



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**(CORAM: OJWANG & DULU, JJ.)**

**CRIMINAL APPEAL NO. 438 OF 2004**

**BETWEEN**

**JAMES GACHINI MOKO..... APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from the Judgement of Senior Principal Magistrate M.W. Wachira dated 23<sup>rd</sup> August, 2004  
in Criminal Case No. 1184 of 2003 at the Kiambu Law Courts)***

**JUDGEMENT OF THE COURT**

In the first count, the appellant was charged with robbery contrary to s.296(2) of the Penal Code (Cap.63). The particulars of the offence were that on the night of 5<sup>th</sup> – 6<sup>th</sup> May, 2003, at Miguta in Kiambu District, in Central Province, he together with others not before the Court, being armed with dangerous or offensive weapons namely *pangas* [cleavers] and axes, robbed **Peter Thuo Gitau** of one television set, seven pairs of shoes, one mobile phone, a driving licence, a wrist-watch, an identity card, assorted clothes and cash, all valued at Kshs.38,000/=, and at, immediately before, or immediately after the time of such robbery, assaulted **Peter Thuo Gitau** and **John Kariuki Ginaro Gitau**. In the alternative, the appellant was charged with the offence of handling stolen property contrary to section 322(2) of the Penal Code (Cap.63). And the particulars were that on 10<sup>th</sup> May, 2003 at Githunguri Village in Kiambu District, otherwise than in the course of stealing, the appellant dishonestly handled one wrist watch the property of **Peter Thuo Gitau**, knowing or having reasons to believe it to have been stolen or unlawfully obtained.

In the second count, which was also a charge of robbery contrary to section 296(2) of the Penal Code (Cap.63), the particulars were that on the night of 5<sup>th</sup> – 6<sup>th</sup> May, 2003 at Riamute Village in Kiambu District in Central Province, the appellant jointly with others not before the Court, and while being armed with dangerous or offensive weapons, namely *pangas*, axes and iron bars, robbed **Charles Njenga Ng'ang'a** of one Sony television, a radio cassette, a motor vehicle, Nissan Sahara registration No. KAJ 063H, one wrist watch, one jacket, and cash (Kshs.7,400/=) all valued at Kshs.487,400/=, and at, or immediately before, or immediately after the time of such robbery, assaulted the said **Charles Njenga Ng'ang'a**. To this count there was an alternative charge: handling stolen goods, contrary to s.322(2) of the Penal Code. The particulars were that on 10<sup>th</sup> May, 2003 at Githunguri Village in Kiambu District, in Central Province, the appellant, otherwise than in the course of stealing, dishonestly handled one wrist-

watch and one jacket, maroon in colour, the property of **Charles Njenga Ng'ang'a** knowing or having reason to believe them to be stolen or unlawfully obtained.

Count 3 of the charge was still robbery contrary to section 296(2) of the Penal Code (Cap.63). The particulars were that, on the night of 5<sup>th</sup> – 6<sup>th</sup> May, 2003 at Riamute Village in Kiambu District, in Central Province, the appellant jointly with others not before the Court, and while armed with dangerous or offensive weapons namely *pangas* and axes, robbed **Joseph Macharia Kago** of one motor vehicle battery, one jacket, one television booster, one wheel-spanner, assorted clothes and cash (Kshs.9,800/=) all valued at Kshs.15,000/=, and at, or immediately before, or immediately after the time of such robbery, assaulted the said **Macharia Kago**.

It was PW1's testimony that on the night of 5<sup>th</sup> – 6<sup>th</sup> May, 2003 at about midnight, strangers entered his compound. When he noticed this situation, he awakened his wife, and the two of them left the bedroom. Suddenly thereafter, the window grills and the doors were smashed, and the intruders entered the house. PW1 took refuge in the store, and climbed on a wardrobe, with the intention of reaching the ceiling; but then one of the robbers saw him and forced him to climb down and to lie down. After PW1 complied, he was ordered to remove his shoes, which he did. PW1 identified the man who ordered him to climb down, lie down and remove his shoes as his own cousin and neighbour, the appellant herein. PW1 had had a torch, which he flashed at the appellant when the appellant had forced him to climb down; and he saw the appellant clearly. The appellant had then demanded Kshs.50,000/=, which PW1 did not have. The appellant was brandishing an axe, as he ordered PW1 to surrender all the money he had. PW1 surrendered his wallet which contained Kshs.2,400/=, the keys to his wall-unit, and the keys to his motor vehicle, registration No. KAJ 353M. The appellant, acting in cahoots with other robbers, robbed PW1 of his television set worth Kshs.25,000/=, a radio, a jacket, an Omax wrist-watch, and a motor vehicle. PW1 screamed for help, after the robbers left, and a neighbour came along, and helped him to get to the Police Station, for the purpose of making a report of the incident. As PW1 now returned home, he received a report that his motor vehicle had been abandoned by the road-side. He was able to retrieve the motor vehicle. His jacket and wrist-watch were recovered from the appellant herein.

Even as PW1 went through an ordeal at the hands of the robbers (including the appellant herein), his wife (PW4) who had locked herself up in the bedroom was attacked, and the robbers demanded from her Kshs.100,000/=; she did not have it, but surrendered to the robbers Kshs.1,500/= which she had. She was forced into the lounge, where she was made to surrender the car keys. She joined her husband in screaming for help, after the robbers were gone.

PW2 testified that about 10 robbers wearing masks, deprived him of his property, on the same night when PW1 and PW4 were attacked and robbed of their property. PW2 had been unable to identify these robbers, but later, he learned that an item robbed from him, a Geneva wrist-watch, had been recovered from the appellant herein. He was able to identify this wrist-watch in Court.

During that same night of plural robberies, PW3 was robbed of his property. There were no lights at the time, and he did not identify any of the robbers. PW3 later learned that his jacket, one of the items stolen from him that night, had been recovered, and he was able to identify the same in Court.

PW5, No. 68936 **Police Constable Edin Adi** received the reports of the robbery, and informed the OCS. On 9<sup>th</sup> May, 2003 he accompanied the OCS and other Police Officers to the home of the appellant, being led by PW1. The appellant was not at home, so they went to a place known as **Thakwa**, where the appellant had rented a house; and there they found the appellant and his wife. When PW5 and the Police team conducted a search in the appellant's rented house, they recovered several items, among them wrist-watches, clothes and cash (Kshs.3,300/=). The Police officers then contacted several complainants, who came along and identified their property among the items found at the appellant's rented house. The appellant was then charged with the relevant offences.

The appellant gave a sworn defence in which he denied entering the houses of the complainants and committing the offences charged. He pleaded that on 9<sup>th</sup> – 10<sup>th</sup> May, 2003 he had been pre-occupied with milk sales – all through from 1.00 a.m – 5.00 a.m. When he returned home he found Police officers

talking to his mother, and the person they were seeking was not himself, but his brother, one **Kimani**. When he took them to **Kimani's** house, **Kimani** ran away; and a search in **Kimani's** house led to the recovery of some property.

The learned Magistrate acquitted the appellant on counts 1 and 3 – because the complainants in those instances had not identified the robbers. As regards count 2, it was held that the appellant had been properly identified by means of torch-light, by PW1. Before making this finding the trial Court warned itself of certain matters, and in that connection, relied on a High Court decision in **Waithaka Chege v. Republic** [1979] KLR 271. It had in that case been held that, while an issue of visual identification at night should always be approached with great care and caution, conviction could be entered where there had been visual identification at night by torch-light, in a situation wherein such identification coincided with evidence of recognition. In the context of the principle in the **Waithaka Chege** case, the learned Senior Principal Magistrate thus treated the testimony of PW1:

***“In the present case I have in mind that the accused [was] identified by torch-light, and I have cautioned myself of the need for care and caution in [relying on] the evidence of PW1. In his evidence in chief the witness told [the] Court –***

***‘the man who ordered me to lie down is James Gachini. I had a torch when I was climbing to the ceiling, and when he ordered me to climb down, I [flashed] the torch on his face. I recognised him because he is my neighbour and a cousin to my wife. He stepped on me and ordered me to remove my shoes.’***

***This leaves no room [for] doubt that the accused was well known to the complainant before the date of the offence.’***

The learned Magistrate was, in my view, sensitive and methodical in ascertaining the reliability of the identification of the appellant by PW1. PW1 gave compelling evidence that he, indeed, did see the face of the appellant; his torch-light enabled him to see the face of the appellant; he did so at a delicate stage in his movements towards the ceiling, and from his intended hide-out in the ceiling; when PW1 did flash the torch-light into the face of the appellant he would have been somewhat precariously balanced in his movement, and in these circumstances, we will take judicial notice, he was unlikely to be much guarded as he lit up the face of his tormentor. And when he flashed his torch-light, PW1 saw a familiar face – that of a neighbour, and a relative of sorts. This is true evidence of *recognition*, and goes beyond mere *identification*. So, in the confrontation between PW1 and the appellant, as the appellant endeavoured to find a roof-refuge, indeed do lie corroborative circumstances for the visual perception which he had of the appellant, at the material time. There is still more corroboration, in the fact which comes in the shape of undisputed testimony, that PW1 it was, who led Police officers to the home of the appellant on 9<sup>th</sup> May, 2003 – just three days after the offence was committed. And then, at the appellant's home, PW1's stolen property was recovered. PW2's stolen wrist-watch was also found with the appellant. This entire scenario must lead to the conclusion, as the learned Magistrate found, that “the witness knew the particulars of the appellant quite well.”

The learned Magistrate, for good cause, rejected the appellant's defence. In her words:

***“The defence of the [appellant] that he was engaged with his duties between 1.00 a.m. – 5.00 a.m. on the night of 9<sup>th</sup> – 10<sup>th</sup> May, 2003 is of no [evidentiary] value because the robbery herein was committed on the night of 5<sup>th</sup> – 6<sup>th</sup> May, 2003 [at about] midnight.’***

The learned Magistrate found the appellant to have committed robbery as specified in count 2 of the charge. But thereafter the Court made a statement which would show error of law:

***“However, I find that there is no medical evidence to show that actual violence was used against the complainant. I reduce the offence of robbery under section 296(2) of the Penal Code to a lesser offence of robbery under section 296(1) of the Penal Code. I find the accused guilty of the lesser offence and convict him accordingly. The accused is convicted of the alternative charges.***

Owing to the apparent error in the judgment, referred to above, learned State Counsel **Ms. Gakobo** indicated at the very beginning that when this appeal first came before the High Court, on 30<sup>th</sup> November, 2006 the appellant had been put on notice by the State that enhancement of sentence would be sought, for it had been found by the trial Court that the appellant, at the time of the robberies which are the basis of the charges, was in company with others not before the Court; and on that account the Court was obliged to convict on the capital robbery charge. It was, besides, on record that the gang of robbers had been armed with offensive weapons – and this was yet another ingredient of capital robbery. After this Court explained the respondent’s notice further to the appellant, he thus responded “*Nitaendelea na case*”, meaning “I have elected to proceed with my appeal.” The Court thus recorded: “The appellant elects to proceed. So, learned counsel **Ms. Gakobo** may proceed to make her full submissions.”

**Ms. Gakobo** submitted that even though the robbery had taken place at night, the complainant (PW1) “was able to identify the appellant, and to recognise him as a neighbour, and a cousin to his wife.” Learned counsel noted that PW1 had described in specific detail the role which the appellant played in the robbery. She considered it significant, as emerged from PW1’s testimony, that after the appellant noticed that PW1 had identified him, he hit PW1 with a club, and also seized PW1’s torch.

Learned counsel contested the appellant’s claim that the trial Court had not adequately considered his defence; for the Court had duly analysed all the evidence, and found that the appellant’s defence was made-up, was baseless, and was for rejecting.

**Ms. Gakobo** submitted, quite correctly, in our view, that the trial Court had made a mistake of law, in reducing the charge facing the applicant from violent to simple robbery. She urged the Court to substitute conviction, from that for simple robbery to that for capital robbery, with a consequential imposition of the death penalty, in place of a term of imprisonment for the appellant.

The appellant contended that he had not been properly identified as a culprit, in the robbery which is the basis of the charge. Our analysis of the evidence, however, shows that there was both recognition and ordinary identification, indicating quite accurately that the appellant was properly netted as the criminal.

We do not believe the appellant when he characterises the complainant’s evidence as contradictory, and applies that perception to cast aspersions on PW1’s evidence of recognition and identification. We are not in agreement with the appellant that he had been identified under difficult conditions, given our findings of fact in relation to identification and recognition.

We are unable to agree with the appellant when he claims that he had an alibi defence which the trial Court had ignored. The learned Magistrate had correctly, in our view, found that the alleged alibi relates to the night of 9<sup>th</sup> – 10<sup>th</sup> May, 2003 whereas the impugned act of robbery took place several days earlier, on 5<sup>th</sup> – 6<sup>th</sup> May, 2003.

It has not appeared to us that the appellant’s position, whether in the shape of the evidence tendered for him at the trial, or as regards the grounds and submissions placed before this Court, has in any way shaken the reliability and integrity of the State’s case. As already noted, the appellant was well identified as the man who, with others not before the Court, broke into the complainant’s house and robbed him and his wife of their property. The status of such evidence against the appellant is still more enhanced by the fact that the complainant’s stolen property was found in the possession of the appellant. Such property in the appellant’s custody, by the doctrine of recent possession, is indeed, reliable proof that he robbed them from the owner. This doctrine, as has been held (*D.P.P v. Nieser* [1958] 3 WLR 757), is “a convenient way of referring compendiously to the inferences of fact which, in the absence of any satisfactory explanation by the accused, may be drawn as a matter of common sense from other facts, including, in particular, the fact that the accused has in his possession property which it is proved has been unlawfully obtained shortly before he was found in possession of it.” No explanation was at all proffered by the appellant herein for being in possession of PW1’s goods which had only so very recently been robbed from him; it is not unfair, in these circumstances to infer that the appellant was the thief. He was also found with the wrist-watch belonging to PW2, again, only so recently stolen.

The learned Senior Principal Magistrate had acquitted the appellant in respect of the 1<sup>st</sup> and 3<sup>rd</sup> counts of robbery – because in those cases, there had been no identification of the appellant at all. That, in our view was a correct decision, since identification is a crucial link between an accused and the offence committed. Save that the appellant should have been found guilty of the alternative charge under the first count.

In count 2 of the offence, as already noted, the appellant was clearly identified as one among a group of robbers armed with dangerous or offensive weapons. This, therefore, was a typical case falling under s.296(2) of the Penal Code (Cap.63), and the learned Magistrate erred by meting out punishment under s.296(1) of the Penal Code. Once she found the appellant guilty, as she did find, she was duty-bound to impose capital punishment as prescribed by s.296(2) of the Penal Code.

Therefore, firstly, we uphold the conviction of the appellant, save that we do so, as was specified in the charge sheet, under s.296(2) of the Penal Code. We therefore quash the trial Court's sentence of a term of imprisonment, and impose the death penalty against the appellant, in the terms of s.296(2) of the Penal Code. We dismiss the appellant's appeal. We also find the appellant guilty of the offence charged in the alternative in the first count. In respect of the alternative charge, we impose a sentence of five years imprisonment, which will remain suspended, in the light of the capital punishment imposed under the main charge in the second count.

***Orders accordingly.***

**DATED and DELIVERED at Nairobi this 12<sup>th</sup> day of June, 2007.**

**J.B. OJWANG**

**JUDGE**

**G. A. DULU**

**JUDGE**