



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

**Criminal Appeal 238 of 2005**

**DANIEL MWANGI WAMBOI.....APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from the judgement of Principal Magistrate Mrs. M.W. Murage dated 4<sup>th</sup> May, 2005  
in Criminal Case No. 14 of 2004 at Kikuyu Law Courts)***

**JUDGMENT OF THE COURT**

The appellant herein, **Daniel Mwangi Wamboi**, was 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 appellant, on 3<sup>rd</sup> June, 2004 at Kinoo Village in Kiambu District, within Central Province, jointly with others not before the Court, being armed with offensive weapons, namely iron bars and clubs, robbed **George Omondi Otieno** of one radio, Sony by make, one pressing- iron, two pairs of shoes, and one jacket – bearing a total value of Kshs.21,550 – and at, immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said **George Omondi Otieno**.

In a second count, the appellant faced a similar charge, with different particulars: that he had, on 3<sup>rd</sup> June, 2004 at Kinoo Village, jointly with others not before the Court, and while armed with offensive weapons, namely iron bars and clubs, robbed **Lucy Wangari Thuo** of a television set, JVC by make, and one radio – these bearing a total value of Kshs.17,500/=, and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said **Lucy Wangari Thuo**.

The appellant also faced a third count of robbery with violence. The particulars in this regard were that, on 3<sup>rd</sup> June, 2004 at Kinoo Village, he, jointly with others not before the Court, being armed with offensive weapons, namely iron bars and clubs, robbed **Ann Nzioki Njoroge** of her cellphone, Nokia 8210 by make, a radio, Sony by make, and cash – all bearing a value of Kshs.24,000/= ? and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said **Ann Nzioki Njoroge**.

PW1, **Victory Musani Otieno** from Kinoo, testified that she was asleep in the company of her husband on 3<sup>rd</sup> June, 2004 at 2.00 a.m., when she was awakened by noises just outside the house. She looked outside, and saw many people who were announcing they were Police officers, and ordering residents to open up their houses. These intruders crushed a security light which was illuminating the outside. PW1 awakened her husband, who stood up to check what was happening outside. In the meantime, the

attackers reached PW1's house; they entered; they demanded money and cellphones. PW1's husband opened the bedroom door, and the intruders entered, one of them flashing a torch. One of them grabbed shoes, and a cloth pressing-iron. The thugs found PW1's handbag, which they inspected; but no money was found in it. They stayed for about two minutes in the bedroom, and another two minutes or so in the sitting room. PW1 testified that she had been able to see the appellant herein, who was carrying two torches, as well as a club. PW1 did not see the other intruder in the bedroom very well. The appellant herein took a Sony radio, an iron, two pairs of shoes, a jacket – all valued at Kshs.21,000/=. The intruders assaulted PW1's in-law, injuring his back and chest. As many as 10 different families living on the same plot were attacked and robbed by the said intruders.

PW1 and others raised the alarm, and went up to the landlord's house, where they indicated that they would be able to identify one of the robbers. Some of the victims of the attack went up to the Police station to report the incident; whereas others went to the house of the appellant herein; they did not find him – and the appellant's sister explained that the appellant had gone to work. The Police were led to the place where the appellant was, and he was arrested. PW1 had noted the kind of clothes the appellant was wearing at the material time – a greenish jacket on the outside, and a black one inside. The black jacket was marked for identification in Court.

On cross-examination, PW1 testified that the bedroom where the robbery took place, was dark at the material time. The appellant had a torch, but also took PW1's torch – so that he now had two of them. What difference in lighting did this torch make, in the bedroom? PW1 said: "It is a big torch and it gave a lot of light. I saw you. You held a torch and a [club] in one hand. As you tried to hold a bag, it fell. You had a greenish jacket on top. It was long-sleeved. I saw the black one inside."

PW2, **Lucy Wangari Thuo** from Uthiru, testified that she was at her residence on 3<sup>rd</sup> June, 2004 at 2.00 a.m. when she heard people outside announcing that they were Police officers. These intruders hit the first neighbour's door, then the second neighbour's, and then came to PW2's door, which they forced open. Six of the intruders entered, and switched on the sitting-room light; three remained in the sitting-room, while three others entered PW2's bedroom. The intruders in the bedroom demanded money and cellphones. PW2 was standing at the door to the bedroom; and from that position she saw the intruders in the sitting room, who bore clubs, machetes and a hammer, break into her wall unit and grab her television set and radio. PW2 stood looking at the accused; and the accused ordered her to return to her bedroom. The accused, who hit the said wall-unit, was familiar to PW2. He used to visit a barber near PW2's residence, and PW2 used to see him from time to time. The lounge light was on, as the appellant herein, who carried a club and a hammer, broke the wall-unit. It was PW2's testimony that the gang of robbers stole in the whole plot, and the residents went and reported the matter to the landlord of the plot as a whole. The residents also made a report at Kinoo Police Station. PW2 saw the accused when he was being arrested; he was wearing a green jacket and a black sleeveless item of clothing inside.

On cross-examination, PW2 said she had clearly seen the appellant herein at the *locus in quo*, and she knew him as **Mwangi**. PW2 said the appellant had been arrested while wearing the very same clothes he was wearing during the robbery.

PW3, **Anne Njoki Njoro** testified that she was in her house on 3<sup>rd</sup> June, 2004, when thugs entered the plot announcing that they were Police officers. Six of the robbers broke into her house; one of them who was wielding a club, demanded a cellphone, and threatened to hit PW3's twin children. She had Kshs.4000/= which she handed over to the thugs. These intruders entered the house when the lights were on; they grabbed PW3's radio and Nokia cellphone. The appellant herein, who was one of the robbers, PW3 testified, was wearing a green jacket and a black sleeveless fitting inside.

PW3 said she had known the appellant, who had at one time fetched water for her. The appellant, whom PW3 knew as **Mwangi**, was wielding a club, while in PW3's house. He stood next to PW3, and at some stage, stood on the table; and PW3 says:

"I saw him. He took....About 30 minutes in the plot ...[We] told the Police we had identified one person. We went to the suspect's sister's place. A young man took us to where he was. He opened. He was

wearing a green jacket and a black one inside.”

On cross-examination, PW3 confirmed that the appellant herein, whose regular occupation was unknown to her, had one day in the past, served her by fetching water for her.

PW4, **Joan Wambui Mbugua**, testified that she was the landlady of the residential units at the plot which was the *locus in quo*, and that her family also live on that same plot. As PW4 slept, on 3<sup>rd</sup> June, 2004 at 2.00 a.m. she heard noises emanating from the gate area of the plot; these noises were from the plot’s tenants who had just been attacked by a gang of robbers. Some of the tenants said they knew a lady who was sister to one of the suspects, and who lived in the neighbourhood. Landlady and tenants made for the house of the said sister of one of the suspects, and they found her at home. The appellant, who was not found at home that night, was later arrested. PW4’s husband alerted the Police, upon receiving information about the robbery.

On cross-examination, PW4 said she and her husband had made an inspection following the night-robbery, and had found that the doors to the tenants’ houses were broken.

PW5, Police Force No. 70451 **Police Constable Fredrick Odera** of Kikuyu Police Station, testified that, on 3<sup>rd</sup> June, 2004 he was at the station, and received a report from Kinoo Police Post, that a suspect had been arrested, in connection with a robbery which had taken place that night. PW5 re-arrested the suspect, namely the appellant herein, and recorded a statement. Some of the witnesses identified the appellant as one of the attackers who, while claiming to be Police officers, had broken into their houses. PW5 produced the jacket said to have been worn by the appellant herein, during the robbery attack.

PW6, **George Omondi**, a driver living at Kinoo, testified that robbers had attacked tenants at the plot which was the *locus in quo*, on 3<sup>rd</sup> June, 2004 in the small hours of the morning. When PW6 was awakened and looked out through the window, he saw some 10 people armed with clubs and machetes. Members of the gang, in a while, broke into the house of PW6 and his wife. Speaking in Kiswahili, and flashing a torch, the intruders entered PW6’s house; and they grabbed several items which they found in the house: a radio, a pressing-iron, clothes, a jacket, a pair of trousers – all valued at Kshs.20,000/= . Two of the robbers had entered PW6’s house; they warned PW6 and his wife “they would finish us if we screamed”; they remained in the house for five minutes; they were armed with a club, and a long metal bar.

It was PW6’s testimony that the intruder with the torch flashed it onto the appellant herein, enabling PW6 to see the appellant’s face. The two were very near the place in the house where PW6 was, and PW6 noticed that he had not seen the appellant’s face before. The appellant herein was wearing a jacket, which PW6 identified in Court.

After the robbers left, some of his neighbours reported the incident at Kinoo Police Post; and later, the appellant was arrested. None of the stolen items was recovered.

On cross-examination, PW6 thus said, on the question of identification during the night of robbery:

“I saw you well. I recorded a statement and told the Police so. You are [dark] and not tall. That is what I told [the] Police. I told the Police I could positively identify [you], since there was enough light.... You had a bright, big torch. The torch had enough light, and outside, there were a security light. It was broken by the thieves. When you first entered, the [security] light was on. Then you broke it. You broke about eleven doors....The jacket in Court is blue. You were wearing the jacket.”

At this stage the prosecutor sought adjournment, on the ground that there had been a mix-up in exhibits – involving a black jacket and a blue jacket being produced in Court on different days of hearing.

PW7, Police Force No. 26408 **Sgt. Paul Muteti** of Kinoo Police Post, testified that he had been on duty on the material night, at 2.30 a.m., when he received a call from the *locus in quo*, with information that robbers were on the plot. PW7 and fellow-officers went to the scene, but found the robbers already gone.

The tenants were outside their houses, their effects gone with the thieves; and they said they could identify one of these thieves. PW7 wanted to know where the said robber could be found; and he was told by some of the tenants, they knew the robber's sister. A younger brother of the appellant led the Police officers and some tenants to the appellant's house. PW7 arrested the appellant who had a jacket which the tenants identified. PW7 took the appellant and the jacket to the Police station, and the appellant was booked-in, and charged.

On cross-examination, PW7 testified that the appellant was wearing a black jacket at the time of arrest. The complainants had identified the appellant at the time of arrest, and he had been on his bed as he wore the said black jacket.

PW6 was recalled for the purpose of further cross-examination by the appellant. In PW6's testimony, the appellant had been wearing a blue jacket when the appellant had been arrested.

When put to his defence, the appellant herein elected to make a sworn statement. He said he had been asleep at his home, on the material night, when he heard a knock on the door. He opened upon being told it was Police officers knocking. The officers searched the house, found nothing, and ordered him to wear the clothes he had been wearing earlier in the night. The Police officers arrested him, and took him to Kinoo Police Post, and the following day he was taken to Kikuyu Police Station, where he was now told he was suspected of having stolen from certain complainants on the material date.

On cross-examination, the appellant denied that the jacket produced as an exhibit in Court was from his house. He said he knew none of the witnesses except *Lucy Wangari Thuo* (PW2); and he said: "I never heard her [PW2] say I robbed her." But he went on to say he had a grudge with PW2, and that PW2 was the one who directed her neighbours to arrest him. The appellant denied that he had been part of the gang of robbers of the material night. The appellant said on several occasions that he would call a witness in support of his case. But in the end, he did not call the witness, and decided to close his case.

In her assessment of the evidence, the learned Magistrate thus remarked:

**"In their evidence, PW1, PW2, PW3 and PW6 all identified [the] accused as having been among the robbers. They told the Court that the [robbers] had torches and they were able to see their faces. They recalled the jacket [the] accused wore. PW2 and PW3 [knew] the accused before that day. They vividly recalled what transpired that night. When they called [the] Police, they gave the name of [the] accused, and even led [the] Police to [the] accused's house where he was arrested.**

**"[The] accused has not challenged this evidence. He was positively identified. His defence only tells how he was arrested. He has not challenged the prosecution case. I find him guilty as charged, [on] the three...counts of robbery, and convict him accordingly."**

The trial Court sentenced the appellant herein to death on each of the three counts, and he came before this Court on appeal, contending as follows: (i) that he had not been properly identified as one of the robbers; (ii) that the prosecution evidence was full of contradictions; (iii) that the trial Court should have recognized that the case against him was a frame-up, contrived due to personal grudges; (iv) that the prosecution case had not been proved beyond reasonable doubt; (v) that no effects were recovered from the appellant, so as to link him with the robbery incident; (vi) that the trial Court had wrongly rejected the appellant's defence.

The appellant developed the foregoing points in written submissions; but in oral submissions his focus was the conflicting prosecution evidence regarding the colour of the jacket he was said to have been wearing at the material time. This discord in the testimony, the appellant urged, showed that he had not been properly identified as a suspect.

Learned State Counsel *Mrs. Gakobo* contested the appeal. She urged that the appellant had been well identified at the *locus in quo*: both PW1 and PW6 testified that the robbers had powerful torches which illuminated the appellant as he performed his part in the robbery; these witnesses were each with the

robber for some four minutes or so, and were able to perceive the way the appellant was dressed and armed.

With regard to the second count of the charge, counsel submitted that PW2 had testified that there was electric lighting in her sitting room, when the robbers committed the robbery at her house, and she saw the appellant herein, a person she had known, as one of the robbers. This was a case, counsel urged, of recognition, and not ordinary identification, and its accuracy admitted of no doubts. Hence conviction on this evidence could not be faulted.

In the case of the charge in count 3, PW3 had testified that the lights in the house were switched on during the robbery attack, and she was able to see and to identify the appellant as one of the robbers. PW3 had known the appellant before, and she was able to describe in detail the appellant's mode of dress, at the material time.

Learned counsel submitted that there was no evidence of a grudge between PW2 and the appellant which led to his being charged with the robbery offences; for there was additional independent evidence (such as that of PW3) which showed that the appellant was part of the gang of robbers.

The appellant, we note, has sought to build his case upon the fact that the robbery had taken place at night, and, therefore, potentially, such is a time when the identification of a suspect may prove unsatisfactory. However, we see firm and unchallenged evidence, firstly, that lighting was at the beginning coming from external security lights, before the robbers crushed the same; secondly, that the robbery was conducted with electric lights switched on, in respect of some of the houses robbed (PW2, PW3); some of the houses were broken into, and flashing torches illuminated the appellant as one of the robbers (PW1, PW6); some of the witnesses had seen the appellant before, and so the available lighting at the time of robbery gave them an opportunity to *recognize* the appellant herein as the thief (PW2, PW3). The foregoing special conditions, in our opinion, provided an adequate opportunity for proper identification of the appellant herein as one of the robbers on the material night; and we *hold*, on the evidence, that a full and proper identification was made of the appellant on that night.

Therefore, already, we find the status of identification to have been such as to properly *link* the appellant with the crimes of robbery. While it is true that there is no perfect consistency of testimony, on the colour of the jacket which the appellant wore at the material time, we hold this to be insignificant: in the light of judicial notice which we hereby take, that the dark colour of the jacket could, at night, have erroneously been thought by different observers to be green or blue or black.

We hold that the appellant was properly convicted on all the three counts. We will make the following orders:

(1) *We dismiss the appeal, and uphold the conviction recorded by the trial Court.*

(2) *We affirm each of the sentences of death pronounced by the trial Court, provided that the sentences in respect of the second and the third count of the charge, shall remain in abeyance pending the execution of the sentence in respect of the first count.*

***It is so ordered.***

**DATED** and **DELIVERED** at Nairobi this 15<sup>th</sup> day of April, 2008.

**J.B. OJWANG**

**JUDGE**

**G.A. DULU**

**JUDGE**

**Coram: Ojwang, & Dulu, JJ.**

**Court Clerks: Huka & Erick**

**For the Respondent: Mrs. Gakobo**

**Applicant in Person**