



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Criminal Appeal 151 of 2004**

**JACKSON GITHUI WANJERI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal against conviction and sentence of judgement of J. N. Nyagah (S.R.M.)*

*of 23<sup>rd</sup> April, 2004 of Criminal Case No.240 of 2003 Senior Resident Magistrate's Court – Karatina)*

**JUDGEMENT**

The appellant together with 7 other persons were charged with the offence of robbery with violence c/sec 296(2) of the Penal Code and with the charge of attempted robbery with violence c/sec 297(2) of the Penal Code. The learned magistrate convicted the appellant and sentenced him to death as provided in law. The appellant has now appealed against the conviction and sentence.

The prosecution's evidence was that PW1 on the night of 21<sup>st</sup>/22<sup>nd</sup> March, 2003 was in her house at Karogoto trading centre. She was with her husband. They both heard the door being knocked. The husband took a spear and a panga. The door continued to be knocked. There was a person who climbed the roof amongst the robbers. These robbers were saying that they wanted from PW1 kshs.30,000/= which she was going to use to buy maize. PW1 took the money some of which she hid in her chest and the other she left on the bed together with the mobile phone. She and her husband saw an opening in the roof made out of iron sheets. She went through the opening and lay on the iron sheet. Her husband began to struggle with the robbers who had broken the windows and were now in the house. Thereafter the police came but the robbers ran away. In that incident PW1 lost Kshs.18,000/=, a mobile phone and a wrist watch. Her husband had fallen from the roof and was taken to the hospital.

PW2 was her husband. On that night he heard dogs barking which awoke him. The doors and windows were kicked and he went to the window armed with a spear and struggled with this people for one hour. Before the struggle he had put on the electricity. He climbed onto the roof and as he climbed on the counter he fell down and was injured. In the meanwhile his wife remained in the roof. These thieves were also firing a gun. Members of the public came and so did a policeman. PW5 was a daughter of PW1 and 2. She gave evidence as to how she had seen one of the accused earlier in the day. Later on at 11 p.m. she heard the door being banged. Her mother screamed and her brother climbed into the roof. Her father was fighting the robbers and the mother took some money while keeping some in the mattress. Both her parents climbed into the roof when two robbers entered the house and found her. They asked her for the money and at that time the electricity light was on. She recognized one of them, the appellant herein. He requested her to open the drawers. At one time he wanted to hit her with a panga. She remained with the appellant while others went to look in the other rooms. She said she knew the appellant whom she had met when she went to visit a schoolmate at her home. The appellant was in that

home. She told the police that she was able to identify one of the robbers. In response to questions from the court this witness said that there was electricity light inside the house which was fluorescent tube. There was also light outside the house. She said that she stayed with the appellants during the incident for one hour. They were during that time looking for money.

PW10 a police officer received a call that there were robbers at Karogoto. On arriving at the scene the robbers had disappeared. On carrying out investigation the appellant was arrested. The appellant was put to his defence and in his defence he said that on 21<sup>st</sup> March, 2003 he attended a burial. He returned home at 6.00 p.m. that night until he slept at 9.00 p.m. He was arrested at his home. He denied committing the offence.

The trial court convicted the appellant on count 1. On conviction the appellant was sentenced to death. He was acquitted on the charge of the attempted robbery. The evidence of PW5 was clear and consistent. PW5 was a secondary school student in Form 3. She spent one hour with the appellant in a well lit room throughout the incident. This is while the appellant and his colleagues were looking for money. At one time this appellant wanted to hit her with a panga. She knew the appellant before having met him at the schoolmate's home.

We are aware that this being identification by single witness there is of necessity need to warn ourselves on danger of basing a conviction on the evidence of identification by a single witness. It is indeed possible for a witness to believe quite genuinely that the attack was by someone she knew and yet being mistaken. In the case of Abdalla BIN Wendo v Republic [1953] 20 EACA 166, the Court of Appeal of East Africa said

**“...but on identification issue a witness may be honest yet mistaken and may make erroneous assumption particularly if he believes that what he thinks is likely to be true...”.**

We have accordingly warned ourselves and find that the identification of the appellant by PW5 was without error. This witness displayed clarity in description of her contact with the appellant. They were together for one hour in a house well lit by fluorescent light. Throughout this time they were in close proximity. Apart from the clarity of the witness we do also find that the conditions of the identification were favourable. In our finding there is no basis of interfering with the finding of the lower court and we do hereby dismiss the appeal and confirm the conviction and sentence.

Dated and delivered at Nyeri on the 3<sup>rd</sup> day of October, 2007.

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**