



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 1 & 2 of 2004**

**LUCAS WEKESA AUGUSTINE.....1<sup>st</sup> APPELLANT**

**JACKSON MWANIKI GITONGA .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....**  
**RESPONDENT**

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

Lucas Wekesa Augustine alias Opiipi and Jackson Mwaniki Gitonga, the 1<sup>st</sup> and 2<sup>nd</sup> appellants herein, were jointly tried on a charge of four counts. In the first three counts the appellants faced the offences of robbery with violence contrary to section 296(2) of the penal code. In the fourth count the appellants faced a charge of burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the penal code. In the end the appellants were acquitted of the offences stated in counts 3 and 4. They were however convicted and sentenced to suffer death in counts 1 and 2. Being aggrieved they each preferred an appeal. On the application of the learned state counsel and with the approval of the appellants appeals were ordered consolidated. The appellants put forward a total of 9 grounds in their petitions of appeal. The appellant filed and relied on written submissions with leave of this court.

We wish to set out the case that was before the trial court before delving into the merits and the demerits of the appeal. The prosecution's case before the trial court is buttressed by the evidence of four witnesses. The complainant in court 1, Tsuma Zua Kauto (P.W.1) told the trial court that he was asleep in his house on 15.6.2002 when at 3.00 a.m. he heard a knock at his door. The visitors appealed to P.W.1 to come out to treat a patient. He dressed up, put on the lights went and opened the door only to be shoved aside by a person who wore rastas and military uniform whom he identified to be Lucas Wekesa (1<sup>st</sup> Appellant). He was forced to sit down and was hit when he attempted to rise. The 1<sup>st</sup> appellant held P.W.1's Land as he kept guard while armed with a metal bar. P.W.1 said he saw Jackson Mwaniki Gitonga (2<sup>nd</sup> appellant) ransack his room, P.W.1 had known the 1<sup>st</sup> appellant for many years as his neighbour. He also came to know the 2<sup>nd</sup> appellant in 1994 through his brother whom he went to school together. P.W.1 saw the appellants with the assistance of electric light he had put on. After ransacking P.W.1's house the duo left. P.W.1 said he followed them out and that is when P.W.1 learnt that there was a spate of robberies that night within the area. P.W.1 informed the police of the ordeal he underwent. P.W.1 mentioned the names and the physical description of his assailants.

Julia Omenda (P.W.2) was the complainant in Count II. At about 2.00 p.m. on 15.6.2002 while she was asleep P.W. 2 was woken up by people who identified themselves to be police officers. She opened the door. Those people had their torches shone at her. P.W. 2 said she managed to recognize them as a result. She was pushed and forced to lie down on her bed. She heard the 2<sup>nd</sup> appellant tell the 1<sup>st</sup> appellant to take her outside the house. P.W.2 claimed she saw the 1<sup>st</sup> appellant in a pair of a green shirt and a pair of white trousers. He took P.W.2 to a neighbour's house called Charles where she was forced to lie down on the bed as she was hit. P.W.2 said lights were on and this assisted her to see the assailants who were armed with pangas, spears, iron bars and twisted bars. P.W.1 said the 1<sup>st</sup> appellant was somebody well known to her. She also stated that the 2<sup>nd</sup> appellant is well known to her as her neighbour. When the gang disappeared P.W.2 went back to her house where she discovered that her clothes, utensils, jacket and 5 pairs of shoes worth Kshs.16200/- had been stolen. P.C. Samuel Ondara (P.W.4) gave the details of how he managed to arrest the appellants. P.W. 1 and P.W. 2 had given the

names and description of the 1<sup>st</sup> and the 2<sup>nd</sup> appellant to the police.

When placed on their defence, each of the appellants gave an unsworn statement. Lucas Wekesa (1<sup>st</sup> appellant) said he was arrested while he was resting in a shade over lunch hour on 18/6/2002 by Police officers who were in company of P.W. 2. He claimed that P.W.1 had a grudge against arising out of an outstanding debt over a medical bill in respect of his child P.W.2 treated in his clinic.

Jackson Mwaniki Gitonga (2<sup>nd</sup> Appellant) gave a near similar story as that of the 1<sup>st</sup> appellant. He said he was arrested while he was watching football. He said he was arrested because of an outstanding debt which was due to P.W. 1 over the medical bill incurred by his wife when she was treated by P.W.1.

On appeal, the appellants put forward a total of 9 grounds of appeal. The appeal is strenuously opposed by Mr. Onserio learned State Counsel. Mr. Onserio, correctly summarized the grounds raised to four broad grounds. The first ground is said that the charge that faced the appellants was defective in that there is no allegation that violence was used. It is the submission of the appellants that the evidence tendered showed that violence was used yet the charge sheet states that the appellants threatened to use violence. According to Mr. Onserio, the charge was not defective because it contained all the ingredients of the offence of robbery. It is admitted by Mr. Onserio that though the charge did not state that the weapons were dangerous, still there is an allegation that the assailants were more than one. We have considered the two divergent submissions. It is clear that in counts I and II, the charge states that the robbers threatened to use violence. We agree with the submissions of Mr. Onserio that if the robberies were more than one then there is no necessity of stating that the weapons used were dangerous in the charge sheet. However the issue stated by the appellants is that there is no allegation that they threatened to use violence. We have perused the evidence and it is clear that the charge states that the assailants used actual violence. Unfortunately there was no medical evidence produced to establish the allegation. The Prosecution failed to tender the evidence of the doctor. With respect, we agree with the appellants that the use of actual violence and threatening to use actual violence are two different phrases carrying two different meanings. The charge facing the appellants was a serious one carrying a mandatory death sentence, hence the charge must be precise. We agree that the evidence tendered did not prove the charge to the effect that the appellants threatened to use actual violence. We are of the view that the charge of robbery with violence was not proved. We are however convinced that the offence of simple robbery under Section 296 (1) of the penal was proved instead but we will not substitute the conviction and sentence because of what we will state hereinafter.

The second ground argued is to the effect that the appellants were not identified. We have re-evaluated the evidence and we are satisfied that the appellants were positively identified and placed at the scene of crime. P.W.1 and P.W.2 knew well the appellants. There was sufficient light within the scene hence there was nothing to suggest that there were evidence mistaken identities. In fact P.W. 1 and P.W.2 mentioned the names of the appellants to the police who were easily arrested by the police.

The third ground is that there is contradictory evidence in the testimonies of P.W. 1 and that of P.W.4. we have examined the aforesaid testimonies and we have not seen any material contradiction. We find no merit in this ground.

The fourth and last ground is that the evidence of P.W. 1 were not sworn contrary to section 151 of the Evidence Act. We have perused the recorded evidence and it is clear that part of the evidence of P.W.1 was received without the witness being sworn. That is contrary to the provisions of Section 151 of the Evidence of Act. This renders the evidence inadmissible.

The other aspect which we have noted is that part of the prosecution's case was conducted by an incompetent prosecutor. On 23/9/2002 Corporal Ouma conducted the prosecution's case yet he was not authorized to do so.

For the above pointed defects we think it is only fair to allow the appeal. We contemplated to order for a retrial but upon looking at the history of this case, we find that it would be prejudicial to the appellants to undergo another trial having spent over 6 years in prison. If we order for a retrial we think it

will give the prosecution a chance to seal the loopholes that have emerged from the trial. For example, the prosecution will of course tender sworn evidence of P.W. 1. Secondly, the prosecution will most probably secure the attendance of the doctor to present the medical report contained in the P3 form.

In sum, we think the case before the trial court was badly handled partly by the trial magistrate and partly by the prosecution. The prosecution allowed part of its case to be conducted by an incompetent prosecutor. The prosecution also failed to timeously summon the doctor to testify. The trial court on its part failed to ensure that P.W. 1 tendered sworn testimony when recalled. For the above reasons we do not think any conviction is sustainable as earlier contemplated. A fair conclusion is to allow the appeal. We allow the appeal by quashing the conviction and by setting aside the sentence of death. We order the appellants to be set free forthwith unless lawfully held.

Dated and delivered at Mombasa this 23<sup>rd</sup> .day of September 2008.

**J. K. SERGON**

**F. AZANGALALA**

**J U D G E**

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