



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO  
Criminal Appeal 57 of 2005**

1. Criminal Law
2. Criminal Appeal – Two judge bench Ang’awa ,Mugo JJ
3. Subject of subordinate court case.

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

**Particulars of Count I**

*On the 4<sup>th</sup> June, 2003 in Bureti District of the Rift Valley Province jointly with others not before court while armed with dangerous weapons namely two home made pistols and a panga robbed Henry Kipkeoch Thomason of Kshs. 22,000/= and or immediately before and immediately after the time of such robbery used actual violence to the said Henry Kipkeoch Thomason*

**Particulars of Count II**

*On the 4<sup>th</sup> June, 2003 at Monire Estate in Bureti District within Rift Valley Province jointly with others not before court while armed with dangerous weapons namely, two home made pistol and panga robbed John Masati Achoki of Kshs. 600/=, a national identity card, electors card and NSSF card and at or immediately before or immediately after the time of such robbery used actual violence to the said John Masati Achoki*

**Particulars of Count III**

*On 4<sup>th</sup> June, 2003 at Monire Estate in Bureti District within Rift Valley Province jointly with others not before court while armed with a dangerous weapon namely, two pistol and a panga robbed one Anthony Kiplangat Kirui of Kshs. 200/- an electors card and note boo, coat, half sweater, one pair of black leather shoes and a wrist watch make quarts all valued at Kshs. 2,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Anthony Kiplangat Kirui.*

**Count IV**

*Possession of fireman without a firearm certificate contrary to section 4(1) and 4 (2) b of Cap 114 Laws of Kenya.*

**Particulars of offence**

*On 4<sup>th</sup> June, 2003 at Monire Estate in Bureti District within Rift Valley Province jointly with others not before court were found in possession of two firearms namely home pistol without a firearm certificate.*

**Count V**

*Being in possession of one ammunition without a firearm without a firearm certificate contrary to section 4(1) and 4(2)(a) (b) of Cap 114 Laws of Kenya*

**Particulars of offence**

*On 4<sup>th</sup> June, 2003 at Monire Estate in Bureti District within Rift Valley Province jointly with others not before Court were found in possession of one ammunition without a firearm certificate.*

b) **Plea**

Original accused No. 1 – not guilty (*never appealed*)

Appellant No. 2, original accused No. 2 – not guilty

c) **After trial**

Appellant No. 1, original accused No.2 and original accused No. 1 respectively Found guilty and convicted on count IV and V on possession of firearm and ammunition. Acquitted on other counts.

d) Appellant original accused No. 2 only appeals against conviction and sentence of seven years imprisonment.

3. **In reply by state counsel**

Sufficient evidence to support conviction and sentence

4. **Held**

- i) Trial magistrate erred
- ii) Charge should have accused been convicted on count 1, 2 and 3.

- iii) Count IV and V integral parts of count 1, 2 and 3 same if in the alternative which is not permitted by law.
- vi) State ought to have cross petition for appellant and No. 1 original accused.

5. Case Law

a) Anjononi & others V Republic (1980) KLR 59

6. Advocate – NIL

Appellant in person

B.L. Kivihya Senior State Counsel instructed by the Attorney General for the Respondent.

STEPHEN OMONDI ..... APPELLANT

**Original Accused No. 2**

VERSUS

REPUBLIC ..... RESPONDENT

**(From the original conviction and sentence of the Principal Magistrate Court,  
A.G. Kibiru ESQ Senior Resident Magistrate in Criminal Case No. 2310/2004 at Kericho delivered on 1<sup>st</sup> July, 2005)**

**JUDGMENT**

**I: Procedure**

1. In Kenya, the State does not provide legal representation for the capital offence of Robbery with violence.
2. The appellant Stephen Omondi Ondieki was unrepresented in both courts. He was charged with another whose trial was conducted together with his, but who chose not to appeal against his conviction and sentence.
3. A total of five counts were preferred- out of these three were  
Robbery with violence contrary to **Section 296(2)** of the penal code.

The particulars of offence being

**Count I**

*On 4<sup>th</sup> June, 2003 in Bureti District of the Rift Valley Province jointly with others not before court while armed with dangerous weapons namely two home made pistol and a panga robbed Henry Kipkeoch Thomason of Kshs. 22,000/- and or immediately before and immediately after the time of such robbery used actual violence to the said Henry Kipkeoch Thomason*

**Particulars to Count II**

*On the 4<sup>th</sup> June, 2003 at Monire Estate in Bomet District within the Rift Valley Province jointly with others not before court, while armed with dangerous weapons namely two home made pistols and a panga robbed John Misati Achoki of Kshs. 600/=, a national identity card, and NSSF card and at or immediately before or immediately after the time of such robbery used actual violence to the said John Misati Achoki.*

**Particulars to Count III**

*On 4<sup>th</sup> June, 2003 at Monire Estate in Bureti District within Rift Valley Province jointly with others not before court while armed with a dangerous weapon namely, two pistol and a panga robbed one Anthony Kiplangat sum of Kshs. 200/= an electors card, a note book, coat, half sweater, one pair of black leather shoes and a wrist watch make quarts all valued at Kshs. 2,500/= and at or immediately before or after the time of such robbery used actual violence to the said Anthony Kiplangat Kirui.*

A further two counts being count IV and V were added. Namely Count IV

*Being in possession of a firearm without a firearm certificate contrary to section 4(1) and 4(2) (b) of the Cap 114 Laws of Kenya.*

Particulars of offence being

*That on the 4<sup>th</sup> June, 2003 at Monire Estate in Bureti District within Rift Valley Province jointly with others not before Court were found in possession of two firearms, namely home pistol without a firearm certificate.*

## Count V

*Being in possession of one ammunition without a fireman without a firearm certificate contrary to Section 4(1) and 4(2) (a) (b) of the Cap 114 Laws of Kenya.*

Particulars of offence being

*On 4<sup>th</sup> June, 2003 at Monire Estate in Bureti District within Rift Valley Province jointly with others not before court were found in possession of one ammunition without a firearm certificate.*

4. The appellant and his co accused in the subordinate courts pleaded not guilty to all the charges. After trial, the learned magistrate convicted them only on Count IV and V but acquitted both of them on count I, II and III. Both were sentenced to seven (7) years imprisonment on count IV and V with the sentences running concurrently on 1<sup>st</sup> July, 2005.
5. Only the original 2<sup>nd</sup> accused appealed against the sentence and conviction on 14<sup>th</sup> July, 2005. It was unclear why nothing occurred on this file for four years. The appeal was admitted to hearing on 22<sup>nd</sup> April, 2009 and heard before two judges.

## II: Appeal

6. The appellant argued in his appeal that the suspects who had been met, were never adequately identified. Evidence relied on by the witnesses was not correct to justify a conviction.
7. A brief fact of the case being, that the prosecution witness PW1 was on the evening of 4<sup>th</sup> June, 2003 at around 7.00p.m he was attacked by a group of person not less than three who robbed him of his shop takings of Kshs. 22,000/= bread and meat that he had in his pockets. He did not see his assailants.
8. At around the very same time on the same date of 4<sup>th</sup> June, 2003 PW6 was at around that 7.00p.m also attacked by at least three persons. They stole his coat that had his identity card, voting card NSSF card and 36 cycle spares together with 60/=. He was cut on the head and shoulder. He screamed for help. People came. His identity cards were later recovered and identified by him.
9. PW1 and 4 gave evidence but not the complainant in Count III, Anthony Kiplangat Kirui.
10. An hour later about 8.00 p.m a group of five persons were heard approaching the watchmen in the said vicinity with the words shoot! shoot!. Their guns pistol could not go off. They were chased and apprehended with the two appellants surrendering. The pistol was recovered. The other items such as the identification papers were recovered in the tea plantation where the appellant had been apprehended. This included the ammunition cartridge and pistol, one black shoe. A voting card of one Anthony Kiplangat, a torch was also recovered.
11. The owner of the identity card John Misati Achoki was traced to give evidence.
12. The trial magistrate could not comprehend the link of the robbery with the appellant but relied on the direct evidence before him.
13. The appellant therefore stated he was on his way walking. He was never arrested with the items before court. He prayed that the conviction and sentence be set aside.

IV: Opinion

14. The trial magistrate erred in acquitting the two accuseds and appellant in this matter. A spat of attacks was carried out to at least three persons within the vicinity. The watchmen were last to be attacked. A charge of attempted murder or attempted robbery with violence should have been preferred against the two appellants on the attack upon the watchmen.
15. The appellant and others shouted “shoot! shoot!”. They were pursued into the tea plantation, where a cutlass-panga was recovered, an identity card belonging to complainant No. 1 and other items to a complaint in Count III.
16. Items further recovered at the scene of arrest (*PW4 and PW5*) was the pistol.
17. It is wrong and in error for the prosecution to have a separate charge for count IV and V of being in possession of the gun and ammunition. It most certainly means a “double” charge. See the case law of

Anjonini & other

versus

The Republic

(1980) Kenya Law Rep 59

where the appellant was charged with Robbery with violence, then on a second count with assault. This is not permitted to be so referred unless it is a count in the alternative. It was the same violence relied on in commission of the robbery.

It is the same concept herein. We find therefore that the appellant should be found guilty and convicted with Count I and II of the charge before the subordinate court.

Count III – the complainant did not give evidence and the appellant is correctly acquitted. Count IV and V are a duplicity.

18. We find the appellant guilty on count I and II with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code.
19. The state should have cross appealed for the accused No. 1 Zacharia Ogamba Ondicho.
20. Appellant was later recognized as a miller. He was apprehended with accused No. 1. At the scene they were both beaten. A third colleague who was said to be with them was beaten to death and died.
21. The appellant was apprehended and lynched by the mob. We do not believe that he may have been an innocent bystander.
22. The appellants appeal is dismissed. The appeal sentence is set aside and substituted under Section 354(3) (a) iii to:-

Count I – Death

Count II – Death

Count III – Dismissed

Count IV and V are a duplicity and is quashed and set aside.

23. The appellant is to serve and be condemned to death on the 1<sup>st</sup> count. The sentence on the second count will be suspended and left pending.

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

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**M.A. ANG'AWA**

**JUDGE**

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**M.G. MUGO**

**JUDGE**

Appellant in person

B.L. Kivihya Senior State Counsel instructed by the Attorney General for the Respondent