



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

**Criminal Appeal 80 of 2006 & 83 of 2006 (Consolidated)**

**SIMON PAULO MALIEL & ANOTHER..... APPELLANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

**(From the original decision in Limuru Senior Principal Magistrate's Criminal Case No. 705 of 2005  
– M.N. MWAI (SRM))**

**J U D G M E N T**

**SIMON PAULO MOLIEL** (*1<sup>st</sup> appellant*) and **SHAURI MESHELEK** (*2<sup>nd</sup> appellant*) were charged in the subordinate court with two others. There were a number of counts. Count 1 was for robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of offence were that, the two appellants together with two others between the night of 25<sup>th</sup> and 26<sup>th</sup> December, 2004 at Kidfarmaco area in Kiambu District within Central Province, jointly with others not before court and while armed with crude weapons namely metal bars, robbed **GEORGE WAKARIA NJOROGE** of his one Central Processing Unit (CPU), a databank, one pair of shoes, a wall clock make ajanta and one speaker model Sony all valued at Kshs.40,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **GEORGE WAKARIA NJOROGE**. In the alternative, the two others who were **JOHN SADAM RONGOENI** and **ELIUD MIDARONI WAIRUMBI** were charged with handling stolen goods contrary to section 322 (2) of the Penal Code. The particulars of offence were that on 28<sup>th</sup> December, 2004 at Gitaru village in Kiambu District of the Central Province jointly otherwise than in the cause of stealing, dishonestly handled one Central Processing Unit (CPU) and one databank all valued at Kshs.30,000/- the property of **GEORGE WAKARIA NJOROGE** knowing or having reasons to believe them to be stolen goods. The two appellants were charged in count 2 with attempted robbery contrary to Section 297 (2) of the Penal Code. The particulars of offence were that jointly with the two others between the night of 25<sup>th</sup> and 26<sup>th</sup> December, 2004 at Gitaru village in Kiambu District within Central Province jointly while armed with crude weapons namely metal cutter attempted to rob **PAUL KARURI KAMURE** his TV make great wall, radio make Panasonic all valued at Kshs.80,000 and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence to the said **PAUL KIRURI KAMURE**. Count 3 related to the other two accused who were **JOHN SADAM RONGOENI** and **ELIUD MUDARONI WAIRUMBI** was for being in possession of suspected stolen property contrary to Section 313 of the Penal Code. The particulars of offence were that on 28<sup>th</sup> December, 2004 at Gitaru village in Kiambu within Central Province having been detained by AP Inspector Odera had in their possession one CD Radio Cassette (Klavrevox), one radio cassette (sunny) one small radio (Nakira), one speaker plus two calculators reasonably suspected to have been stolen or unlawfully obtained. In count 4,

the appellants together with the two others were charged with unlawfully entering Kenya contrary to Section 4 (1) as read with Section 13 (2) of the Immigration Act Cap. 172 Laws of Kenya. The particulars of offence were that between 24<sup>th</sup> and 28<sup>th</sup> December, 2004 at Gituru village in Kiambu District within Central Province, being Tanzanians were found having entered Kenya without entry permit from the Immigration Department.

All the four accused persons before the subordinate court were recorded as having pleaded guilty to count 4 of being in Kenya illegally contrary to the provisions of the Immigration Act. They were each sentenced to serve 6 months imprisonment. After a full trial, all the four accused persons were acquitted of count 1, which related to robbery with violence. The other two accused were convicted of the alternative count, in which only the two of them were charged, and sentenced to 3 years imprisonment. The same two accused persons who were charge alone in count 3, were acquitted of that count. The two appellants herein were found guilty of count 3, for attempted robbery, and were sentenced to death as law prescribes. The two appellants, being dissatisfied with the decision of the trial court, have now appealed to this court against both the conviction and the sentence. In addition to their petitions of appeal, the two appellants filed written submissions. At the hearing of the appeals, the two appeals Nos. 80 of 2006, and 83 of 2006, and were consolidated and heard together as they emanated from the same trial in the subordinate court.

At the hearing of the appeal, both appellants relied on their written submissions.

The learned State Counsel, Mr. Makura, conceded to the appeal on the charge of attempted robbery, but supported the conviction on the charge of being unlawfully present in Kenya. Counsel submitted that with regard to the charge of attempted robbery, the appellants were convicted on the evidence of P.W.3, the complainant. Counsel contended that P.W.3 was not able to identify any of the appellants. Counsel contended that the said witness said that he saw someone peeping through the window. The said P.W.3 went out, but the person who was peeping closed him back into the house and, on screaming, that person who was accompanied by others ran away. Counsel also submitted that no actual violence was proved, and that the appellant was arrested at 1 am merely because he wore a clean or green jacket. That could not be positive identification.

Regarding the charge of being unlawfully present in Kenya, Counsel submitted that though the magistrate sentenced the appellants to 6 months imprisonment, she should also have made a recommendation for their repatriation to their country of origin, Tanzania. Counsel urged us to make a recommendation for their repatriation of the applicants to Tanzania .

The brief facts are as follows. During the night of 25/12/2004 there were a spate of attempted breaking and attempted robberies in Gituru area of Kiambu District. One of those was at the house of P.W.3 **PAUL KIRURI KAMURE**. He was at home at about 8.30 pm, when a cousin of his noticed someone peeping through the window. P.W.3 went out of the house and saw someone with a green jacket. That man chased P.W.3, and P.W.3 ran back into the house. Because the person who was outside and his companions were trying to break into the house, P.W.3 and his cousin screamed. When neighbours responded and started coming, the intruders ran away. A chase did not yield results, as P.W.3 and the members of the public who came to the scene did not find the people who attempted to break into the house. However, they decided to patrol the area and, at about 1 am, they saw two people. They ordered those two people to stop, and one ran away. The other, who was **SHAURI MESHELEK (2<sup>nd</sup> appellant)** was restrained. On being searched, he was found with a metal bar and a cutter under his clothes. The 2<sup>nd</sup> appellant was beaten, and offered to take the members of the public to where he and others lived. There, they found 3 others, one of them being the 1<sup>st</sup> appellant who was wearing a green jacket. The same 1<sup>st</sup> appellant was also found with a pair of scissors. All the four were taken to the police station and charged with the offences which we have listed at the beginning of this judgement. As we have already stated, the appellants were convicted of attempted robbery of P.W.3 **PAUL KIRURI KAMURE**, as well as for the offence of being in Kenya illegally.

When they were put on their defences the appellants gave unsworn testimony. They both stated that they

were Tanzanians. The 1<sup>st</sup> appellant stated further that he was a watchman and lived at Kikuyu. On 25/12/2005 he went to work as usual. There was a party at his employer's house and he participated in slaughtering a goat. He went back home at 11.30 am. At 9.30 pm, he went to sleep. At 12 midnight people armed with machetes and clubs opened his door. Those people had come with the 2<sup>nd</sup> appellant who was tied. Then he was also tied and taken to the police station together with people he did not know. He denied committing any offence. He also denied knowing the 2<sup>nd</sup> appellant.

The 2<sup>nd</sup> appellant, on the other hand, stated that on the Christmas day, he did not go to work. He however went to Kikuyu Garden Bar, at 1 pm to celebrate the day. He later went home. On the way, he met some people who asked him whom he was. He told them that he was a Maasai and was going home. They arrested him and took him to a house of 3 other Masai's and also took those 3 Masais. He stated that he was surprised that the prosecution witnesses stated that he was arrested with weapons.

We have evaluated the evidence on record, as we are required to do in a first appeal. There is no evidence that the 2<sup>nd</sup> appellant was identified as one of the people who attempted to rob the complainant P.W.3. He was arrested at night when he was walking at 1 am. He is said to have been carrying a metal cutter under his clothes. That, together with the allegation that he sent the members of the public to the house where other persons were arrested appears to be the basis of his conviction for attempted robbery with violence. In our view, that is not adequate evidence to connect him to the offence. We agree with learned State Counsel that his conviction cannot stand.

With regard to the 1<sup>st</sup> appellant, his only identification appears to be with regard to the wearing of a green jacket. Even assuming that, indeed he wore a green jacket which is doubtful, that cannot be a basis for his conviction. Firstly, in our view, it is not easy for anyone to distinguish green colour at night, unless the light is very bright and one has come very close. Secondly, a green jacket is not a specific identification mark for a person, as green jackets are clearly a common item. The identification of the appellant was not positive. We also agree with the learned State Counsel in conceding to the appeal of the 1<sup>st</sup> appellant on the charge of attempted robbery. We allow the appeals on conviction.

On the charge of being in Kenya illegally, the two appellants pleaded guilty. The plea, in our view, was unequivocal. The appellants did not appeal against this conviction. The sentence of imprisonment is lawful and not excessive. The magistrate did not make a recommendation for them to be repatriated to their home country in Tanzania under Section 26A of the Penal Code. The learned State Counsel asks us to make such an order. Under Section 26A of the Penal Code, there is no mandatory requirement to make a repatriation order if the offence charged under the Immigration Act has a maximum sentence of 12 months. The offence herein under the Immigration Act has a maximum sentence of 12 months. We will decline to make a repatriation order. If the Minister for Immigration wants he can use powers vested in him to take necessary action.

Consequently, we order as follows-

**1. *The appeals of both appellants against***

***their conviction and sentence on the attempted robbery charge is hereby allowed. We quash the conviction on that count and set aside the sentence of death imposed upon them.***

**2. *The conviction of both the appellants on the offence of being in Kenya illegally and the sentence are hereby upheld.***

It is so ordered.

Dated and delivered at Nairobi this 19<sup>th</sup> day of June, 2008.

**J.B. OJWANG**

**G.A. DULU**

**JUDGE**

**JUDGE**

**In the presence of-**

1<sup>st</sup> appellant in person

2<sup>nd</sup> appellant in person

Mr. Makura for State - absent

Huka/Mwangi Court clerk