



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT EMBU

CRIMINAL APPEAL CASE NO. 186 OF 2008

MOSES GITARI KARIMI..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(From the conviction and sentence by A.K. Kithuku, The Senior Resident Magistrate's Court at Kerugoya in Criminal Case No. 978 of 2007 delivered on 7/10/2008)*

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

The appellant in this case had been charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The facts of the prosecution's case are as follows:-

**COUNT ONE**

**ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.**

**DANSON KITHAKA NDAMBIRI (2) MOSES GITARI KARIMI:-** On the 17<sup>th</sup> day of June 2007 at Karia Village in Kirinyaga District of Central Province jointly with others not before court being armed with offensive weapons to wit iron bars and pangas robbed FRIDA WAWIRA GIKUNJU cash Kshs. 3,000/=, VCD machine make AFTRON, DC CLIP, 2 CDS, 13V packets of sportsman cigarettes, Safaricom cards bamba 50, one crate of soda all valued at Kshs. 10,348, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said FRIDA WAWIRA GIKUNJU.

**COUNT TWO**

**ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.**

**MOSES GITARI KARIMI:-** On the 17<sup>th</sup> day of June 2007, at Karia village in Kirinyaga District of Central Province jointly with others not before court being armed with offensive weapons to wit iron bars and pangas robbed SUSAN WANGARI GIKUNJU case Kshs. 2,700/= and a mobile phone make Motorola C-113 all valued at Kshs. 4,699/= and at or immediately before or immediately after the time of such robbery used actual violence to the said SUSAN WANGARI GIKUNJU.

**ALTERNATIVE CHARGE**

## **HANDLING STOLEN GOODS CONTRARY TO SECTION 322 (2) OF THE PENAL CODE**

**DANSON KITHAKA NDAMBIRI:- On the 11<sup>th</sup> day of July 2007 at Karia Village in Kirinyaga District of Central Province otherwise than in the course of stealing dishonestly retained one AFTRON MACHINE clip knowing or having reason to believe to be stolen item.**

After a full trial, the learned magistrate acquitted both accused persons on the first count. As far as second count is concerned, the appellant in this case was convicted under Section 215 of the CPC. He was later sentenced to death as provided by the law. The learned magistrate also acquitted the 1<sup>st</sup> accused for the alternative charge of handling stolen property. Being dissatisfied with the judgment, the appellant in this case has appealed against both conviction and sentence. The appellant has relied on the following grounds of appeal:-

1. *That the learned magistrate erred in law and fact in failing to find that the appellant was not properly identified.*
2. *That the learned magistrate erred in law and fact failing to find that the circumstances at the time of the alleged robbery were not favourable for the complainant to identify the appellant.*
3. *That the learned magistrate erred in law and fact in disregarding the fact that the appellant's identification was not free from error.*
4. *That the learned magistrate erred in law and fact in failing to find that the complainant could not have recognized the appellant as she alleged for the following reasons:-*
  - (i) *She did not give the appellant's name in her initial report.*
  - (ii) *Her witness did not corroborate her recognition of the appellant.*
5. *That the learned magistrate erred in law and fact in failing to find that the complainant's alleged recognition of the appellant was not free from error.*
6. *That the learned magistrate erred in law and fact in failing to warn himself to the danger of convicting the appellant on the evidence of one witness.*
7. *That the learned magistrate erred in law and fact in making judgment against the weight of evidence.*
8. *That the learned magistrate erred in law and fact in failing to find that the prosecution did not prove its case against the appellant beyond reasonable doubts.*
9. *That the learned magistrate erred in law and fact in failing to find that the prosecution had not proved the particulars of the charge beyond reasonable doubts.*
10. *That the learned magistrate erred in law and fact in disregarding the defence put forth by the appellant.*
11. *That the learned magistrate erred in law and fact in failing to accord the appellant the assistance of an interpreter contrary to the provisions of Section 77 (2) of the Constitution of Kenya.*
12. *That the learned magistrate erred in law and fact in conducting the proceedings in language that the appellant did not understand and failing to have the same interpreted contrary to the provisions of Section 198 (1) of the Criminal Procedure Code.*
13. *That the learned magistrate erred in law and fact in failing to record the language in which the proceedings were conducted.*

During the hearing of the appeal, the appellant was represented by Mr. Magee. In his submissions, the learned counsel stated that the prosecution did not prove the charge beyond any reasonable doubt. Further to the above, he also submitted that the particulars alleged that the complainant was robbed of cash Kshs. 2,700/= and a mobile phone called Motorola. The learned counsel pointed out that in her evidence, the complainant stated that she was robbed of cash Kshs. 2,500/= and the phone. The learned counsel also submitted that there was no reconciliation that was made between the charge and the evidence in court. In addition to the above, he also submitted that the complainant never showed any evidence that she had any money prior to that. He also contended that no evidence was adduced as regards to the phone. Apart from the above, the learned counsel also stated that the complainant did not produce any receipt to prove ownership of the same. Besides the above, the learned counsel also submitted that the conviction was based on a single witness who was PW2. He contended that her evidence was not very clear and the circumstances were not conducive to proper identification. The learned counsel recalled that PW2 had stated that she had identified the appellant since the light from the torch was reflected from the mirror. However, the learned counsel took issue with her evidence since she did not state where the mirror was and the size of the same neither did PW2 state the intensity of the light. The learned counsel also submitted that PW2 had stated that she was seated while the appellant was standing during the incident. Whereas PW2 had stated that she knew the appellant and had informed the police, during cross examination she admitted that she never mentioned the name of the appellant to the police when reporting the incident. In support of his submissions, he quoted the following cases:- **Kiarie vs. Republic, Lesarau vs. Republic and Mwenda vs. Republic**. Apart from the above, the learned counsel also submitted that the witnesses never corroborated the evidence of the complainant. The learned counsel also submitted that PW3 and PW4 had stated that they did not know who had robbed the complainant. The latter never told them who had assaulted her. In conclusion, the learned counsel submitted that the record does not indicate the language which was used in the trial. That means that Section 198 (1) of the CPC was not complied with. Specifically, he pointed out that during the evidence of DW2, it does not show the language that had been used. He also pointed out that even when the appellant was giving evidence, the language used had not been indicated. The learned counsel also submitted that the appellant was arrested about a month after the offence in relation to a different offence. He was later taken to court on 5<sup>th</sup> September 2007 while the plea was taken in February 2008. That was a period of about six months. He was of the view that the circumstances under which he was brought to court was not clear. On the basis of the above, he has submitted that the conviction is not safe and hence should be quashed.

On the other hand, the appeal has been opposed by Mr. Wohoro who appeared for the Republic. The learned counsel submitted that the conviction revolves around the testimony given on 6<sup>th</sup> March 2008. Specifically, he referred this court on page 13 and 14 of the record where PW1 stated she knew the accused since childhood. PW1 did not have any doubts about the person that she saw on the material day. He further submitted that during the commission of the offence, PW1 screamed and PW3 and PW4 rushed to the scene. During the robbery, PW1 was injured and was taken to the hospital. According to Mr. Wohoro, the ingredients of the offence were actually established while PW5 who is a clinical officer confirmed the injuries sustained by the complainant. That tallies up with the evidence of the complainant. He further stated that it is the complainant who identified the appellant and led the police to the arrest of the appellant. The learned counsel also referred this court to the evidence of PW6. On the basis of the above submissions, the learned counsel has urged this court to uphold the conviction and sentence since the offence was proved beyond reasonable doubt.

Being the first appellant court, we have the duty to re-consider and re-evaluate the evidence which was adduced before the trial court before we make our own conclusions. Besides the above, this court is also very alive to the facts that we never saw nor heard any witnesses. Refer to the case of **Okeno vs. Republic** [1972] EA at page 32. In her evidence, PW2 Susan Wangari Gikunju who is a shopkeeper testified that on 17<sup>th</sup> June 2007 at around 1 am, while she was asleep in her shop she heard people hitting the front door. She woke up and saw Moses Gitari and two other people getting in. The intruders had torches and later on Gitari cut her on the head. The other two went to her mother's house. Gitari who is the appellant in this case took money from the drawer. PW2 further stated that the light from the torch was reflected from the mirror and he saw his face. When she tried to run out, Gitari cut her again on the head and she fell down. She later screamed and people run to the scene. She later noticed that they had taken 2,500/= and the phone. PW2 was later taken to hospital where a P3 form was filled by PW5, Esther

Gachoki. According to PW5, the complainant had a blood stained t-shirt and she also had a history of assault on the previous day. PW5 also testified that the complainant looked sickly and was bleeding while having a deep cut wound on the scalp at the back. The said injury was stitched and approximate age of the said injury was 14 hours. The probable weapon used was a blunt object and she classified the injury as harm. From the evidence of record, it is apparent that the incident took place at 1 am. However at that particular time, the robbers who entered into the house of the complainant were carrying torches and that is how PW2 managed to see the appellant through the light which was reflected from the mirror. It was the evidence of the complainant that she had known the appellant since childhood and that is how she managed to recognize him.

In the case of **Maitanyi vs. Republic** [1986] KLR 198 the court held as follows:-

***“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that conditions favouring a correct identification were difficult.***

***2. When testing the evidence of a single witness, a careful inquiry ought to be made into the nature of the light available and whether the witness was able to make a true impression and description.***

***3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. This is before the decision is made.”***

From the judgment of the learned magistrate, it is apparent that he never cautioned himself about relying on the evidence of a single witness. Besides the above, it is apparent that the offence took place at night and PW2 stated that she was able to see Moses Gitari and two other people get into her house. It was her testimony that the robbers had torches and that Gitari hit her on the head. The evidence on record does not show how long the robbers were there to enable the complainant identify any body positively. The complainant had also indicated that she was able to see Gitari who is the appellant while relying on the light which was being reflected from the mirror. It is not clear how big the mirror was and how powerful the light from the torches were. Though the offence was committed on 17<sup>th</sup> June 2007, the appellant himself was arrested on 19<sup>th</sup> July 2007. That clearly shows that a full month had elapsed before the accused was arrested and identified by the complainant. In the event that the complainant had actually known the appellant, then one would have expected her to lead the police to arrest the appellant immediately. However, that was not done in this particular case. Given the above doubts, we wish to resolve the same in favour of the appellant. The upshot is that we hereby concede to the appeal. The appeal is therefore allowed while the conviction is quashed and sentence is set aside.

The appellant should be set free forthwith unless otherwise lawfully.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 9<sup>TH</sup> DAY OF FEBRUARY 2012.**

**MUGA APONDI  
JUDGE**

**H.I. ONG’UDI  
JUDGE**

**In the presence of:-  
Magee for Appellant  
Matiru for State**

**MUGA APONDI**  
**JUDGE**

**H.I. ONG'UDI**  
**JUDGE**

**9<sup>TH</sup> FEBRUARY, 2012.**