



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

**Criminal Appeal 391 of 2004**

**STEPHEN NGAKU MACHUA.. .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 2953 of 2003 of the Senior Resident Magistrate's Court at Kiambu (M.W. Wachira - SPM)**

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

**STEPHEN NGAKU MACHUA** was charged with two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. Both offences being alleged to have been committed on 15<sup>th</sup> April 2003 at Kiloma East in Kiambu. The Appellant was after the trial convicted in the first count and sentenced to death as by law prescribed. It is against the conviction that he now appeals to this court.

The Appellant was represented by Counsel, **Mr. Mumo** Advocate, who also filed the petition and memorandum of appeal. Counsel raised six grounds of appeal, which challenges the charge as being defective, the evidence as not supporting the charge, reliance on the evidence of the prosecution which was contradictory and inconsistent in material facts, relying on evidence that was not adduced in court, failure to take into account the fact that the evidence of identifying witnesses was contradicted by the parade officer and failure of the trial magistrate to write the judgment in conformity to the provisions of **Section 169 (1)** of **Criminal Procedure Code**.

The Respondent was represented by **Miss Nyamosi** who also conceded to the appeal. The facts of the prosecution case were that on the 15<sup>th</sup> April 2003, PW3 a gardener to PW1, was tending to flowers in the compound of PW1 at 3.00 p.m. when thugs struck and ordered him to lie down. The thugs beat him up breaking his hand and left him lying down unconscious. The thugs robbed him of his watch. PW3 was unable to identify the robbers. PW2, who was working in the main house heard PW3's screams and walked out towards the gate and stumbled on three men armed with a panga, iron bar and rungu holding down on PW3 who was by then writhing in pain. As she turned to go to help, other men who had crude weapons intercepted her, tied her hands and blind folded her. They then forced her to lead them to the house where several items were stolen. Eventually PW2 identified the Appellant in an identification parade upon which he was charged with both counts of robbing PW3 and PW2. A second man who was charged together with the Appellant was eventually acquitted.

We have analyzed and evaluated afresh the evidence adduced before the lower court while bearing in

mind that we neither saw nor heard the witnesses and giving due allowance. See **OKENO vs. REPUBLIC [1972] EA 32.**

The first ground of appeal argued was that the charge was defective. Counsel submitted that the Appellant had been charged alone until 22<sup>nd</sup> December 2003 when the prosecution successfully applied to substitute the charge in order to introduce the co-accused. However, all the prosecution did was to add the co-accused name in the charge but left the particulars un-amended. Counsel submitted that that rendered the charge defective as it did not indicate that the two persons charged committed the offence jointly.

**Miss Nyamosi** conceded to this ground and added that in fact the particulars of the charge did not fit a capital robbery charge.

The particulars of the charges were as follows:

***“On 15<sup>th</sup> April 2003 at Kiloma Estate in Kiambu District of Central Province robbed WILFRIDA JUMA of one CD Player make Sony, one computer, one Compaq Computers, and keyboard one TV Samsung 17 inches, one mobile phone make alcatel, the properties of one BRUCE KILIATRICK all valued at Kshs.350,000/- (Three hundred and fifty Thousand shillings) and at or immediately before or immediately after such robbery threatened to use personal violence on the said WILFRIDA JUMA.”***

The particulars of the charge do not indicate that more than one person committed the charge and for that reason alone, the charge does not support the fact that two accused persons had been named as the ones charged with the charge in addition there were other defects in that the charge did not indicate whether other persons apart from those charged were involved in the robbery. The fact that the particulars of the offence did not reflect the number of persons charged with the offence and was silent whether the offence was committed with others not in court rendered it fatally defective. In that sense, we agree with **Miss Nyamosi** that the particulars did not fit the capital offence that was preferred against the Appellant. That first ground of appeal therefore succeeds.

That finding is covered in the second reason advanced by the Appellant’s advocates, that the particulars of the charge were not supported by the evidence adduced. **Mr. Mumo** submitted that the evidence adduced indicated that the Applicant committed the offence with four others but the charge was silent on that point. The charge listed only six items as those stolen from the Complainant’s house yet in the Complainant’s evidence there were 35 stolen items. We do not wish to belabour that ground since we agree with **Mr. Mumo** that the charge as framed was defective and secondly the evidence adduced did not support it.

The third ground argued was that the prosecution evidence was inconsistent. However the Appellant’s advocates submission on this ground did not tally as he raised issue with court’s finding that PW1, the Complainant led police to arrest the Appellant yet in PW1’s evidence all he said was that he had not been present during the incident and that his workers, PW2 and PW3 were the only ones who could identify anyone.

**Mr. Mumo** continued to submit that PW2 who in evidence alleged that she had seen the Appellant during the robbery and had later identified him in an identification parade had in fact not identified the Appellant. Counsel submitted that the defence called the Parade Officer as their fourth defence witness. DW4 was the Inspector who conducted the identification parade to which PW2 was called.

DW4 said that PW2 had in fact identified other persons in the parade but not the Appellant.

**Miss Nyamosi** conceded that what PW2 stated in evidence that she had identified two people in identification parades the Appellant being one of them was in fact disapproved by the parade officer, DW4. Counsel for the State submitted that the issue ought to have been resolved by the learned trial magistrate in her evidence but she failed to do so.

We have carefully analyzed the evidence of PW2 and have confirmed that she testified to having identified two persons who included the Appellant in this case. The Parade Officer was conveniently not called by the prosecution and rightly, the defence called him as a witness. From the Parade Officer, DW4, it is quite clear to us that he conducted two identification parades to which PW2 was the identifying witness. It is also clear that in those parades, PW2 identified other persons other than the Appellant and his co-accused.

In **NDUNGU KIMANYI vs. REPUBLIC [1979] KLR 282** it was held:

***“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”***

The single identifying witness in this case, PW2 has been proved to have lied to the court concerning a very important issue, the only one which connects the Appellant to the offence, that of identification. Clearly, PW2 was discredited in evidence and the only way to resolve the inconsistency created by her testimony was by finding her a dishonest witness who could not be believed. PW2’s evidence ought not to have been taken into account. PW2 was clearly lying to the court. This witness had in fact not identified anyone of those charged in the case. Even if she believed that she had identified the Appellant and was therefore an honest but confused witness, her evidence was worthless and could not have founded any conviction in this case.

The last ground raised by **Mr. Mumo** concerned the learned trial magistrate’s failure to refer or consider the evidence of DW4 in her judgment. We agree that the learned trial magistrate disregarded the evidence of DW4 and failed to mention it anywhere in her judgment. We also agree with **Mr. Mumo** that the failure contravened **Section 169 (1) of Criminal procedure Code** which states what a judgment content should include.

We have considered whether that failure occasioned a failure of justice or was one which could be cured under **Section 382** of the **Criminal Procedure Code**. **Section 382** of the **Criminal Procedure Code** provides as follows: -

***“S.382 Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the Code, unless the error, omission or irregularity has occasioned a failure of justice;***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”***

We find that the failure to consider the defence witness occasioned a failure of justice and could not be cured under the provisions of the quoted section.

Having considered this appeal and in our own evaluation of the evidence, we have come to the conclusion that the conviction was unsafe and ought not to be allowed to stand. Accordingly we allow the appeal quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 1<sup>st</sup> day of February 2007.

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Mr. Mumo for the Appellant

Miss Nyamosi for the Respondent

CC: Tabitha/Eric

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**LESIIT, J.**

**JUDGE**

.....

**MAKHANDIA**

**JUDGE**