



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 237 & 236 of 2009

PETER NGIGE WERU alias GATHWARA.....1<sup>ST</sup>  
APPELLANT

-versus-

REPUBLIC.....RESPON  
DENT

*(Judgment arising from the Chief Magistrate’s Court at Nyeri in Criminal Case No.764 of 2008 by J. K. Kiarie – S.P.M.)*

CONSOLIDATED WITH

CRIMINAL APPEAL NO.236 OF 2009

PAUL NDEGWA MWANGI alias MATHENGE.....2<sup>ND</sup>  
APPELLANT

-versus-

REPUBLIC.....RESPOND  
ENT

*(Judgment arising from the Chief Magistrate’s Court at Nyeri in Criminal Case No.764 of 2008 by J. K. Kiarie – S.P.M.)*

J U D G M E N T

Paul Ngige Weru alias Gathwara, Paul Ndegwa Mwangi alias Mathenge, hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, were jointly tried on a charge of six counts:

In Count I, the two Appellants were jointly charged with the offence of **Robbery with Violence** contrary to Section 296(2) of the **Penal Code**. The particulars of the offence are that: *on the 4<sup>th</sup> day of July, 2007 in Nyeri Township of Nyeri District, within Central Province, jointly with others not before Court while armed with dangerous weapons namely: knives and Somali swords robbed NO.33528 Police Constable Peter Mwaniki Gicheche of one Smith & Wesson Piston Serial Number AFL 4024, 6 rounds of .38 ammunitions and cash Kshs.100/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said No.33528 Police Constable Peter Mwaniki*

**Gicheche.**

In Count II, the two Appellants were jointly charged with the offence of **Preparation to Commit a Felony** Contrary to **Section 308(1)** of the **Penal Code**. The particulars of the offence are that: *on the 19<sup>th</sup> day of July, 2008 at Gitei Village Kipiriri in Nyandarua District within Central Province, jointly with others not before Court were found in possession of one Sterling Sub-Machine gun Serial Number KR 9048, one Smith & Wesson Pistol Serial Number AFL 4024, 23 rounds of .38 special ammunitions, 26 rounds of 9 mm caliber ammunitions, two pairs of Kenya Police Shirts Uniform, one Beret Cap with Kenya Police Crescent, one black rain coat and a torch in circumstances that indicate that you were so armed with intent to commit a felony namely: Robbery.*

In Count III, the two Appellants were jointly charged with the offence of **Being in Possession of a Firearm without a Firearm Certificate** contrary to **Section 4(2) (a)** of the Firearm Act Cap 114 Laws of Kenya. The particulars of the offence being that: *on the 19<sup>th</sup> day of July 2008, at Gitei Village Kipiriri in Nyandarua District within Central Province, jointly without reasonable excuse had in their possession a Sterling Sub-Machine Gun Serial Number KR 9048 and a Smith & Wesson Pistol Serial Number AFL 4024 without a Firearm Certificate in force at that time.*

In Count IV, the two Appellants were charged with the offence of **Being in Possession of Ammunitions without a Firearm Certificate** contrary to **Section 4(2) (a)** of the Firearm Act Cap 114 Laws of Kenya. The particulars of the offence being that: *on the 19<sup>th</sup> day of July 2008, at Gitei Village Kipiriri in Nyandarua District within Central Province, jointly without reasonable excuse had in their possession 23 rounds of .38 special ammunitions without a Firearm Certificate in Force at that time.*

In Count V, the 1<sup>st</sup> Appellant was charged with the offence of **Having Suspected Stolen Property** contrary to **Section 323** of the **Penal Code**. The particulars of the offence are that *on the 19<sup>th</sup> day of July, 2008 at Gitei Village Kipiriri in Nyandarua District within Central Province, having been detained by No.39190 Inspector Philemon Lagat, No.53307 Sergeant Boniface Musau and No.38854 Police Constable Peter Mbuvi, Police Officers as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code, had in his possession a mobile phone make Vodafone Serial Number 357308013118324 reasonably suspected to have been stolen or unlawfully obtained.*

In Count VI, the 2<sup>nd</sup> Appellant was charged with the offence of **Having Suspected Stolen Property** contrary to **Section 323** of the **Penal Code**. The particulars of the offence are that: *On the 19<sup>th</sup> day of July, 2008 at Gitei Village Kipiriri Nyandarua District, within Central Province having been detained by No.39190 Inspector Philemon Lagat, No.53307 Sergeant Boniface Musau and No.38854 Police Constable Peter Mbuvi Police Officers as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code, had in his possession two mobile phones make Signature Serial Number 350077211241793 and Nokia 3310 Serial Number 351534008714530 reasonably suspected to have been stolen or unlawfully obtained.*

At the close of the trial, the Appellants were acquitted in Counts 1, V and VI but were convicted in Counts II, III and IV. They were each sentenced to serve 10 years, 5 years and 5 years in Counts II, III and IV respectively. The Appellants were aggrieved, hence they each filed an appeal. Those appeals were ordered consolidated. On appeal, Peter Ngige Weru alias Gathwara, the 1<sup>st</sup> Appellant put forward the following grounds in his Petition:

**“1. That I pleaded not guilty to the charge.**

**2. The Learned Magistrate erred in law in facts that items stated in Count 1 were intended to commit a felony namely: Robbery and no evidence tendered or called by the Prosecution in support of the charge, that was intended to commit a robbery act, and order for amendment of the charge under Section 214 of the Criminal Procedure Code Cap 75.**

**3. The Learned Magistrate erred in law and in facts that the recovered bag and exhibited was jointly**

***in the possession of the accused and no evidence called by the Prosecution to prove how the accused could be found in possession of the said bag i.e. who had the bag between the two accused and found that the owner of the house in which it was found in could be as well in possession as well as the deceased husband to P.W.***

***4. The Learned Magistrate erred in law and in facts in convicting on evidence that was not only contradicting but also inconsistent where Prosecution Witnesses stated each accused had in his possession of each own bag and only one that was his exhibited and explanation by the Prosecution as to whereabouts of the other.***

***5. The Learned Magistrate erred in law and in facts in failing to find the explanation offered by the Appellant in his defence as to who he came into being in the alleged house firearms were found and either give a cogent reason as to why defence cannot stand or involve law of joint offender and found the owner of the house, reliable of the possession despite the fact she was a wife of the deceased.***

***6. Since I cannot remember all that was told during trial, I pray to be furnished with proceedings to enable me raise more reasonable grounds.***

***7. The Learned Magistrate erred in law not to enable finding that there was no explanation offered by the prosecution in not abiding with the requirement by Section 72 (3) (b) of the Constitution, than that were manufacturing incriminating evidence against the Appellant.”***

Paul Ndegwa Mwangi alias Mathenge the 2<sup>nd</sup> Appellant, put forward the following grounds:

***“1. That I pleaded not guilty.***

***2. That the Learned Trial Magistrate erred in law and in facts in convicting me relying on the exhibit which the recovery was not proved beyond reasonable doubt to know the person who was really in physical possession of the same, and contradictions and inconsistent evidence by Prosecution of their whereabouts.***

***3. That the Learned Trial Magistrate erred in law and in facts in rejecting my defence as to how I was found in the alleged house where the firearms were recovered without giving a reference or cogent reasons hence defiling natural justice.”***

When the appeals came up for hearing, the 1<sup>st</sup> Appellant made oral submissions while the 2<sup>nd</sup> Appellant relied on written submissions. Miss Maundu, Learned State Counsel strenuously opposed the appeals.

Before delving deeper into the merits or otherwise of the appeal, we wish to set out in brief the case that was before the trial court. The Prosecution summoned the evidence of ten (10) witnesses in support of its case. The case started with the testimonies of Catherine Wanjiku Mwangi (P.W.1) and Winfred Wamucii Ngige (P.W.2). It is the evidence of P.W.1 and P.W.2 that the late Julius Gathemia Ngotho left his house on 18<sup>th</sup> July 2008, at 7.00 A.M. and came back at 9.00 P.M. in the company of the Appellants. The deceased is said to have come with a bag. P.W.1, the deceased’s widow served the trio dinner as P.W.2 returned to bed to sleep. P.W.1 returned to bed in the main house but was joined by her late husband at 2.00 A.M. It is the evidence of P.W.1 and P.W.2 that when they woke up in the morning of 19<sup>th</sup> July 2008, they found the Appellants seated in the kitchen at the fireplace warming themselves. P.W.1 prepared tea while P.W.2 was sent to purchase cigarettes in the local trading centre called ‘*Soweto*’. The late Julius Gathemia Ngotho decided to go for the cigarettes himself when P.W.2 failed to get some. It is said Police Officers stormed the house while the late Julius Gathemia Ngotho was away and arrested the Appellants. The police recovered a bag which was said to be in possession of the Appellants. Inside the aforesaid bag were two guns, police uniforms and ammunitions. P.W.1 and P.W.2 said they were rescued by Police Officers when villagers who had gathered in their homestead threatened to lynch them. The duo

were taken to Kipipiri Police Station. The late Julius Gathemia Ngotho was arrested and lynched by members of the public. It is said the members of the public went and destroyed the home of the deceased blaming the family for being associated with series of robberies within the neighbourhood. P.C. Peter Mburu (P.W.3), I.P. Philemon Langat (P.W.4) and Sgt. Boniface Musau (P.W.10) told the trial court that police got a tip off from police informers that suspected armed robbers had sought refuge in the home of the late Julius Gathemia. The trio confirmed that acting on the information they stormed the deceased's home where they met P.W.1 and P.W.2 and arrested the Appellants. A bag was recovered next to the Appellants who were warming themselves at the fireplace. Inside the bag were a pistol, torch, police belt with crescent, two blue police shirts, one grey coat, 26 rounds of ammunition and 23 special 38mm rounds of ammunition. The aforesaid items were produced as exhibits in evidence. Johnstone Mungeli (P.W.5) a firearm expert examined the pistol and ammunitions and found them to be a firearm and ammunitions within the meaning attached to by the Firearm Act. P.C. Peter Mwaniki (P.W.6) told the trial court that on 4<sup>th</sup> July 2010 between 8.30 p.m. and 9.00 p.m. he was attacked by four people while on his way to Nyeri Police Station and in the process he lost the pistol which was assigned to him. Later the pistol was recovered in the bag said to have been found lying next to the Appellants. P.W.6 attended an Identification Parade mounted by C.I.P. Mathenge (P.W.8) whereupon he identified the Appellants to be part of the gang who had attacked and robbed him of his gun.

When placed on their defence, the Appellants each denied committing the offence. The first appellant raised the defence of alibi. He claimed he was in prison when the alleged offences were committed. Both accused persons claimed that they had visited the home of the late Julius Gathemia Ngotho to buy potatoes and that is when they were arrested.

The Learned Senior Principal Magistrate considered the evidence from both sides and came to the conclusion that the 1<sup>st</sup> Appellant had established his defence of alibi. He also found that the conditions for identification were not favourable for a positive identification free from error. The Learned Trial Senior Principal Magistrate formed the opinion that the Appellants together with their host, the late Julius Gathemia Ngotho had the bag which had the pistol, ammunition and police uniform. The Appellants' defence that they had gone to purchase potatoes from the deceased was rejected.

Having given a brief summary of the case that was before the trial court, we now wish to consider the merits of the appeal. We have already enumerated the grounds of appeal relied by the Appellants. We have carefully considered those grounds and we think there is basically one main ground of appeal. The Appellants are merely saying that they were not found in possession of the bag which had the pistols, ammunitions and police uniforms. The duo stated that the bag belonged to the deceased. We have critically looked at the evidence of P.W.1. She stated that the Appellants each had a bag. She said she left her husband with the duo at the kitchen. In the morning P.W.1 said she found the Appellants still at the kitchen with their bags. P.W.1 said the police arrived, arrested the accused before searching for the bags. P.W.1 admitted she had potatoes which she harvested and sold to other people. In cross-examination, P.W.1 stated that the bags were recovered from her kitchen while the appellants were already outside the house and handcuffed. P.W.3 said he found the Appellants in the kitchen with a bag next to them P.W.4 and P.W.6 gave evidence similar to that of P.W.3. According to the evidence of P.W.4, it is clear that the Appellants told him they had gone to purchase potatoes from the deceased's home. There is no doubt that the pistols, ammunitions and police uniforms were found in the kitchen of P.W.1 where the Appellants were locked up. The duo were arrested and handcuffed and the bag containing the aforesaid items was recovered while the Appellants were outside that kitchen. They have alleged that the bag belonged to the late Julius Gathemia Ngotho. In our minds, we have entertained the notion that it is possible that the bag belonged to the deceased. We have also entertained the notion that the Appellants could have been businessmen who had gone to purchase potatoes from the late Julius Gathemia Ngotho. It is clear from the evidence of P.W.4 that the Appellants had told him that they had gone to buy potatoes. We are enjoined by law to give the benefit of doubt to the Appellants which we hereby do. We allow the appeals by quashing the conviction and by setting aside the sentences. The Appellants are hereby set free forthwith unless lawfully held.

**Dated and delivered this 8<sup>th</sup> day of June 2012.**

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**J. K. SERGON**  
**JUDGE**

.....  
**J. WAKIAGA**  
**JUDGE**