REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 2O9 OF 2005

JULIUS NGIGI KIMANI………………………………………. ACCUSED

VERSUS

REPUBLIC...…………………………………………….. RESPONDENT

(Being an appeal from the judgment of L. Nyambura,

Senior Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 2472 of 2005 at Kigumo)

JUDGMENT

The appellant in the Lower Court was charged with three counts of Robbery with violence contrary to Section 296(2) of the Penal Code. All the offences were committed on the same day at Gakuyu village to various persons. The appellant on being tried by the Lower Court was convicted and sentenced to death on all three counts. Before we even begin to consider the merits of the appeal we wish to point out that the Learned Magistrate erred in imposing a death sentence on all three counts of robbery. In this regard we shall repeat what the Court of Appeal has stated on

sentencing in the case of *Abdul Debano Boye & another v Republic Criminal Appeal No. 19 of 2001 (unreported).*

"***We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a***

person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentence of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."

He was aggrieved by the conviction and sentence and has therefore preferred this appeal before court. This is the first appeal. In deciding this appeal we are guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

"***As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570)."***

The 1st complainant said that he is a teacher at Igikiro Secondary School. He also runs a shop at Sabasaba and had also rented a shop at Gakuyu area. He is a resident of Gakuyu. He recalled that on 22nd December 2004 he had gone to his shop which he closed at 10.30p.m. He proceeded home in his pick up in the company of his employee and his brother. As they approached the gate of his house they heard commotion. On entering into the compound the pick up was surrounded by six men. These people were armed with crude weapons and pistol. They were ordered out of the pick up and as they got out they were being abused. These men were also beating their dogs. He identified one of the men as the appellant. The appellant was from his own home area and he even had an occasion to carry him in his pick up. They were all ransacked at gun point. They took away his money Kshs.6000/- and the mobile phone. The men led them into the house. Inside the house there was a lamp and the men also had big torches. These torches were flashed over the appellant. The complainant was led into his bedroom where the men stole Kshs.6000/-. The appellant who was armed with a panga made attempt to cut the complainant but was dissuaded by his accomplice. The

robbers also stole from the house TV set, DVD, gas cooker, gas cylinder, three torches, clothes and mobile phones. The robbers then ran away carrying those items tied up in bed sheets and gunny bags. The complainant reported the matter to the Saba Saba Police Station where this complainant said that he was able to identify the appellant whom he called Ngige. The police went to the appellant's home at 9a.m. From there they recovered a torch belonging to this complainant which he had marked with the initials A.M which he said stood for Alfred Muiru. In that home the police were also able to recover his employee's purse which contained a list of names of the people he had given credit to. The police also recovered a piece of bread.

PW 2 was in the company of the first complainant in the pick up. When they packed the pick up in the compound of the complainant's home they were confronted by robbers. One of the robbers had a gun which he pointed to the complainant. The robbers asked this witness for her mobile and she responded that she did not own one. They were then led into the house where there was light. She was able to recognize the appellant who she said that she had known and had seen him at Gakuyu. The appellant at one point

wanted to hit her claiming that she lied that she did not have money. The other robbers dissuaded him from harming her. She enumerated the items that were stolen from that house and said that they were loaded in gunny bags and others were carried in bed sheets. Later she said that her purse was recovered in the appellant's home. In it were her earrings and a list of debtors. She identified the purse.

PW 3 gave evidence in support of count II. He repeated the evidence of the complainant in count I and stated that the robbers stole from him Kshs.200/- and a mobile phone. He was told by PW 1 that Ngige the appellant had been identified in the robbery. He however was not able to identify any of the robbers because he had been told to lie down during the robbery.

As can be seen from the evidence above there was no evidence that supported count III. There was no witness by the name of Ann Wairimu Karanja in support of that count. But perhaps of more concern and an issue that was raised by the appellant in his submissions was that on all three counts the charge does not state that the robbers used dangerous or offensive weapons. In all the three counts it is stated that the robbery took place while the robbers were armed with

pistol, rungus and panga. There is no indication that those weapons were dangerous or offensive. Section 296(2) of the Penal Code provides as follows:-

"***If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or 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."***

As can be seen from that sub-section it is essential that the particulars of the charge do indicate that a person was armed with dangerous or offensive weapon failure to state that means that the charge is defective and the consequence of that finding is that the appellant's appeal would succeed. That was holding by the Court of Appeal in the case of *Juma vs Republic (2003) 2 EA* pg………. The court held as follows:-

"***The charge referred to the appellant having been armed with knives but the particulars did not clearly state whether the knife was a dangerous weapon. Under section 296(2) of the Penal Code the charge must state that the accused was armed with a dangerous or offensive weapon or instrument.***

The charge as laid was defective as it did not clearly specify the essential ingredients of the offence under section 296(2) of the Penal Code. Appeal allowed; conviction quashed and death sentence set aside."

The charge which the appellant faced in the lower court being so defective leads this court to find that the appeal does succeed. We therefore do hereby quash the conviction against the appellant and do set aside his sentence. The appellant is hereby set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 29th day of May 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDI

JUDGE