REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(*Coram: Ojwang, J*)

CRIMINAL APPEAL No. 274 of 2006

BETWEEN

FREDRICK KIMANTHI NGINDI……………………….………...APPELLANT

-AND-

REPUBLIC……………………………………..…………..RESPODENT

(An appeal from the Judgment of Senior Resident Magistrate L.W. Gicheha dated 25th May, 2006 in Criminal Case No. 1217 of 2004 at Thika law Courts)

JUDGEMENT

The original charge was that of capital robbery, but after hearing the case the learned Magistrate found otherwise. The trial Court thus remarked**:**

> ***"However the ingredients of robbery with violence contrary to section 296 (2) [of the Penal Code] [have] not been satisfied, as the accused was not armed. I therefore reduce the offence to [one under] section 296 (1) P.C."***

The original charge stated that the appellant herein, on 15th February, 2004 at Kiunyu Village in Thika District, in Central Province, jointly with others not before the Court and while armed with machetes and other crude weapons, robbed ***James Mburu Gitau*** of cash in Kshs. 2000/=, and at, or immediately before, or immediately after the time of such robbery, used personal violence upon the said ***James Mburu Gitau***.

PW1, ***James Mburu Gitau***, a casual labourer at Kiunyu Village, testified that he was asleep at his house on 15th February, 2004 between 1.00 a.m. and 2.00 a.m. when a bang from outside felled his door. He woke up only to find two intruders, who demanded money, and who embarked upon assaulting him. One of the robbers flashed a torch, which illuminated the face of the appellant herein, a man of the village who was known by the nick-name ***Kausi*.** In his testimony PW1 says: "I did not know what they were armed with, but when I told them I did not have money, they hit me on the face. I do not know what they used to hit me on the forehead; I assumed they had hit me with a stone. The accused then [attempted to strangle] me by the neck. His colleague removed Kshs.2000/= from the trouser pocket".

On cross-examination, the witness confirmed one point, that those who robbed him and who battered him in the night were two men. He said, referring to the appellant herein: "The torch which was flashed at

your face belonged to your colleague". And this perception was corroborated by PW2, ***Amos Muratha Gitau*** who said: "I recall the 15th of February, 2004 at 2.00 a.m. I heard a scream while asleep in my house. I woke up and noticed two people who had a torch….. outside in our compound, between my house and that of [PW1]. I was not able to identify these persons. One of the persons flashed the torch at me and hit with a machete. I managed to kick one of them and he fell down. I did not identify the person I knocked down. [He] ran away."

The fact of *plurality* in the number of intruders, on the material night, is testified to also by PW3, ***John Gitau Kamau.*** On 15th February, 2004 at 2.00 a.m., as he slept, he heard screams from the house of his brother (PW1). He went into his brother's house and found two people assaulting him and his wife. PW3 hit one of the two men, and both ran away. PW1 was bleeding from the eye, and a first-aid had to be done on him.

PW4, Police Force No. 97070690 ***A.P.C. John Kamau,*** of Kiunyu Police Post, had visited the *locus in quo* on 15th February, 2004 at 10.00 a.m., and found a stone which appeared to have been used to crush and fell PW1's door just before the alleged robbery.

From such a turn in the witness testimony I have re-examined the content of the judgement, with a view to understanding the basis upon which the trial Court stepped down a capital robbery charge to simple robbery. The legal basis for such a relegation of the offence to a comparably minor one is unclear. The following passages in the learned Magistrate's Judgement may be set out, to illuminate the basis of my concern:

> **(a) "It is not in dispute that a robbery took place on the night of 15th February, 2005 and the complainant herein was robbed of Kshs.2,000/=. The evidence is corroborated by PW1 and PW5 who went to the scene of robbery [and] saw the broken door and carried away the stone used to break the door. The evidence of PW2 and PW3 also confirms this as they narrate how they even chased the robbers away."**
>
> **(b) "There is no evidence that the said assailants were armed with any weapon as *they did not attempt to attack PW2 and PW3 when they came to assist PW1. They simply ran away. They hit PW1 on the face, and it is evident they used personal violence on PW1. The only issue is whether it is the accused person who robbed PW1 on the said night."***

The latter part (italicized) of the foregoing passage seems to be the point in the trial Court's assessment of evidence where it was laying a basis for the reduction of the charge to one of *simple robbery*. However, the logic in the modification of charge did not emerge very clearly. I doubt that the fact that the two robbers took off after robbing PW1, and did not attack PW2 and PW3 can be held to prove they were not armed, and bore no means of violence. It is also not clear whence the trial Court derived the conclusion that the two robbers only used *personal violence*; there is no such evidence; but there is evidence that a stone would have been used during the robbery; indeed PW1 thought he was hit with a stone, by the robbers. The trial Court finds that several persons had broken into PW1's house, but, without a clear basis, now only seeks to know "whether the accused person [was the one] who robbed PW1 on the said night." In these rationalizations for converting a charge of capital robbery to one of simple robbery, this Court finds no fundamental reasoning, and perceives not, the exercise of a judicial frame of mind.

(c) When the trial Court states: "*I am therefore satisfied it was the accused who robbed PW1 on the said night*," there is an unexplained dropping-off of the role of the *second robber* who was not in Court; yet, in law, the fact that the *recorded evidence* shows there was another robber, is legally significant: it qualifies the robbery in question as *capital robbery*, in the terms of s.296(2) of the Penal Code (Cap.63, Laws of Kenya), under which the charge had been quite properly laid by the prosecution.

S.296(2) of the Penal Code thus provides:

> **"If the offender is armed with any dangerous or offensive weapon or instrument, *or* is in company with one or more other persons, *or* if, at or immediately before or immediately**

after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

It is obvious then, that the instant case was one of capital robbery, and the only charge correct in law, would have been just that: because the appellant was alleged to have been "in company with one or more other persons", at the material time; and it was, besides, alleged that at the time of the robbery, the two attackers "beat, struck or used… other personal violence" upon the complainant; and indeed, there was evidence that the robbers had broken the complainant's door using a stone, and an *offensive device* was used to hit the complainant.

This case, therefore did not fit into the category defined in s.296(1) of the Penal Code, and the learned Magistrate was in grave error of law in reducing a s.296(2) robbery charge to a s.296(1) charge.

Consequently, the appeal coming before this Court was entirely misguided and the proceedings in the same must be declared a *mistrial*, and the matter referred back to the Attorney-General to take lawful decisions regarding the State Law Office's stand on the trial which led to the appeal herein.

I will make orders as follows:

(1) The proceedings of this Court taken on 17th October, 2007 are hereby declared a mistrial.

(2) The Deputy Registrar shall have this decision brought to the attention of the Attorney-General, to the intent that the State Law Office shall direct itself according to law, in relation to the appellant's appeal.

(3) The Registry shall list this matter for mention and for directions before a two-Judge Bench, on the basis of priority.

(4) The appellant shall continue to be held in prison custody.

(5) Production order to issue, for the mention-date assigned by the Registry.

Orders accordingly.

DATED and DELIVERED at Nairobi this 10th day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gakobo

Appellant in person