



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 154 & 161 OF 2012**

**PETER GITHINJI MWANGI .....1<sup>ST</sup> APPELLANT**

**GERALD WATHIU KIRAGU ALIAS MATHU.....2<sup>ND</sup> APPELLANT**

**VS**

**REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the Chief Magistrate's Court, Nyeri (E.K. Makori) delivered on 17<sup>th</sup> August, 2012 in Criminal Case No. 818 of 2011)**

**JUDGMENT**

**FACTS**

1. The appellants, **Peter Githinji Mwangi and Gerald Wathiu Kiragu alias Mathu**, were charged with two counts of the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.
2. The particulars of the charge in Count I were that on 23<sup>rd</sup> October, 2010 at Rurii village within Nyeri County jointly with others armed with offensive weapons namely pangas and metal bars robbed **James Ndaraiya** of cash Kshs. 400/=, one torch all valued at Kshs. 900/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **James Ndaraiya**.
3. The particulars of the charge in Count II were that on 1<sup>st</sup> November, 2010 at Rurii village within Nyeri County jointly with others armed with offensive weapons namely pangas and metal bars robbed **Agnes Wangu Ndaraiya** a crowbar, mattock, chisel, mason fork, jembe, pair of shoes, robe fertilizer (10 kgs) and maize flour (10 kgs) all valued at Kshs. 10,550/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Agnes Wangu Ndaraiya**. They were each sentenced to serve 5 years imprisonment in Count 1.
4. The Appellants have appealed against their respective conviction and sentence. They filed their petitions in person. Those grounds of appeal were as follows –
  - i. There was contradictory evidence adduced by the prosecution
  - ii. There was a long standing dispute among the parties
  - iii. The appellant's defence was not considered
  - iv. The magistrate was biased, oppressive and discriminative
  - v. The prosecution had not proved their case to the required standards.
5. The facts of the case as recorded were that the on 13.10.10 at 9.30 pm the complainant (PW1) and his

family were taking supper in their kitchen when the 1<sup>st</sup> and 2<sup>nd</sup> appellant appeared with a torch and knife. It was his account that the door had not been closed and the 2<sup>nd</sup> accused ordered them to lie down when he got in the house. He said that as they lay down he heard them calling out at others saying 'Ali ali'. He was led out of the kitchen and he was able to see 3 other men outside the kitchen but did not identify them. 6. He was then led to the main house into the bedroom where they demanded for money. He said that the 1<sup>st</sup> appellant took Kshs. 400 from a table and the 2<sup>nd</sup> appellant took a torch. After that he said that they started searching the house before the colleagues outside called them out. He said that after they ran away he released his family and made a phone call to the police. He said that he was able to identify the Appellants who were neighbours and he knew them and there was bright electricity light during the attack. He also said that he had known the 2<sup>nd</sup> appellant since birth and he knew the father of the 1<sup>st</sup> appellant..He said that the appellants were later arrested.

7. PW 2's account had been that as the assistant chief of Rukanga the 2<sup>nd</sup> Appellant had approached him on 10.11.10 seeking his assistance and it was then that the Appellant told him about the rumors of him being a thief. He said that the 2<sup>nd</sup> appellant had denied being a thief. He had however aided in his arrest after he was informed that 2<sup>nd</sup> appellant had cut someone.

8. PW3 corroborated the testimony of PW1. It was her testimony that the Appellants attacked them on 23.10.10 at 9.30 pm as they were having supper with her family. She said that the door was suddenly opened and she saw the two appellants with the aid of bright electric light. She said that they were told to lie down and the 1<sup>st</sup> appellant had threatened to kill her for being a security agent. She said that they claimed to be Mungiki from Muranga and they demanded from her father (PW1) "chai ya wazee". She said that the appellants then took her father to the bedroom where he was robbed of Kshs. 400/= and a torch before running away. She told the police she had identified the two.

9. On the second incident it was her account that on 1.11.10 at about 4-5.00 am while sleeping she heard noises outside the house. When she peeped outside with the aid of a bright security light she saw the 1<sup>st</sup> appellant carrying a mattress and the 1<sup>st</sup> appellant carrying a sack. She then raised alarm and when they heard her screams they ran away. She said many neighbours came to their rescue and in the morning the assistant chief visited the scene. She said that they noticed that the appellant had dug down under the wall at their store and stolen a crowbar, mattock, chisel, mason, mattress, blankets, rope, books, clothes, maize flour, fertilizer and a fork jembe. She said the items belonged to her. She said that she had reported the matters and had been called to identify some items at the police station. She said that she was able to identify her pair of sports shoes and a chisel inscribed with her father's abbreviations.

10. Pw4, Pw 5 and Pw8 were the investigating officer and the arresting officers in the case respectively. Pw4 stated that he had recovered pair of shoes and chisel which Pw 3 confirmed to have belonged to her. The recovery was made after the appellants had robbed one Esther Njeri Kanyi on a different incidence reported on 2.11.10. The recovery was made near the house Esther Kanyi.

11. PW6 and Pw7 the Assistant Chief and Chief of Kaharu sub-location respectively testified that indeed there was a robbery at the complainant's house. PW6 received a call from pw3 about the attack. On arrival at the scene they noted that the thieves had accessed the house and stolen Kshs. 400 and a torch. They both stated to know the appellants for many years. The victims however did not give the names of the attackers to them even though they had said that they had identified the attackers. They advised them to do so at the police station.

12. Pw9 was also an investigating officer in the case. It was his testimony that he took over the case in the Month of November 2010. It was his testimony that in the first complaint the complainant PW1 had been robbed by robbers on 23.10.10 while having supper with his family. That the appellants were armed with pangas and a metal bar. The appellants had stolen cash kshs. 400/= and a torch. In the 2<sup>nd</sup> incident he said that the complainant Pw3 had woken up at 13.12hours and found the kitchen window open. On checking she found that she had been robbed. He said that the appellants had been arrested on different days. He also said that during investigations another robbery had taken place at the house of Njeri Kanyi where

they recovered sports shoes and a chisel which PW3 had positively identified as belonging to her. Pw9 went on to produce the items in exhibit.

13. In defence, the 2<sup>nd</sup> appellant questioned the evidence of Pw2 and Pw8 claiming that they were contradictory. He said that the evidence in count II was not compatible with the offence. He questioned why Pw1 as the victim did not make a report of the offence but sent his daughter to do so. In count II he pointed out that nobody had been arrested with the exhibits and questioned why the evidence of Esther Njeri Kanyi was never adduced in court. He stated that the evidence of Pw9 showed that he was not the investigating officer in the case. He also pointed out that pw6 and Pw7 stated that no names of the victims were given to him. That had the victims known the attackers they would have said so. The 1<sup>st</sup> appellant on his questioned why the names of the attackers were not mentioned to the assistant chief. It was stated that there was no confirmation made that the incidence had been reported to the police. He questioned why the crucial witnesses were not called to testify such as neighbor who lent pw3 a phone, a police who was called at the scene, Pw1'S wife and Esther Njeri.

14. The 2<sup>nd</sup> appellant said that on the day of the crime he was at his place of work in Thika and that the matter was in court due to a family feud. He said that there was no evidence placing him at the scene and that there was no proof of him committing the offence. The 1<sup>st</sup> appellant on his part said that on the material day he was in a burial and was forced to sleep at Watuka. He produced a receipt of the hired vehicle for that day. He claimed not to be at the scene of crime. He claimed that matter was in court due to land disputes between his family and the complainant's.

15. The appellants called witnesses to their defence. DW3 was the witness for the 2<sup>nd</sup> appellant who claimed to have been with the appellants in the evening of 23.10.10. Dw4 on his part testified for the 1<sup>st</sup> appellant who confirmed to have attended a burial on 23.10.10 and after the funeral slept at Endarasha.

16. On appeal the 1<sup>st</sup> appellant filed a mitigation of appeal, which he advanced at the hearing, where he prayed for leniency in regards to the 5 year sentence since he had another 15 years sentence in Cr. Case No. 532 of 2010 which would run consecutively. He also claimed to have reformed. The 2<sup>nd</sup> appellant equally prayed for his sentence to be reduced.

17. The appeal was heard on 4.04.2016 where the prosecution made oral submissions in court on opposing the appeal. The prosecution submitted that the two appellants had been convicted with the offence of robbery with violence and the prosecution witnesses proved that the appellants had carried out the offence. It was stated that the maximum sentence could have been meted out to the appellants but they were sentenced to 5 years in prison. That the court had exercised its discretion. It was further stated that only prison can inform the court of reform and other cases were not relevant to the instant case. Finally that it was stated that the appellants should continue serving the sentence.

### **ISSUES FOR DETERMINATION**

18. After hearing the parties the only issue framed for determination is as follows;

(i) Whether the sentence imposed was manifestly excessive.

### **ANALYSIS**

19. The Appellants were found guilty and were convicted on a lesser count of robbery contrary to Section 296(1) of the Penal Code and were sentenced on the 17/08/2012 to a term of five (years)imprisonment, each.

20. Out of the five (5) years they have served approximately three (3) years and (10) ten months of the term imposed; their appeal is only on sentence and they contend that they have reformed and are seeking for a reduction of their sentence.

22. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The appellate court must satisfy itself that the trial court did not take into account relevant factors or in the circumstances of the case the sentence is harsh and excessive.

23. Section 296(1) of the Penal Code provides for a fourteen (14) year sentence for the offence of robbery and reads as follows;

**“Any person who commits the felony of robbery is liable to imprisonment for fourteen years”**

24. This court is therefore satisfied that the sentence of five (5) years is within the law; the appellants are also not first offenders and are currently serving a term of fifteen (15) years; I therefore find no good reason to warrant interference with the sentence as it is found not wrong in principle or manifestly harsh and excessive.

### **FINDINGS**

25. For the forgoing reasons these are my findings;

- i. This court finds that the trial magistrate when passing sentence did not act on wrong principles of law; the sentence imposed of five (5) years is found not to be manifestly harsh or excessive.

### **DETERMINATION**

26. The appeals on sentence are found to be lacking in merit and are hereby dismissed.

27. The sentences imposed are hereby affirmed.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 9th day of June 2016.**

**HON.A. MSHILA**

**JUDGE**