



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

**Criminal Appeal 232 of 2005**

PETER NJOROGE KINUTHIA..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

*(An appeal from the Judgement of Principal Magistrate Mrs. M.W. Murage dated 4<sup>th</sup> May, 2005 in Criminal Case No. 27 of 2004 at the Kikuyu Law Courts)*

**JUDGEMENT OF THE COURT**

The charge laid against the appellant herein was robbery contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that the appellant, on 22<sup>nd</sup> October, 2004 at Ruthingiti Village, Kiambu District in Central Province, being armed with a dangerous weapon namely a *panga* [a broad two-to-three-foot-long cutter or cleaver], robbed **Joseph Waweru Mungai** of a bicycle valued at Kshs.3,500/= and, immediately before the time of such robbery, wounded the said **Joseph Waweru Mungai**.

The section of the trial Court's findings which led to the verdict now appealed against, reads as follows:

**"I have considered the evidence before the Court. I find that the complainant positively identified the accused as the person who attacked him. [The complainant] knew him before that day, and it was not dark. There is also evidence that a *panga* was recovered from the accused's house. [The] accused has not challenged this evidence. His defence is a mere denial. I find him guilty as charged, under s.296(2) of the Penal Code [Cap.63] and convict him under s.215 [of the Civil Procedure Code (Cap.75)]."**

With that verdict, the trial Court proceeded to pronounce the only sentence permitted by law, the death penalty.

Ahead of the execution of the said sentence, the appellant comes to this Court challenging the learned Magistrate's judgement. He contends as follows:

- (a) that, the trial Court erred in law and fact, in relying on the evidence of a single witness especially with regard to identification;
- (b) that, the trial Court failed to consider that the complainant had not made any report of the incident at the Police Station;

(c) that, the trial Court ought to have made orders summoning essential witnesses who however, were not called by the prosecution;

(d) that, the trial Court erred in fact and in law by failing to consider that there was no Investigating Officer, and that this fact led to want of proof-beyond-reasonable-doubt;

(e) that, the trial Court erred in law and fact, in failing to consider the defence case.

The appellant who appeared in person, had handed in his written submissions; and it was his preference that the State Counsel should make submissions first, before he responded.

Learned counsel **Ms. Gateru** contested the appeal, and supported both conviction and sentence. She urged that the prosecution had proved the charges to the required standards, in the terms of s.296(2) of the Penal Code (Cap.63).

It was the testimony of the complainant (PW2) that he had been attacked and robbed of his bicycle by the appellant, a person he had known for some four years prior to the incident; he not merely identified, but *recognised* the appellant as the culprit. This testimony of recognition, **Ms. Gateru** urged, provided safe evidence which allowed no possibility of a mistake.

At the time the offence was committed, the appellant had cut the complainant several times with a *panga* – on the arm, face, causing serious injuries as was confirmed by **Dr. Mwaura** (PW1). On the P3 form which PW1 produced in Court, the complainant's injuries were described as "grievous harm."

On the contention that there was no Investigation Officer in this case, learned counsel stated that PW4 was the Investigation Officer.

Counsel disputed the contention that the trial Court had not considered the defence case, in arriving at its findings. The trial Court had considered the defence case, and come to the conclusion that that case amounted to a *mere denial*.

The appellant had introduced an amendment to his grounds of appeal, now contending that when the hearing began in the trial Court, the charges had not been read out to him. Learned counsel contested this assertion; at page 1 of the proceedings it is recorded that the charge was read to the appellant in a language that he understood; and the appellant thereupon pleaded not guilty; and so it was not true as the appellant contends, that his trial-rights as set out in s.77(2) of the Constitution had been contravened. Counsel submitted that the proceedings on record indicated that the language of the Court, and of witnesses, was noted; and where interpretation was deemed necessary, it was provided; and consequently, there was no violation of the provisions of s.198 of the Criminal Procedure Code (Cap.75) which relates to interpretation of evidence to accused or his advocate.

By the amendment to his grounds of appeal, the appellant also contended that the charge sheet had been defective and so could not found a valid trial. But learned counsel now urged that the said charge sheet was not at all defective, as it showed very well the State's claim.

The appellant also contended that there had been contradictions in the prosecution evidence. **Ms. Gateru** submitted that the prosecution case was not at all marred by contradictions, and, indeed, "if the Court were to find any contradictions, they would be so minor as [not to be capable of affecting] the prosecution case." Learned counsel urged that there was strong evidence on record to support conviction; and hence the appeal should be dismissed.

The appellant's final word is that he had been arrested in connection with this case, from his house; and he knew nothing about the case.

PW1, **Dr. G.K. Mwaura** who examined the complainant several days after the incident, found him dehydrated, and bearing cuts on the body: a cut across the nasal bridge, 4 inches long; a cut on the left

side of the head, 4 cm; a cut at the left ear, 3 cm; three cuts on the left arm, 3 inches. The complainant had been admitted to a clinic, where his wounds had been stitched, and intravenous fluid administered. The complainant suffered loss of blood, and partial blindness on the left eye. PW1 concluded that the said injuries were caused by a sharp object.

PW2, the complainant was walking along with his bicycle which had a tyre-puncture, at about 7.00 pm when he saw the appellant, a person well known to him, coming from the opposite direction. The appellant fell upon him with *panga* cuts, felling him, but the assault on him still continued forcing the complainant to feign death. The appellant took the bicycle and left with it. The complainant was helped by passers-by who took him to Ruthigiti for first aid; and thereafter he was admitted at St. Theresa's Clinic for five days. He later attended Thogoto Eye Clinic, and also gave to his father details of his attacker. His bicycle was not recovered.

It was at 8.00 pm on the material date, that the complainant's father, **Mungai Gichuki** (PW3) received word that his son had been physically attacked. PW3 went straightaway to Ruthigiti, and accompanied Administration Police officers to the clinic where first aid was being given. The complainant told PW3 that he had been attacked by the appellant herein. PW3 then took the complainant to St. Theresa's Hospital, where he was admitted.

PW4, Police Force No. 70785 **P.C. Hussein Ali** testified that he had been assigned the task of investigating the instant matter. He found the appellant at Ruthigiti, already arrested by Administration Police; and he re-arrested the appellant who was then charged with robbery with violence.

PW5, Administration Police No. 79191747, **A.P.C. Ndambiri** testified that on the material day and at the material time he was in his office when an injured person was brought in, and who said he had been robbed of a bicycle and a bundle of flour, and had been cut with a *panga*. PW5 and other officers arrested the appellant herein, and retrieved the said *panga* after the complainant identified the same. On cross-examination, PW5 testified that the appellant had been arrested as he lay, and it is at the locus where he lay, that the *panga* had been recovered.

The appellant elected to give unsworn testimony, and said the *panga* which was found in his possession had that day been taken by him for repair. After repairing the *panga* he had used it in Ngong Forest to cut trees; he then returned home, did cultivation in his farm, and lastly, went to sleep; and it was as he lay, at 11.00 p.m., that his arrest took place.

The real question before this Court is whether the evidence as laid before the Court, securely established that the appellant it was, who on the material day attacked, and violently robbed the complainant of his bicycle.

*Identification* is the crucial link in this respect, to determine whether or not the charge was safely proved and there was no possibility of error.

The learned Magistrate recorded as a fact emerging from the testimony of PW2, and we see no reason to doubt her finding, that the complainant had known the appellant for several years. Therefore, in a normal situation, the kind of identification which the complainant could make of the appellant, was *recognition*; and recognition when the fact of it is proved, can rarely be doubted, as it arises from *familiarity* between the one who perceives and the one who is seen. Just as the complainant says he had known the appellant for years, so does PW3, the father of the complainant, also affirm. Taking judicial notice that PW2 and PW3, as son and father, would be likely to be familiar in common with certain particular people who they have been meeting, we will hold that, indeed, the complainant was able to recognise the appellant. PW2's averment that he had known the appellant before the incident, is, in this respect, corroborated.

Although the robbery incident took place at about 7.00 pm, no question has arisen in the testimonies or in cross-examination, that visibility could have been poor at the time. We would not, in the circumstances, see this as a relevant question, as we take *judicial notice* that in the equatorial lands, there is not known to be significant variations in the amount of open-air lighting during specific hours of day, so that the

beginning of night-time, and end of day-time cannot always be ascertained by reference to the clock; and generally, just as the learned Magistrate did remark, there was *no substantial darkness* at the time of the incident herein.

Only *the complainant* saw the appellant, at the time of the robbery. We have seen nothing from the record of evidence to show doubts as to the complainant's truthfulness as a witness; and there was no doubt expressed, even in the cross-examination, as to the veracity of the complainant's testimony. We have to conclude that the most reliable evidence was adduced, showing the appellant to be the one who violently robbed the complainant of his bicycle. It is securely proved, we believe, that the complainant was seriously injured, during the robbery.

During the robbery, the complainant saw the appellant use the *panga*, as his instrument of violence. A *panga* was found in the custody of the appellant, several hours after the incident, when he was arrested and the same retrieved. It was PW5's testimony that the said *panga* had been identified by the complainant as the instrument used in the robbery. To counter that evidence, the appellant gave, in an unsworn statement, an account regarding that *panga* which, we think, does not stand up: that he had gone with the *panga* from Ruthingiti in Kiambu, repaired it, and gone on to Ngong Forest in Kajiado District using it to cut trees, and then returned to Ruthingiti to cultivate his farm, and later gone to sleep still guarding the *panga*, with which he was arrested a few hours following the attack on the complainant. This account sounds to us unreal, and we would dismiss it as an untrue story.

We hold that the charge of robbery contrary to s.296(2) of the Penal Code (Cap.63) was securely established, as against the appellant. We dismiss his appeal, uphold conviction, and affirm the sentence imposed by the trial Court.

***Orders accordingly.***

**DATED and DELIVERED** at Nairobi this 20<sup>th</sup> day of September, 2007.

**J.B. OJWANG**

**JUDGE**

**G.A. DULU**

**JUDGE**

**Coram: Ojwang & Dulu, JJ**

**Court Clerks: Tabitha Wanjiku; Eric**

For the Respondent: Ms. Gateru

**Appellant in person**