**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 285 of 2006**

**DANIEL NJOROGE MBUGUA ……......…….............. APPELLANT**

**- AND -**

**REPUBLIC ……….............................………..……RESPONDENT**

***(An appeal from the judgment of Principal Magistrate Mrs. Murage dated 7th June 2006 in Criminal Case No. 20 of 2005 at Kikuyu Law Courts)***

**JUDGEMENT**

*Daniel Njoroge Mbugua*, the appellant herein, faced a charge of robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant jointly with others not before the Court and while armed with an offensive weapon, namely a toy pistol, on 5th June, 2005 at Kerwa Village in Kiambu District within central Province, robbed *George Gaitho Kung'u* of cash, in the sum of Kshs.2000/=, and at or immediately before or immediately after the time of such robbery, threatened to use actual violence upon the said *George Gaitho Kung'u.*

*Joseph Kariuki Mungai* (PW1) testified that on 5th June, 2005 at 8.15 a.m. he was on duty in his office, when two men entered and said they had come to purchase milk. But as soon as the two were in the office, they whipped out pistols, and commanded those in the office to lie down. They demanded money with menaces, and grabbed Kshs.2000/= and took off. PW1 and others in the office raised alarm by screaming, and gave chase after the thieves. They caught up with one of the thieves, and arrested him, while the other thief escaped. PW1 and those accompanying him recovered a pistol from the arrested man; the escaped man went with the said sum of kshs.2,000/=. The man who was arrested, in PW1's evidence, was the appellant herein; and the appellant was at the time taken up to Kerwa Police Post, and handed over.

*George Gaitho Kung'u* (PW2) testified that he was a clerk with Limuru Dairy. On the material date, at 8.15 a.m. two men came into PW2's office, saying they wanted to buy milk. When PW2 went to call his colleague the alleged customers followed him; and soon whipped out a pistol, demanded money with menaces, and ordered the occupants of the office to lie down. PW2 reacted by picking up a hoe, and hitting the thug who stood next to him; and at that moment the other thug ran away, with shs.2000/= grabbed from the office. PW2 managed to arrest the injured robber.

On cross-examination, PW2 said he had not met the appellant herein before, and, at the time he arrested the appellant, the appellant was holding something which looked like a pistol. Pw2 testified that the alarm raised at the material time, brought out villagers, who threatened to lynch the appellant herein.

Pw4, *Police Constable Isaac Ngugi* of Kikuyu Police Station testified that he and *P. C. Odera* and *A. P. C. Abdi* and others had on the material date, at 10.00 a.m. re-arrested the appellant herein, after receiving reports that the appellant and another while armed with a toy pistol, had committed robbery. PW4 identified the appellant and the said toy pistol in Court.

The appellant who elected to make an unsworn statement, said he had indeed gone to the dairy office to purchase milk, but he had then seen two people behind him and one of them had a gun; he said he (the appellant) was one of those ordered by the intruders to lie down. He said PW1 had a grudge with him (the appellant), and the prosecution case was a frame-up; that it was Pw1 who took the toy pistol, and then had him (appellant) taken to the Police station.

The appellant had a witness *Beatrice Wambui* (DW2), a hair-salon worker who said the appellant is her friend. She said PW2 had previously been her friend, and she had left him for the appellant herein ? and as a result Pw2 had been unhappy with the appellant. On cross-examination, DW2 said Pw2 had been her friend between 2002 to 2004, and that Pw2 was known to her as *Fred Gaitho.*

DW2 said that on the material date, 5$^{th}$ June, 2005 she was not in the company of the appellant herein, and so she would not know if on that date, the appellant was involved in a robbery.

Assessing the foregoing evidence, the learned Magistrate proceeded as follows:

"I have considered the evidence in its entirety [as well as] the lengthy submission of the accused person. More particularly I have considered the authorities cited by the accused.

"On the issue of identification, [the] accused does not deny having been at the scene. Pw1 and PW2 testified that they arrested [the] accused after the robbery, as he tried to run away. PW2 even hit him before arresting him. [Although] [the] accused has stated that PW2 had a grudge with him ..., [no] grudge or malice was alleged on [the] part of Pw1. [The] accused called DW2 to confirm that she was Pw2's girlfriend. She was however, not at the scene at the time of the robbery.

"Arising from the above, I find that whether [the] accused had shared a girlfriend with PW2 or not does not challenge the prosecution case. The details of [the] robbery were vividly recounted by PW1 and PW2. It would be too much of a coincidence for [the] accused to have been at the scene of robbery where his enemy (PW2) was, so that PW2 could frame him. And even if that was the case, the evidence of PW1 is not challenged. DW2 is [the] accused's girlfriend and cannot be considered an independent witness. She was not at the scene during the robbery .... PW1 and PW2 testified that they did not know [the] accused before and if he had escaped, they would not have been able to identify him".

The learned Magistrate found the evidence against the appellant herein overwhelming, and his defence unconvincing. She dismissed the defence as untrue, and found the appellant herein guilty as charged, and sentenced him to death as provided by law.

In his grounds of appeal, the appellant contended that he had not been positively identified at the *locus in quo*; that certain vital evidence was not called by the prosecution; that he had been convicted on inconclusive circumstantial evidence; that the charge brought against him had not been adequately proved; that the trial Court had erred in rejecting his defence.

The appellant came before this Court with written submissions, to which was appended a document bearing the heading, "Amended Grounds of Appeal"; and in these new grounds the appellant contended that the prosecution case had been "riddled with contradictions"; and that a certain prosecution witness had testified without the witness-oath being administered to him.

When he made his oral submission, the appellant confined himself to only some of his grounds of appeal. He said there was contradiction in the testimonies of PW1 and PW2; that he had a grudge with PW2, and PW2 used PW1 to give false evidence.

Learned counsel *Mrs. Gakobo,* for the respondent, contested the appeal, and submitted that there was sufficient evidence to support the conviction.

Counsel urged that the time of day when the robbery incident took place, was conducive to positive identification, and there was evidence on record showing that the appellant had been one of the robbers; the appellant had a toy-pistol in his possession; and he was arrested within the vicinity of the *locus in quo.* The circumstances in which the arrest took place, counsel submitted, put the appellant in a spot and identified him as one of the robbers.

Counsel contested the claim by the appellant that there was a grudge between him and PW2; from the evidence of both PW1 and PW2, neither of these two had ever met the appellant before. Counsel urged that there was no reason for the two key witnesses to fabricate evidence against the appellant.

We have carefully considered all the evidence, as well as the manner in which the learned Magistrate had analysed the same before finding the appellant guilty and convicting him accordingly. The appellant's purpose in calling DW2 was to show that a deep-seated grudge based on lost affections of a woman, marked the relationship between Pw2 and the appellant; and that, therefore, the whole case was a charade orchestrated by PW2 for the purpose of settling scores with the appellant.

That purpose, in our assessment, fails; for it was clear that DW2 did not even know the names of PW2 very well, and her evidence was in most respects, strategic, rather than factual. Besides, we find the evidence of both PW1 and PW2 believable: they did not know the appellant, and had not met the appellant before.

We are not able to believe the appellant's evidence that he was an innocent milk-purchaser who was coming to the dairy all alone, and just happened to walk into gangsters who were going to rob him at the dairy. From more credible evidence, only two men from outside came to PW1 and PW2 at the dairy; one of them took off with grabbed money; the other, being the appellant herein, was disabled with a hit of the hoe, and then arrested; and when arrested, the appellant had an offensive and possibly dangerous weapon in the shape of a pistol-like gadget.

This whole scenario points to but one conclusion, in our assessment: the appellant went up to the dairy offices early in the morning, as a robber; and that is why he was brandishing a toy-pistol.

We dismiss the appeal; uphold the conviction; affirm sentence.

Orders accordingly.

DATED and DELIVERED this 9th day of February, 2009.

**J. B. OJWANG G. A. DULU**

**JUDGE JUDGE**

Coram: Ojwang & Dulu, JJ.

Court clerk: Huka & Erick

For the Respondent: Mrs. Gakobo

Appellant in person