



1. Criminal Law Division
2. Criminal Appeal – Ang'awa, Mugo jj
3. Subject of subordinate court case.

A) Robbery with violence contrary to **Section 296(2)** of the Penal Code.

**Particulars of offence**

*On the 2<sup>nd</sup> day of December, 2005 at Cherote in Kericho District within the Rift Valley Province jointly with others not before Court while armed with dangerous weapons namely pistols robbed Stephen Njuguna Njenga of 750 cartons of Supermatch Kings Cigarettes, 10 cartons of supermatch menthol cigarettes and 83 cartons of rockets cigarettes all valued at Kshs. 8,720,000/= and a motor vehicle registration number KAK 459S Canter Lorry valued at Kshs. 2 million all valued at Kshs. 10,720,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Stephen Njuguna Njenga*

**Count II**

Robbery with violence contrary to **Section 296(2)** of the Penal Code

**Particulars of offence**

*On 2<sup>nd</sup> day of December, 2008 at Cherote in Kericho District within the Rift Valley Province jointly with others not before the Court while armed with dangerous weapons namely pistols robbed Charles Mwenda Kiruja of one Nokia mobile phone 1100 valued at Kshs. 4,500/= and cash Kshs. 3,500/= all valued at Kshs. 8,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Charles Mwenda Kiruja.*

- b) Plea not guilty entered to Count I and Count II.
- c) Trial 13<sup>th</sup> December, 2005 to 3<sup>rd</sup> April, 2006.
- d) Judgment by lower court 27<sup>th</sup> April, 2006.
- e) Found appellant guilty as charged.
- f) Sentence Death

**4. Appeal against Sentence and conviction**

- a) Delay caused due to issue as to whether appeal be heard by one judge or two judges.
- b) Appeal heard by two judges on 13<sup>th</sup> October, 2009
- c) **Petition of appeal**
  - i) Trial magistrate wrongly analyzed evidence and arrived at wrong conviction
  - ii) Facts did not support charge.
  - iii) Inconsistent evidence contradiction to evidence.
  - iv) Case not proved beyond any reasonable doubt.
  - v) No parade forms produced as exhibits to prove identification parade.
  - vi) PW2 and PW5 did not attend any identification parade.
  - vii) Defence evidence ignored by trial magistrate.
  - viii) Conviction made against appellant.
  - ix) Sentence imposed a nullity.

**5. Arguments in Appeal**

**By appellant**

- a) Issue of language used.
- b) Issue of identification parade
- c) Alibi evidence given by appellant was never discharged.

**By the state**

- a) Language used indicated.
- b) Appellant caught red handed and rescued from mob justice.

**6. Held**

- a) Sufficient evidence to convict accused with offence.
- b) Chain of events not broken.
- c) Appellant dismissed on both conviction and sentence.
- d) Sentence to read :- Counts one death.

Count two – to remain in abeyance.

**7. Case Law**

**By Appellant**

- i) **Joseph Maina Gicheru V R**  
Cr. Appeal 175/05
- ii) **George Weru Wachira V R**

Cr. Appeal 219/05

Kasango J

Makhandia J

(22.5.08)

By State — Nil

**8. Advocates**

T.M.O. Nyaingiri advocate instructed by M/S Nyaingiri & Co. advocates for the Appellant – present

R.K. Koech Senior State Counsel instructed by the Attorney General for the Respondent - present

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO**

Criminal Appeal 16 of 2007

**PETER MAINA MACHARIA. .... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the conviction and sentence imposed by K. Mogambi Esq  
Senior Resident Magistrate, Kericho in Principal Magistrate Criminal Case 2301/2003  
on the 16<sup>th</sup> March, 2007)*

**JUDGMENT**

**I: Procedure**

1. The delay in hearing of this appeal arise due to there being visiting judges to this station at Kericho and later a Resident Judge and thus the law which did not permit the hearing of capital offence cases and or any criminal appeals by one judge without leave of the Hon. Chief Justice.
2. The appellant was able to convince the Resident Judge that he was permitted to hear an appeal alone. By the time the appeal was heard, the Hon. the Chief Justice appointed a two bench to hear the appeals at the High Court at Kericho.

## **II: Background**

3. The Appellant Peter Maina Macharia was charged in the subordinate courts with two counts of

Robbery with violence, contrary to **Section 296(2)** of the Penal Code.

The particular of offence in Count I being;

*On the 2<sup>nd</sup> day of December, 2005 at Cherote in Kericho District within the Rift Valley Province jointly with others not before Court while armed with dangerous weapons, namely pistols robbed Stephen Njuguna Njenga of 750 cartons of Supermatch Kings Cigarettes, 10 cartons of supermatch menthol cigarettes and 83 cartons of rocket cigarettes all valued at Kshs. 8,720,000/= and a motor vehicle registration number KAK 459S Canter Lorry valued at Kshs. 2 million all valued at Kshs. 10,720,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Stephen Njuguna Njenga*

4. The particulars of offence to the second Count of Robbery with violence contrary to **Section 296(2)** being;

*On 2<sup>nd</sup> day of December, 2008 at Cherote in Kericho District within the Rift Valley Province jointly with others not before the Court, while armed with dangerous weapons namely pistols robbed Charles Mwenda Kiruja of one Nokia mobile phone 1100 valued at Kshs. 4,500/= and cash Kshs. 3,500/= all valued at Kshs. 8,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Charles Mwenda Kiruja.*

5. The Appellant pleaded not guilty to both counts. His trial from plea on 13<sup>th</sup> December, 2005 was finalized on 3<sup>rd</sup> April, 2006. The trial magistrate found the appellant guilty as charged and convicted him upon the two counts.

6. The appellant was sentenced to death.
7. Being dissatisfied with the conviction and sentence of the subordinate court he appealed to this High Court by way of a Petition of Appeal.

The grounds being;

- i) **That the trial magistrate wrongly analyzed the evidence and arrived at the wrong conviction of the case.**
- ii) **The facts before the subordinate court did not support the charge.**
- iii) **The evidence was inconsistent and contradictory.**
- iv) **The case was not proved beyond any reasonable doubt.**

### **III: Appeal**

8. The advocate for the appellant emphasized in his arguments that the language used at the trial was not indicated and therefore the appellant should be acquitted.
9. The issue of identification parade conducted upon the appellant was questioned with PW2 and PW5 never attending the parade nor was there any identification parade form produced as exhibits before court when the parade was conducted. The appellant had his head bandaged whilst the other parade members had no bandage.
10. The appellant is said to have had an alibi that was not considered nor discharged.
11. In reply, the state counsel pointed out that the language used in the

proceedings was indicated. In this case there was sufficient evidence to convict the appellant as he had been caught red handed and rescued mob justice from members of the public.

12. The advocate for the appellant relied on the case law from the High Court of Kenya at Nyeri being;

**Joseph Maina Gicheru V R**  
**Cr. Appeal 175/03**  
**consolidated with**  
**George Weru Wachira V R**  
**Cr. Appeal 219/05**  
**Kasango J**  
**and Makhandia J**

where the issues of language used and the issue of identification parade was raised.

#### **IV: Background**

13. A brief background of the facts of this case is that there were three canter lorries that was transporting goods being cigarettes from a Cigarette Manufacturers to its various station in Kenya within the Western region of Eldoret, Kisumu, Kakamega and Kericho.
14. The motor vehicle lorry registration KAK 459S carried its goods to Kericho on the material day of 2<sup>nd</sup> December, 2005. The vehicle left Kericho but not very long and after a few distance on the highway there came a white saloon vehicle that intercepted the canter lorry. They were forced to go into a side road where the driver (*and second complainant in the 2<sup>nd</sup> count*) was robbed of his moneys, mobile phones and placed in the saloon vehicle. The turn boy loader was left in the lorry.
15. Members of public noting what was going on raised an alarm and

began screaming. The saloon car speed off with the driver. It could not be stopped because the occupants had guns/pistols that they used to threaten them.

16. The loader was left behind with one of the robbers who had taken control of the lorry as a driver. On seeing the mob he got off the vehicle and ran into the tea plantation but soon came out where the public beat him up together with the loader. The loader managed to persuade the public he was no part of the robbers' team but he sustained some injuries. The police came and apprehended the accused/appellant.
17. Though the appellant talked of an identification parade through his advocate none of this was relied on by the prosecution.
18. The appellant stated he was a by passer. He saw many people gather around a lorry. He spoke Kiswahili and was able to enquire what was going on. He was beaten up for no good reasons. The trail magistrate did not believe this evidence and neither did the state counsel who argued that the appellant had been caught immediately at the scene.

## **V: Opinion**

19. The evidence before the subordinate courts was direct. The appellant was one of the robbers who robbed the complainant of the motor vehicle canter lorry. His role was a driver and he drove the vehicle after commanding it into a side road. If an alarm had not been raised, the mission of the plan of robbery would have succeeded.
20. The alarm was raised and the appellant was not able to escape. He was apprehended and beaten by members of public.

21. His advocate argued on the issue of alibi evidence but there is no such facts from the appellant to indicate that he raised this in his evidence.
22. The evidence before court was direct. We would hold that the findings on conviction is correct. The appeal against conviction is hereby dismissed.
23. The appeal against sentence would remain as it is but would have been recorded as follows;

**Count No. I - Death**

The sentence against Count II actually should read at abeyance or suspended. The reasons for this is that *“a person cannot be hanged more than once”*

In the case law of

**Kennedy Maina**

**v**

**Republic**

**(Cr.A. 14/05) Nakuru**

**(Tunoi, Bosire, Aluoch JJa)**

The judges of appeal stated

***“The proper approach the [trial magistrate] should have adopted was to sentence the appellant to death in the first count and either order any other sentence to be in abeyance or not sentence him or her at all”***

24. The orders of the court is that the appeal is dismissed on both conviction and sentence. The 2<sup>nd</sup> Count is held at abeyance.

**DATED** this 3<sup>rd</sup> day of December, 2009 at **KERICHO**

.....  
**M.A. ANG'AWA**  
**JUDGE**

.....  
**M.G. MUGO**  
**JUDGE**

T.M.O. Nyaingiri advocate instructed by M/S Nyaingiri & Co. advocates for the Appellant – present  
R.K. Koech Senior State Counsel instructed by the Attorney General for the Respondent - present