



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 34, 35 & 37 of 2006**

**FREDRICK KINUTHIA WAMBUI ..... 1<sup>ST</sup> APPELLANT**

**PETER MBURU NJERI ..... 2<sup>ND</sup> APPELLANT**

**GODFREY GICHIRA NJOKI ..... 3<sup>RD</sup> APPELLANT**

**BONIFACE NJOROGE WANJIRU ..... 4<sup>TH</sup> APPELLANT**

**-AND-**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the Judgment of Senior Resident Magistrate L. Gicheha dated 25<sup>th</sup> January, 2006 in Criminal Case No. 8469 of 2003 at Thika Law Courts)***

**JUDGMENT OF THE COURT**

The four appellants herein were jointly charged with the offence of robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellants jointly with others not before the Court, on 27<sup>th</sup> June, 2003 at Kagunduini Trading Centre in Maragua District, Central Province, robbed **Joseph Mucheru Mwangi** of cash in the sum of Kshs.20,000/=, and at, or immediately after the time of such robbery, used actual violence upon the said **Joseph Mucheru Mwangi**.

PW1, **Joseph Mucheru Mwangi** who resides at Kagunduini, testified that on 27<sup>th</sup> June, 2003 at 1.00 pm he had 20,000/= which he was to use for purchasing cattle for slaughter. He left the butchery to access the Kagunduini cattle market through a rear door and passage. Just before he got into the market, PW1 met the four appellants herein and two others who were not before the trial Court. The 1<sup>st</sup> appellant, who PW1 knew as Kinuthia, held him by the neck, while the 4<sup>th</sup> appellant herein brandished a knife. The group of attackers robbed PW1 of Kshs.20,000/=; and the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants were the ones who physically extracted the money from PW1's pockets. After robbing PW1 of the money, the foursome gang ran away. Two businessmen, **Mwangi** and **Muiruri** saw the appellants herein decamp, and they rushed to the *locus in quo*, to assist PW1. In the meantime, the attackers fled.

PW1 reported the matter to the local Chief, who asked him to report to the Police station. On the following day PW1 reported the matter at Kabati Police Station; but in the meantime, on the evening following the report of the robbery to the Chief, the four appellants herein had come to PW1's house. This was at 8.00 pm, and PW1 was at home. PW1's wife, who was the first to see the four, raised alarm. As the four were making threats against PW1, members of the public arrived, and the four then fled.

After the report to Kabati Police Station was made, the appellants herein were arrested. The Police did not, however, recover any money. PW1 said he knew the appellants herein by appearance and by their names; they live in Kagunduini. PW1 was not present when the four were arrested by Police officers. He learned of the arrest from his employer, who had received the information from the Police.

On cross-examination by 1<sup>st</sup> appellant, PW1 said the attack on him had taken place in broad daylight, and he had clearly seen the attackers.

On cross-examination by 2<sup>nd</sup> appellant, PW1 said he well knew this appellant; in PW1's words:

"I know you from seeing you. You are dark, short and you limp. [After the robbery] you ran away. I saw you, it was daytime. There are witnesses ....."

On cross-examination by 3<sup>rd</sup> appellant herein, PW1 confirmed he knew this appellant. PW1 who had been in his house at 8.00 pm on the day of the attack, said he had recognized the voice of 3<sup>rd</sup> appellant when the gang which had earlier robbed him, now issued threats to kill him, and demanded he should relocate from his current home.

On cross-examination by 4<sup>th</sup> appellant, PW1 confirmed that it was this appellant who carried the knife, at the time the robbery took place. It was this appellant who had grabbed PW1 and handed him over to 1<sup>st</sup> appellant. To events at the scene, there were witnesses: **Gichuhi**, who was PW1's employer, and other businessmen. PW1 said he had seen 4<sup>th</sup> appellant at Kagunduini over a long time, and he would readily recognize this appellant. PW1 confirmed that 4<sup>th</sup> appellant was one of those who had gone to his house at 8.00 pm on the day the robbery had taken place, for the purpose of intimidating him.

PW2, **Elijah Kariuki** who is a cattle merchant, testified that he was at Kagunduini Market on 27<sup>th</sup> June, 2003. This was Friday, a market-day. As he stood behind the butchery, at 12.00 noon, one **Ibrahim** called him to come and give help, as PW1 was being attacked. PW2 came along, and behind a corner plot, he found PW1 surrounded by a group of men. When PW2 sought to know what was happening, 2<sup>nd</sup> appellant demanded he should stop asking questions. The attackers were holding PW1's jacket; but they took off as members of the public approached the **locus in quo**. PW1 said the attackers had robbed him of money which he was going to use at the cattle-market. PW2 knew the appellants herein. He went and called PW1's employer who came to the scene.

On cross-examination, PW2 said he had done business in cattle at Kagunduini Market for long, and during that period of time, he came to know 1<sup>st</sup> appellant herein. He also came to know 2<sup>nd</sup> appellant, and he had been shocked to see 2<sup>nd</sup> appellant pick up a stone-missile for the purpose of casting it at him (PW2), at the material time. The 2<sup>nd</sup> appellant had been reluctant to explain what he and his gang were doing to PW1 at the material time; but PW2 had noticed that PW1 was trembling under the gang attack. To cross-examination by 3<sup>rd</sup> appellant, PW2 said this particular appellant was holding PW1's jacket, when he (PW2) witnessed the attack. To cross-examination by 4<sup>th</sup> appellant, PW2 said he did see this appellant holding PW1.

PW3, **Gichuhi Muiruri**, a businessman at Kagunduini, was at the market on 27<sup>th</sup> June, 2003 at 9.00 am. He gave PW1 Kshs.20,000 for the purchase of cattle. He had been away for some time, and returned to Kagunduini at 2.00 pm, only to be told that the money he left with PW1 had been stolen. PW1 gave him (PW3) the names of the four suspects, and told him there were two other suspects as well. PW3 went with PW1 to the Chief, to make a report. At night, on the same day, PW1's wife had come to PW3, to report that there were people in their house threatening her husband with death. PW3 dashed to the scene, but found that they had fled. PW1 and PW3 later reported the incidents at Kabati Police Station.

PW4, Police Force No. 49729 **Sgt. Steve Guthatie** had been attached to Kabati Police Station at the material time. He and his fellow-officers had been on patrol at about 3.15 a.m. on 28<sup>th</sup> June, 2003 when

they received information that a wanted suspect was sleeping in a certain house in the Kihunduru area. When they identified the said house, they found five men sleeping in there. As these men were not able to answer certain questions, they were arrested and taken to Kabati Police Station. On the following morning, the complainant came to the Police Station, and identified four of the said men, as the ones who had stolen Kshs.20,000/= from him just the previous day. PW4 charged the four persons with the offence. The four were known to the complainant, and the complainant had mentioned their names prior to the arrest. PW4 released the fifth person, whose name had not been mentioned.

PW5, **Ephraim Muriu Wandaka**, a cattle and goats merchant, testified that he was at Kagunduini on the material date at 1.00 pm, when PW1 had been attacked by robbers. He remembered seeing 4<sup>th</sup> appellant herein, among those said to have attacked PW1.

After the trial Court put the appellants herein to their defence, they opted to give unsworn defence. The 1<sup>st</sup> appellant said he was a hawker at Kagunduini, and had been arrested on 23<sup>th</sup> September, 2004 [?] though he did not know for what reason. The 2<sup>nd</sup> appellant made a similar statement, as did also 3<sup>rd</sup> and 4<sup>th</sup> appellants.

The trial Court found that the robbers had used violence to obtain money from the complainant, and that their statements had been entirely evasive as regards the events of the material date, events which had been the subject of reliable evidence by prosecution witnesses. The appellants were found guilty, convicted, and sentenced to the mandatory death penalty.

In their memoranda of appeal the appellants have each contested the evidence of identification and recognition, which led to their conviction; and contended that proof beyond reasonable doubt had not been achieved.

The appellants put forward their cases mostly by written submissions, which they also attempted to urge by oral submissions.

The appellants contend that there were no first reports in which they had been described, such as would form a basis for reliable identification. They urged that this was a frame-up case against them, and that they had not been linked to the robbery incident. The 3<sup>rd</sup> appellant contended that the charge against him was imaginary; in his words: *“I don’t know of a thief who would steal from one he knows, and with whom [he lives in the same place].”*

Learned Counsel **Mr. Makura** submitted that conviction had been based on identification by recognition. The offence had taken place in broad daylight, at about 1.00 pm, and the complainant had known all the appellants prior to the commission of the offence. PW1 had known the appellants by their names, and he lived with them at Kagunduini, in Maragua District. PW1’s testimony, counsel urged, had been corroborated by that of PW2 who also knew all the appellants. Further corroboration, counsel urged, came from PW3 who had given the money which was stolen from PW1, and from PW4 who had arrested the appellants as they hid in a certain house; and upon arrest they were positively identified by the complainant as having been the robbers. There had been further corroboration from PW5, and, counsel urged, proof-beyond-reasonable had in the circumstances, been achieved. Counsel noted that the four appellants when put to their defence, denied committing the offence; and the learned Magistrate after considering their defences found the same not to shake the prosecution case. **Mr. Makura** urged that the conviction entered was safe and should be upheld, the appeal be dismissed, the sentences be confirmed.

That several robbers attacked and stole from the complainant, on the material date, is not in doubt. The theft took place in board daylight, and the complainant has said he very well observed the robbers at the material time. The complainant says he recognized these robbers, who are known to him by appearance and by names, as they live and work in one locality, Kagunduini.

The complainant’s testimony is well corroborated by that of other witnesses, some of whom (particularly PW2) do, very well, know the appellants as residents of Kagunduini. PW2 had an

opportunity to observe the attack and, indeed, to talk to one of those executing the robbery-attack. He observed these attackers and gave testimony on assault-weapons then being wielded by the attackers.

There is more corroboration in PW4 arresting five suspects, and out of them, the complainant picking out the four who had attacked and robbed him of money in broad daylight. When he picked out the four, the complainant made no mention of the fifth who, consequently, was released by PW4.

The scenario of fact emerging is, in our opinion, far from a laboured one, and it is far from a crafted one; it is a **logically flowing** concatenation of events and facts. This is the mark of a true account, not a frame-up of a suspect as contended by the appellants herein. The appellants, moreover, have given a standard account which focuses on the day of arrest, but avoids anything to do with the material date, even though alleging no alibi. We find the defence position to be, in design, evasive, and therefore, incapable of shaking the weighty prosecution case. This is a mode of expressing our finding herein: the prosecution did prove their case beyond reasonable doubt, as against all the four appellants.

We dismiss the four appeals. We uphold conviction, and we affirm sentence as pronounced by the learned Senior Resident Magistrate.

**Orders accordingly.**

**DATED and DELIVERED** this 19<sup>th</sup> day of February, 2008.

**J.B. OJWANG**

**JUDGE**

**G.A. DULU**

**JUDGE**

**Coram: Ojwang and Dulu, JJ**

**Court Clerks: Tabitha Wanjiku and Erick**

**For the Respondent: Mr. Makura**

**Appellants in person**