



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 178 OF 2013**

JOSEPH MWANZIA GATHOKA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 168 of 2012 in the Principal Magistrate's Court at Garissa – M. D. Kiprono (Ag. SRM) on 10<sup>th</sup> April 2013)*

**JUDGMENT**

1. **Joseph Mwanzia Kathoka** and **Josphat Ngala Kitheka** were charged together with the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. It was alleged that between the night of the 18<sup>th</sup> July 2012 and 19<sup>th</sup> July 2012 at Village Ten in Bura, of Tana River County, jointly with others not before the court, being armed with dangerous weapons namely G3 rifle and MP5 sub-machine gun, they robbed Raymond Abira, Omar Suleiman Mwakutunza and Evans Simiyu Wanjala of 300 bags of maize valued at Kshs.900,000/=
2. In count II the appellant was charged alone with the offence of handling stolen goods contrary to **Section 322(1)(2)** of the **Penal Code**. The particulars of the offence were that on 19<sup>th</sup> July 2012, at Ukasi roadblock along Garissa-Nairobi Highway within Kitui County, jointly with another not before the court, otherwise than in the cause of stealing, dishonestly handled 130 bags of maize knowing or having reasons to believe them to have been stolen or unlawfully obtained.
3. The prosecution's evidence against the two men was that **PW1**, **PW2** and another were on guard duties at Village Ten in Bura, providing security for stores of cereals on 18<sup>th</sup> July 2012, when at about 10 p.m. they were set upon by two gun men who bound and gagged them and locked them up in one of the Unihuts. About half an hour later they heard a lorry enter the premises. It was loaded with sacks of maize and driven off. A while later a second lorry came into the premises and also drove off with a cargo of maize. The appellant who was in one of the lorries was arrested at Ukasi barrier by police who had received information of theft of maize in Bura and subsequently charged as read.
4. The second accused was acquitted under **Section 210** of the **Criminal Procedure Code** while the appellant was placed on his defence. In his testimony given on oath, the appellant admitted that he was found in possession of the bags of maize in question but averred that he bought them from a store in Bura through his agent one Mr. Kibichu.

5. At the close of the trial the appellant was convicted in count I and sentenced to suffer death as by law prescribed. He thereafter filed an appeal raising eight grounds. In the first ground learned counsel Mr. Muigai Gacheru contended for the appellant that the charge sheet was defective for containing two charges which were mutually exclusive and should not be contained in a charge sheet as separate counts.
6. We have analysed the record and agree with counsel that it outrages common sense to state that the appellant committed robbery with violence and at the same time handled the property which is the subject matter of the said robbery, knowing or having reason to believe them to have been stolen.
7. The two charges should co-exist in the same charge sheet as alternative charges – see **Ann Nyambura Mbuthia v Republic [2005] eKLR**, to which we were referred, and which is of persuasive value.
8. The more important question is that of the weight of the evidence upon which the appellant's conviction was founded. None of the two witnesses **PW1** and **PW2** who were robbed placed the appellant at the scene of the robbery. **PW4** who was with the appellant at the time of loading the maize could not specify where in Bura the maize was loaded.
9. The trial court's assessment was of **PW4**'s evidence as follows:

**“My opinion is that the testimony of PW4 is overwhelming and the same demonstrates that 1<sup>st</sup> accused person was at the scene”.**

The court went on to conclude as follows:

**“The evidence of PW4 cannot be treated as an issue of identification. In fact he is not a witness of the robbery”.**

The trial court's assessment of the evidence therefore seemed to blow hot and cold in the same breath.

10. Secondly, we find that the appellant gave a plausible explanation as to how he came to be in possession of the maize found in his possession. He said he bought the maize from an Administration Police Officer called Kibichu. The prosecution while admitting that there was such an officer attached to the Bura Police did not call him to rebut that evidence, or evidence that he was an agent for the appellant in his maize selling business.
11. We find therefore that the circumstances in which the appellant bought the maize were suspect, but suspicion alone no matter how strong is not sufficient to found a conviction.
12. Having perused the lower court record, the grounds of appeal and the submissions of the learned counsel, we are satisfied that the learned stated counsel, Miss Maina was wise to concede the appeal, for the nexus between the appellant and the offence is too tenuous to sustain a safe conviction.
13. For the foregoing reasons we find that the appeal is meritorious. We quash the conviction and set aside the sentence imposed on the appellant, and order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED and DELIVERED** in open court this **19<sup>th</sup>** day of **May 2014**.

**A.MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**