



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU  
Criminal Appeal 384 of 2002**

*[From original conviction and sentence in Criminal Case No. 1051 of 2002 in the Chief Magistrate's Court at Nakuru before Hon. S. Muketi (SRM)]*

**GEOFFREY CHEGE MWANGI ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, **Geoffrey Chege Mwangi** was charged with an offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**.

The particulars of the charge stated that on the 29<sup>th</sup> day of April 2002 at Nakuru Township in Nakuru District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pistols, robbed **Musa Njue Rugiri** cash Kshs.5,400/- and a motor vehicle registration number KAG 469G Toyota corolla white in colour valued at Kshs.280,000/- all total valued Kshs.295,400/- and at or immediately before or immediately after the time of such robbery used actual violence to the said **Musa Njue Rugiri**.

The appellant faced a second count of being in **possession of ammunitions without a firearm certificate contrary to Section 4 (1) as read with Section 3 (2) (a) of the Firearm Arm Cap. 114 Laws of Kenya**

particulars of the second count are that on the 30<sup>th</sup> day of May 2002 at Kiti Area within Nakuru Township in Nakuru District of the Rift Valley Province, was found in possession of two rounds of **ammunition 7.62 mm caliber without a firearm certificate thereof**.

The appellant also faced a third count of being in possession of public stores contrary to **Section 324 (2) of the Penal Code**.

The particulars of the third count stated that on 30<sup>th</sup> day of May 2002 at Kiti Area within Nakuru Township in Nakuru District of the Rift Valley Province, had in his possession public stores namely **one jungle trouser and one jungle bag of the Kenya Army such property being reasonably suspected having been stolen or unlawfully obtained**.

The appellant pleaded not guilty to the charges and after a full trial he was found guilty of the three counts of robbery with violence, convicted and sentenced to death as by the law provided.

The appellant being dissatisfied with the conviction and sentence appealed to this court and in the

petition of appeal he has challenged the conviction which he contends was based on contradictory evidence which also lacked credibility. The appellant also challenged the evidence of identification by the prosecution's witnesses which he termed as irregular as the identification parade was not conducted.

During the hearing of this appeal, the appellant who was unrepresented applied and was granted leave to include a further supplementary grounds of appeal and written submissions in addition to oral submissions.

The grounds raised in the supplementary petition of appeal faulted the conviction which was based on a defective charge sheet. The appellant also complained that the evidence by the prosecution witnesses was contradictory and that his defence was not taken into account by the trial court.

On the part of the State, this appeal was opposed. The learned State Counsel **Ms Obati** supported the conviction and sentence and urged this court to uphold the decision by the trial court.

This being a first appeal, this court has a duty to re-evaluate and re-consider the entire evidence and judgment by the trial court and arrive at its own independent determination on whether to uphold the conviction. This court has to bear in mind that it never saw or heard the witnesses as they testified in the trial court and therefore give due regard to that.

(See the case of **Njoroge Vs Republic [1987] KLR page 19**).

We briefly set out the summary of the evidence before the trial court:

On 29<sup>th</sup> April 2002, **Musa Njue Rugiri, PW 1** and his wife **Nancy Njoki, PW 2** arrived to their house within Kiti area at about 6.30 p.m. As they parked their vehicle registration number KAG 469G in their garage, they were confronted by four robbers who were armed with a gun and metal bars. They demanded to be given money. **PW 1** surrendered Kshs.1,500/- and **PW 2** similarly gave Kshs.10,000/-. The robbers bundled **PW 1** and **PW 2** into the house, one of the robbers held the complainants' children who were aged four and five years. They demanded for more money and since the complainants did not have the key to the bedroom which they thought had been forgotten at **PW 2's** place of work. They pleaded with the robbers to allow **PW 2** to go back to the shop and look for the key. Two of the robbers left with **PW 2** to look for the key at the shop while the others were left guarding **PW 1** and the children in the house. Those who went for the key returned after thirty minutes without the key. After they returned, the robbers ordered that **PW 1** should accompany them to his ATM to withdraw some more money.

**PW 1** was bundled at the back seat of his car, two of the robbers were left guarding the complainant's house and they drove to Barclays Bank where **PW 1** withdrew Kshs.10,000/- and gave the robbers. Immediately thereafter there were gun shots and **PW 1's** vehicle which was commandeered swerved and crashed. **PW 1** came out and surrendered to the police. He had sustained some injuries for which he was taken to hospital and treated. According to **PW 1** one of the robbers was also arrested by the police although he was not charged in this case. The police recovered a gun and an iron bar.

A month later on the 30<sup>th</sup> May 2002, **PW 2** spotted the appellant whom she recognized as one of the robbers entering a local video shop. She called the police who came and arrested him. **PW 1** and **PW 2** were able to identify the appellant as one of the robbers who had hit **PW 1** with a metal bar and who was left with **PW 1** when the rest accompanied **PW 2** to fetch the key.

**Purity Kagendo, PW 3** was at the time working for the complainant's as a house girl. She testified how the appellant was one of the robbers who was armed with a metal bar, during the robbery.

**P.C Edward Wamalwa, PW 4** was attached to Nakuru police station and 29<sup>th</sup> April 2002, he received communication about a vehicle registration KAG 469g Toyota Corolla that had been hijacked and a victim who was being taken to Barclays Bank to withdraw money. The police circulated the motor vehicle and when they spotted it, they started firing at it, one of the robbers was shot dead, the vehicle

collided with another and the complainant was rescued.

On 30<sup>th</sup> May 2002, **P.C Benson Chirchir, PW 6** received a report that one of the robbers was spotted at a video shop at Mchanganyiko area. The appellant was arrested and a search was conducted in his house where the police recovered jungle uniform and two live ammunition which were produced as exhibits. **Silas Chepkwony, PW 7** was also among the police officers who arrested the appellant and recovered the ammunitions from the appellant's house and also from the scene of shooting.

The firearms were examined by **Donald Mugo Mbogo, PW 5** on 10<sup>th</sup> June 2002. He examined a 45 Remington pistol, five rounds of ammunition of a 45 calibre and two rounds of ammunition and a pistol magazine. He confirmed that the pistol was a firearm and the ammunition which were both recovered from the scene of the crash and the house of the appellant were confirmed to be a component part of the pistol.

Put on his defence, the appellant denied in his unsworn statement of defence any connection with the robbery. He testified that he was arrested from his place of work at Mchanganyiko where he sells clothes and was taken to the complainant's home and thereafter charged with the present offence.

This appeal turns on the issue of identification of the appellant. The robbery in this case took place between 6.30 and 7.30 p.m. The complainants **PW 1, PW2** and **PW 3** who were victims of the robbery testified that there was electricity light at the garage and in the house throughout the robbery. **PW 1** and **PW 2** were with the appellant for a considerable period of time about one hour during the incident. **PW 2** who spotted the appellant one month later, after the incident and told the trial court that he was the one who was armed with an iron bar with which he threatened **PW 2**, she said that they spoke for a long time as she tried to persuade the appellant not to harm her and the family. The appellant was left behind when the others took away **PW 1** to withdraw money at an ATM. **PW 1** said that he was left with the appellant when **PW 2** was commandeered to go for the keys and they stayed for about thirty minutes.

This evidence of identification was corroborated by **PW 3** the house girl who said that the appellant was one of the people who was left guarding them when **PW 1** was taken hostage and **PW 2** managed to sneak to the neighbour's house where she made a report to the police.

The trial court relied on this evidence to arrive at its conclusion. Whenever a case of an accused person depends wholly or substantially on the correct identification and when the defence alleges the identification is mistaken, the trial court should always take caution before convicting in reliance on the correctness of the identification.

(See the case of **Ngoya Vs Republic [1985] KLR page 309**) where the Court of Appeal held;

***“In accepting evidence of identification the court should take into consideration the circumstances at the time and assess whether or not the same favoured accurate identification.”***

The issue of identification should be re-evaluated further for reasons that the appellant contends that the dock identification was not satisfactory. Both **PW 1** and **PW 2** came into contact with the appellant when he was arrested. That is when they identified him as one of the robbers. It was held in the case of **Ajode Vs Republic [2004] KLR page 81**

***“Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition.”***

In view of this contact between the complainants and the appellant during the arrest, it was not necessary to have an identification parade.

We also find that the learned trial Magistrate sufficiently cautioned herself while dealing with the evidence of identification, evaluated the same and found that there was corroboration by another witness.

We have also considered the defence offered by the appellant and we are in agreement with the trial court that the defence did not shake the otherwise strong prosecution's case.

As regards the submissions that there was inconsistency in the prosecution's evidence, we find no material variance and the minor discrepancy did not affect the weight of the prosecution's case.

We are satisfied that the prosecution proved its case against the appellant beyond reasonable doubt and the appellant was properly convicted. We uphold the conviction and the sentence and dismiss the appeal.

**Judgment dated and delivered at Nakuru this 15<sup>th</sup> day of March 2007.**

**M. KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**