REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang & Dulu, JJ.)

CRIMINAL APPEAL NO. 216 OF 2006

BETWEEN

STEPHEN KIMANI ……APPELLANT

-AND-

REPUBLIC…….....……..RESPODENT

(An appeal from the Judgment of Principal Magistrate Mrs. M.W. Murage dated 5th October, 2005 in Criminal Case No. 15 of 2004 at Kikuyu Law Courts)

JUDGEMENT

The appellant herein, jointly with another, 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 two, on 15th June, 2004 at Kikuyu Township in Kiambu District, within Central Province, jointly with others not before the Court, and while armed with dangerous weapons, namely clubs, machetes and an iron bar, robbed ***James Thuo Kago*** of a television set, Akima by make, and a video deck, Fujitel by make – all valued at Kshs.21,600/= - and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said ***Samuel Thuo Kago.***

PW1, ***Samuel Thuo Kago,*** testified that he was at his home, asleep, on 15th June 2004 at 1.00 am. when he realized intruders had gained access to the house. As PW1 switched on the lights, the intruders, who were three in number, entered his bedroom even as he screamed for help. These armed thugs ordered PW1 to keep quiet, and took away a television set and a VCD. It was PW1's testimony that the one of the intruders, the appellant herein, faced him directly and so he (PW1) had a good look at the man. This intruder was wearing a jacket, a black pair of trousers, sports shoes, and a cap which fell as the thug made his escape. The gang remained in the house for some 10 minutes, before taking off.

PW1 reported the incident at Kikuyu Police Station, and indicated he would recognize one of the intruders. A search ensued, during which one ***Kariuki*** informed the search-party he had met two people carrying a television set. ***Kariuki*** led them to the home of one of the accused persons, and that particular accused was found and arrested. After that accused had been taken to the Police station, PW1 returned home, finding people there who said that a second suspect had been seen. A few hours later, the search

party went to a place called Soweto, and found the appellant herein sitting in a house. PW1 immediately recognized the appellant as the man who had robbed him. PW1 identified in Court the cap and the trousers which he had seen the appellant herein wearing, at the material time.

On cross-examination, PW1 said he had been robbed at 1.00 a.m. and that the appellant herein had been arrested at 1.00 pm later. PW1 said the appellant had entered his bedroom, during the robbery, and that he had seen the appellant's face and he still remembered that face.

PW2, Police Force No. 27332 ***P.C. Mwaura*** of Kikuyu Police Station, in the morning of 15th June, 2004 found in the Occurrence Book a record on a robbery which had taken place several hours earlier, showing that the complainant had been robbed of household goods. PW2 visited the complainant's house, and, close to the bush nearby, he identified a spot which appeared to have been occupied by several persons sitting down. The complainant had reported that the robbers at his house were three men and one of them, 1st accused [the appellant was 2nd accused], had a pair of trousers bristling with black jack which would have caught him in the thickets. PW2 received word that apart from the 1st accused, there was someone else who had been caught in crime by a mob, and the mob handed him over to the Police with a pair of trousers and a cap, as exhibits. Those exhibits which got lost before trial began, had been viewed by PW2 as a connecting thread between the robbery which is the subject of the instant appeal, and the 1st accused and the 2nd accused (appellant herein) – for the reason that the trousers in question were bristling with the pointed seeds of the black jack. To cross-examination by the appellant herein, PW2 said the appellant had been burnt by infuriated members of the public and was held in hospital for some time, with PW2 guarding him there. At that stage, it was not PW2's understating that the appellant was involved in a robbery attack with 1st accused, but he came to know of the participation of the two in the robbery subsequently.

After the prosecution closed their case, the appellant when put to his defence, elected to make a sworn statement. He said he was a quarry worker, and on the material date, at 6.00 a.m. he was going to work when he met a mob. The mob satisfied itself that the appellant was only carrying his tools of trade, and let him pass. But several days later the same mob confronted the appellant, and asked if on the previous occasion, truly he had gone to work at the quarry. The mob arrested him and took him to the quarry, battering him so badly, he regained consciousness only later, while in hospital. He was subsequently charged with the offence of robbery with violence.

On that state of the evidence, the learned Magistrate found the appellant guilty of the lesser offence of robbery contrary to s.296(1) of the Penal Code, convicted him, and sentenced him to a ten-year prison term. The Court arrived at its conclusion on the evidence as follows:

> "From the evidence of the complainant, it is clear that among the people who robbed him, he was only able to identify 2nd accused…PW1 told the Court that the robbers were in his house for 10 minutes and the lights were on. He described clothes which 2nd accused [had won] on that day. I am satisfied that he positively identified [the appellant] as one of those who robbed him. The 2nd accused's defence does not challenge [the] prosecution evidence."

The learned Magistrate, however, held that even though the robbers were armed, "no threat was made to use violence and none was used. No injuries were occasioned. I find 2nd accused guilty of the offence of robbery contrary to section 296(1) [of the Penal Code]".

The appellant in his grounds of appeal, stated thus:

> (i) he should not have been convicted on the evidence of a single identifying witness, in an unfavourable condition of visibility;
>
> (ii) essential witnesses were not summoned, and there was no proof beyond reasonable doubt;
>
> (iii) the property allegedly stolen was not found in the appellant's possession;
>
> (iv) the burden of proof was shifted to the accused person;

(v) the trial Court rejected defence case without giving reasons.

The appellant expanded the foregoing points in written submissions which he brought to Court on the occasion of hearing this appeal.

Learned State Counsel, ***Mr. Makura*** conceded to this appeal, on the ground that there had not been sufficient evidence to sustain the conviction. The only witnesses called were the complainant, and the arresting Police officer. Although PW1's report to the Police had been prompted by one ***Kariuki*** who, although he said he had met those carrying items similar to those stolen from PW1, was not called as a witness.

Counsel noted that although PW1 had been a single identifying witness, the learned Magistrate convicted, without recording a caution to herself signifying the danger attendant on conviction solely on the basis of such evidence**.** ***Mr. Makura*** urged that the conviction was not safe, and should not be sustained.

The witness not called, ***Kariuki,*** who is said to have met two people carrying away electronic equipment, a factor which led PW1 to report the robbery incident, was a most relevant witness who ought to have been called. Insofar as the said ***Kariuki*** was not called, PW1's evidence about him is hearsay – and hence evidence of infinitesimal weight which would by no means strengthen PW1's testimony.

Positive identification was required, as a basis for entering a conviction against the appellant, given that the robbery incident took place sometime after midnight. Although PW1 testified that he very well saw the three robbers, he did not specify with clarity how they related to him inside his bedroom; where exactly he was in the bedroom, during the robbery; whether any of the robbers approached him at close range; whether there was any physical contact between him and the appellant, or any of the robbers.

The uncertain elements in such testimony could only have been cleared by further, corroborative evidence which would also confirm the state of lighting at the time of the incident.

Without ruling out the possibility that the appellant was among those who invaded the complainant's house on the material night, we nevertheless hold the view that firm-enough evidence, with corroboration, and especially on the state of lighting and on the issue of identification, was not placed before the trial Court and, consequently, that the decision to convict was not a safe one. Even as we will, therefore, order the acquittal of the appellant, we have noted that a direction given by the trial Court on the relationship between s.296(1) and s.296(2) of the Penal Code (Cap.63), where a gang of persons invade and rob a complainant, was not correct in law; had there been the required evidence placed before the Court, it would not have been right to convict for a lesser offence.

We allow the appellant's appeal, and set aside the conviction and sentence. The appellant shall forthwith be released from prison custody, unless he is otherwise lawfully held.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 11th day of March, 2008.

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

JUDGE **JUDGE**

Coram: Ojwang & Dulu, JJ.

Court Clerks: Huka & Erick

For the Respondent: Mr. Makura

Appellant in Person