



**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 74 OF 2014**

**(Appeal from Conviction and Sentence in Kandara PM Criminal Case No 152 of 2013 – C Kithinji, Ag SRM)**

**DAVID CHEGE NJENGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant **David Chege Njenga** was convicted after trial of **capital robbery** contrary to **section 296(2)** of the **Penal Code**. It was alleged in the charge that on 25<sup>th</sup> May 2013 at about 11.30 p.m. at Ngararia Market, Ngararia Location within Murang'a County, being armed with a dangerous weapon, namely a machete, he robbed one **Antony Maina Chege** of cash KShs 8,000/00, and that at the time of the robbery he used actual violence to the said Antony Maina Chege. He was sentenced to death. He has appealed against both conviction and sentence.
2. The main grounds of appeal advanced by the Appellant's learned counsel, Mr. Muturi Njoroge, are that the trial court lacked jurisdiction in that the learned trial magistrate was an acting senior resident magistrate and not a substantive holder of that office.
3. Learned Counsel also argued that it was never established by evidence that the complainant had in the first place the KShs 8,000/00 allegedly stolen from him during the robbery.
4. Learned Counsel for the Appellant finally submitted that there were many gaps in the prosecution case that raised a reasonable doubt about the Appellant's guilt that should have been solved in his favour.
5. Learned Prosecution Counsel does not support the conviction. She submitted that there were many doubts in the prosecution case that ought to have been resolved in the Appellant's favour.
6. We have on our own evaluated the evidence placed before the trial court in order to arrive at our own conclusions regarding the same. This is our duty as the first appellate court. We have, however, borne in mind that we did not ourselves see and hear the witnesses testify, and we have given due allowance for that fact.
7. The issue of jurisdiction is not well taken. One needs only look at sections 43 and 45 of the **Interpretation and General Provisions Act, Cap 2** which provide –

“43. Powers and duties of holder of office

**Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the**

**duty shall be performed by the person for the time being holding that office."**

"45. Reference to holder of office includes person discharging functions of that office

**In this Act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office".**

An acting senior resident magistrate can thus try the offence under section 296(2) of the Penal Code that a senior resident magistrate can.

8. The prosecution case as presented was that the complainant (PW1) was coming from his place of work at the material time (about 11.30 p.m.) when he met with the Appellant near a bus stage. The Appellant had been chasing someone. On seeing PW1 the Appellant stopped and told him (PW1) that he had been looking for him. He (Appellant) then hit him with something he had in his hand; he sustained a cut near his right ear. He was again cut on the thumb and fingers as he tried to shield himself from what he realized were blows from a panga. The Appellant then ran across the road where he fell near a miraa kiosk. PW1 who had followed him fell on him. The Appellant then rose and cut PW1 again, this time on the left first finger, together with his phone that he was holding in that hand. The phone was damaged. He hit him again three times on the back with the panga. PW1 then fell down and the Appellant took KShs 8,000/00 from his pocket.

9. PW1 then asked the Appellant what he was after. He answered that he (Appellant) wanted to kill him (PW1). He (Appellant) then escaped. PW1 dragged himself to a car wash nearby and told some 3 workers he found there what had happened. One of them called his (PW1's) brother, **Samuel Mwangi**, at PW1's request. The brother came and upon seeing him (PW1) he reported the matter to the police at **Ngararia AP Post**. A police officer went to the scene. The matter was eventually reported to **Kandara Police Station**. PW1 was attended to at **Kandara Health Centre**. He was referred to **Thika District Hospital** where he was treated and discharged the following day.

10. It was the further testimony of PW1 that he has known the Appellant since his birth as he was a son of his (PW1's) cousin. He recognized him during the attack. There were no street lights at the scene of the attack.

11. A clinical officer (PW2) testified to PW1's injuries on the hands and face. He produced in evidence his medical report (P3).

12. PW1's brother Samuel Mwangi Chege testified as PW3. He rushed to the scene of the attack upon receiving a telephone call. On seeing the state of PW1 he rushed to the Administration Police post nearby and fetched a police officer with whom he went back to the scene. The officer upon seeing PW1, advised that he be taken to hospital immediately. PW3 took him to **Kandara Health Centre** after collecting a note from the police post. PW1 received first aid there and he was then referred to **Thika District Hospital** where he was treated and later discharged.

13. The same morning PW3 went back to the Administration Police post at about 7.30 a.m. He found the Appellant there with a panga. After PW3 gave his report to the police, including that PW1 had told him that he had been attacked by the Appellant, he (Appellant) was arrested and escorted to **Kandara Police Station**.

14. PW4 was a police officer. His testimony was that the Appellant had reported at the Administration Police post that he had cut someone whom he did not know with a panga after that someone attacked him (Appellant) at his home the previous night. PW4 visited the scene and he noted some blood drops near the Appellant's gate. He subsequently escorted the Appellant to **Kandara Police Station**.

15. PW4 also testified that PW3's report about his brother's (PW1's) attack as recorded in the occurrence book did not mention any suspect. He also stated that the Appellant and PW1 were related, and that there

had been a long-standing difference between them.

**16.** PW5 was also a police officer from *Kandara Police Station*. His testimony was that PW1 reported that he had been attacked by the Appellant, injured and robbed of cash. He visited the scene of the attack and subsequently charged the Appellant.

**17.** PW5 also testified that he established that PW1 was a businessman, and that Kshs.8,000/00 was not too large a sum of money to be found on him, considering his business.

**18.** The Appellant testified under oath in his own defence. He stated that on the material evening he had gone to sleep at his home at about 9.00 p.m. At about 11.30 p.m. he heard his gate being forcibly opened. He concluded that a stranger was breaking into his compound. He peeped outside and saw someone outside who was wearing a hat, and his mouth was covered. He did not recognize him. He wanted to make a call to the police but the battery of his phone was low. He therefore decided to go outside and confront the stranger. He took a panga with him.

**19.** Upon demanding that the stranger identify himself the stranger hit him with a fist, upon which he used the panga to defend himself. In the process the stranger continued to try to hit the Appellant; so he cut him on the head. The stranger then started escaping; as a passing shot the Appellant hit him on the back with the panga. The stranger went to the road. The Appellant was afraid to follow him there as he might have companions. He went back into his house and locked himself up there.

**20.** In the morning he went and reported the incident to the Administration Police post. An officer there accompanied him back to his home and he showed him where the attack had taken place – about 3 meters from his house. He also learnt at the police post that his uncle (PW1) had already made a report there that he had been attacked and robbed.

**21.** In cross-examination the Appellant was adamant that he had not recognized the person he had cut the previous evening as he was wearing a hat and his mouth was covered up.

**22.** It was common ground that the complainant (PW1) had been injured with a panga and that the Appellant had injured someone with a panga. In the final analysis it was really the story of the complainant, narrated under oath, against the story of the Appellant, also narrated under oath. According to PW1 the Appellant attacked him deliberately and unprovoked, and in the process robbed him of money. But according to the Appellant a stranger came into his compound at night after forcing open the gate. He was disguised by a hat and a covering over his mouth. He refused to identify himself when challenged; instead he attacked the Appellant with his fist, thereby forcing him to defend himself with the panga he had armed himself with. It was dark and he did not recognize PW1. It turned out the following morning that the stranger was in fact his uncle whom he knew very well.

**23.** What little independent evidence there was tended to place the physical altercation between PW1 and the Appellant near his (Appellant's) gate. The police officers found blood drops about 3 meters from the gate.

**24.** There were baffling aspects to this case. Neither PW1 nor Appellant screamed for help as would have been expected. Had either of them screamed police officers from the police post nearby and possibly other persons, would probably have rushed to the scene and provided much needed corroboration of the story of one or the other.

**25.** There were also the three attendants at the car-wash to whom PW1 went for help. They appear to have been nearby. Why were they not called to testify as they were the ones to whom the complainant went immediately after the attack?

**26.** There seems to have been much more between the complainant and the Appellant than the trial court was told. There was history of a previous altercation between the two. Either of them could have wanted to get back at the other. There was no independent corroborative evidence one way or the other.

27. The sum total is that upon our own evaluation of the evidence placed before the trial court, and given the very grave offence that the Appellant faced, we are not satisfied that the charge against him was proved to the required standard. There were many doubts that should have been resolved in his favour. The conviction is not safe, and learned Prosecution Counsel properly conceded the appeal.

28. In the result we allow this appeal in its entirety. The Appellant's conviction is hereby quashed and the sentence of death passed against him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT MURANG'A THIS 25<sup>TH</sup> DAY OF NOVEMBER 2015**

**HPG WAWERU**

**JUDGE**

**A MSHILA**

**JUDGE**

**DELIVERED AT MURANG'A THIS 27<sup>TH</sup> DAY OF NOVEMBER 2015**