law and fact in that she properly did not address her mind on the failure to have important exhibits produced in court by the prosecution.



3. That the learned trial magistrate did not put any weight on his evidence in defence.
4. That the case against him was not proved beyond reasonable doubt.
5. Duty of the Court
It is trite law, and in accordance with and in particular the often cited authority of *Okeno – Vs- R 1972 EA 32* that its incumbent upon a first appellate Court to consider, evaluate a fresh the evidence on record so as to arrive at an impartial determination.
6. Brief facts of this case
The prosecution called seven witnesses in their case. The appellant gave a sworn statement and did not call any witness in his defence.
The offices that were broken into belong to Nyena Sacco which is situated at Gulf Petrol Station Nyeri Town.
7. Two complainants Mercy Muthoni Wachira and Evelyne Wangechi were in their respective offices at Nyena Sacco when they were accosted by two men one of whom was armed with a pistol. They were reconciling the accounts in preparation to do banking for the day.
8. It is PW1's evidence, she had finalized her accounts which showed a collection of Ksh 234,920/= one of the men stood at the door, threatened her by warning her not to make any move. The Second one proceeded to where she had kept the money. He proceeded to take the money and her two mobile phones, make Infinix and Huawei from her office, they proceeded to that of her colleague Evelyne and ordered her to give them the collection of money she had made. After a short while, they left and went outside. That's when she gathered courage and screamed for help shouting thieves. There were mechanics nearby. They gave chase and managed to arrest the man who was not armed with a pistol. The one who had a pistol managed to escape after threatening to shoot. The pockets of the suspect were ransacked and there was recovery of some Ksh 55,000/= When the money was handed over to her, she decided to hand it over to one Kimani for safe custody. Police were called and the suspect was taken away.
9. PW2 Evelyne Wangechi also testified to have been in the offices of Nyena Sacco when at about 2.30 p.m. she heard a commotion from the office of Mercy (PW1). Someone was saying, give us money. She tried to call for help but suddenly a man pointed a pistol at her and proceeded to take 200,000/= which was inside a carton placed at the counter when this was happening their colleagues by the name of Nancy entered into the office. They pushed her out and she fell down. When the two men left, Mercy (PW1) Screamed for help. Members of public gave chase and managed to arrest the one who was not armed with a pistol.
His colleague managed to escape. Police were called and re-arrested. The suspect.
10. In his defence the appellant in his sworn statement testified to have boarded a vehicle from Nairobi to Nyeri on the 14th day of may 2018 at around 11.00 a.m. He arrived at Nyeri at around 11.00 a.m. upon arrival at Nyeri he alighted at Nyahururu bus stage at around 2.00 p.m. on his way home he heard a commotion behind him, he saw people running, he stepped aside to let them pass but they started beating him. After beating him they locked him in a nearby shop. While there police arrived and he was taken to Nyeri Police Station. At the station he was asked what he had in his pockets. He produced Kshs.9,150/= his Identity Card and phone. The following day he was arraigned in court on charges of robbery.



11. He further testified to have been surprised when witnesses stated that he had been found with Kshs 55,000/= He maintained that he was a victim of mistaken identity. It is his evidence that he was searched by Pc Oscar and Mogaka.

12. Analysis and determination

The Main issue in this case is that of identification.

In the old case of *Republic Versus Turnbull and other* 1976.3 All CR.549. It was held:- “ The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation?

At what distance? In what light? Was the observation impeded in any way? Had the witness even seen the accused before? How often, if only occasionally, had he any special reason for remembering the accused? How long period elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancies between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

13. I have carefully perused the evidence on record and the judgment of the learned trial magistrate and note that at page 17 of her Judgment the last paragraph she did appreciate that the main issue before her was that of identification. She referred to it as a “tricky issue” At page 18 of her judgment line 1 she observed:- “The court notes that the offence took place during the day. PW1, PW2 and PW3 testified that even though the robbers were wearing hooded Jackets, the faces were not covered and they were able to see their faces. In respect of the 1st accused each of the three witnesses who were present at the scene said he had long beards at the time of the arrest. It is note worthy, that at the time of the hearing, the first accused person was clean Shaven.”

14. Further in her Judgment she did observe that there was contradictions as to the amount of money recovered from the appellant. Was it Kshs 55,535/= as alleged by PW1 and PW2 or was it Kshs. 9150/= as alleged by PW6 PC Robert Mogaka.

Further the count noted that PW6 had testified to have prepared an inventory of the money recovered from the first accused/appellant but the notes produced in court were different from those indicated in the inventory as they bore different serial numbers.

The learned trial magistrate proceeded in her Judgment to note that there were gaps in the prosecution case but she did not consider them fatal to the case.

15. I note from the evidence on record that at page 11 the 1st complainant did state to have seen the robbers clearly, that one had a pistol and was brown, short and wore a brown Jacket. The one who was not armed was bearded, black and short. It is noted that the appellant was arrested and locked at a shop upon which police were called and he was taken to police station and placed in cells.

16. No identification parade was held in respect of the appellant for the witnesses to try to identify him.

17. There is no evidence as to whether PW1,PW2 and PW3 in their statements to police gave the description of the appellants.

18. It is alleged that money was stolen from PW1 and PW2 but, the evidence on record is inconsistent as to how much was stolen and how much was recovered and whether the money allegedly recovered was the one produced in court as exhibits.



19. In effect there is no exhibit produced in court which could link the appellant to the robbery.
20. There indeed existed serious doubts in the prosecution case and the trial magistrate alluded to this.
21. A robbery did take place on the day in question but it was not proved beyond reasonable doubt that the appellant did participate in the said robbery. There was no proper identification and the recovery of some money if any could not be linked to the appellant. The numerous doubts in the case should have been resolved in favour of the appellant.
22. I have perused the submissions by the Respondents and I find the appeal has been conceded. This is as it should be. The concession has merit. The appeal succeeds on both conviction and subsequent sentence. The conviction is hereby quashed and the sentence set aside.
23. The appellant is set at liberty unless otherwise lawfully held.

JUDGMENT DELIVERED DATED AND SIGNED AT NYERI THIS 4TH DAY OF AUGUST, 2022.

HON. JUSTICE M. MUYA

JUDGE

In the presence of:

In person: Appellant

Miss Waweru: Respondent

Court Assistant: Kinyua

30 days Right of Appeal.

