REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
Criminal Appeal No. 56 of 2002

BERNARD GITAU JANE……..…….APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

(Being an appeal from the judgment of Abdul El Kindly, Principal Magistrate, dated 7th January, 2002, in the Senior Principal Magistrate's court; Muranga, Criminal Case No. 160 of 2001)

JUDGMENT

The Appellant was charged with robbery with violence contrary to Section 296 (2) of the Penal Code, particulars alleging that on the 20th January 2001 at Mukuyu in Muranga district the Appellant jointly with others not before court and armed with dangerous weapons, namely knives, robbed Peter Mwangi Wanjohi of cash. Kshs. 29,000/ using violence.

From the evidence, Peter Mwangi Wanjohi who gave evidence as PW1 was an employee of John Muniu Githara, PW2, and was given the sum of Kshs.29,000/ by John Muniu Githara to go and pay Magunandu Wholesalers who were creditors of PW2. As PW1 was walking, carrying the money in his coat pocket, from Muranga towards Mukuyu where he was to pay the money, he was confronted by four men first; by a person who asked PW1 for a cigarette. When PW1 said had no cigarette, that man summoned the other three who included the Appellant, according to the evidence of PW1. That was at about 10.20 a.m. The four people held PW1 and took Kshs.29,000/ from him threatening to stab him with knives. It appears they did not take all the money PW1 had because after they had left him, he proceeded to Magunandu Wholesalers and paid them the balance of what the robbers had left with him, explaining what had happened to the payee as well as his employer and they called the police who went to the area with PW1 but could not trace the robbers.

PW3 police constable Kiswili who was one of the police officers who visited the scene told the court that on 26th January, 2001 he received information that one Bernard Gitau had been arrested by the police at Maragua in connection with a different offence. PW3 was one of the police officers who went and collected Bernard Gitau who denied robbing PW1, but was found with newly purchased two tee shirts, one cap, a pair of shoes, a pair of trousers and a bed sheet. The police who did not seem to have seen any money, had taken possession of those items.

Later a police identification parade was conducted in which the Appellant was identified by PW1.

PW1 said that the robbery took about three minutes and that he was not injured.

The evidence of PW4 Inspector Maura Asila purporting to produce the Appellant's statement under inquiry which went into a trial within a trial, was not complete as the statement was not produced as an exhibit. At the close of the trial within a trial, the learned principal magistrate reserved his ruling to

another date and after the ruling had been delivered stating that the statement was admissible, PW4 never came back to the court to produce the statement. But somehow in a manner we do not understand, the trial magistrate's case file contains that statement and it is marked as exhibit 6 and listed as such in the list of exhibits. In our view, that is irregular because the correct procedure is that such a statement, if ruled admissible, must be admitted in the evidence and therefore produced as an exhibit in the main trial, and not during the trial within a trial as it may have happened in this case. It follows from what we are saying that exhibit 6 is not properly in the evidence and we shall ignore it as we hold that what happened was prejudicial to the Appellant who still had the opportunity of cross examining PW4 in the main trial but was never availed that opportunity.

We have almost a similar problem with regard to the charge and caution statement. There was a trial within a trial where the recorded proceedings do not show clearly the end of the prosecution's case as the defence case start immediately after the end of the evidence of the first prosecution witness. At the end of the defence evidence, a ruling is made that the statement is "admitted in the evidence" instead of stating that the statement is admissible" and close the trial within a trial in order for the court to move from the trial within a trial back into the main trial to have the statement admitted in the evidence and be produced as an exhibit whereby the accused person will have been afforded the opportunity to cross examine the producing prosecution witness. Before the witness completed his or her evidence in the main trial.

From what the learned trial magistrate did therefore, the evidence of PW7 Inspector Wangechi ended just before the ruling of the trial magistrate deciding the fate of the charge and cautionary statement in the trial within a trial so that although that ruling included words to the effect that the statement was "admitted", that statement was not, infact, admitted because following the correct procedure, the statement ought not to be admitted in the trial within a trial. It ought to have been admitted in the main trial.

As a result of what the trial magistrate did, the recorded evidence does not show the exhibit number of the statement and the list of exhibits does to include that statement although the statement appears in the magistrate's case file, where it is filed with remarks that it is exhibit number 8. Like in the case of the statement under inquiry, here also what the magistrate did was prejudicial to the Appellant and the statement is not properly in evidence. We shall ignore it.

One other perplexing feature of the two statements attributed to the appellant is that he was arrested by the police at Maragua on 26th January, 2001 as a suspect in a different case. The time of arrest is not revealed. At the time of his arrest one of the other suspects who were being arrested with the Appellant was shot dead in the eyes of the Appellant who was collected by the police from Muranga that same day on the ground that he was also a suspect in this case. By 2.00 p.m. that same day the charge and caution statement was recorded at Muranga. The following day 27th January, 2001 at 12.30 p.m. the Appellant was back at Maragua for statement under inquiry, and it is not clear why that had to be so after recording a charge and caution statement.

From that scenario what the appellant said could be correct. He told the court that having been arrested at Maragua on 26th January, 2001, he was kept there for two days until 28th January, 2001 when he was taken to Murang'a. While still at Maragua, one of the people he was arrested with had made a statement, which the Appellant was made to copy in his own handwriting at Maragua on 27th January, 2001. When he was taken to Murang'a, a lady Inspector of Police he identified as PW7 copied from what the appellant had copied at Maragua and forced the appellant to sign threatening that if he refused to sight his fate would be like that of the suspect he had seen being shot dead.

Following from what we have been saying therefore, the only evidence remaining is that about identification. At the scene of the robbery although Mr. Orinda in his submissions spoke as if it was the Appellant who confronted PW1 asking for a cigarette, the evidence of PW1 indicates that person was not the appellant. According to PW1 the Appellant was among the three robbers who attacked him later after the first attacker had called them. That means PW1 had now four people attacking him at once making it difficult for identification within the three minutes PW1 said they had together, even though the attack was during the day. PW1 did not say he had known the Appellant before and that therefore the appellant's face was familiar. He was not therefore of assistance in the arrest of the Appellant and

although there was evidence that he identified the Appellant on the police identification parade, that evidence is insufficient to support a conviction, especially in view of the Appellant's defence that PW1 was given the opportunity to see him before they met at the parade. He denied the offence throughout the trial and from what remains in the evidence following the flaws committed by the trial magistrate, the conviction of the appellant cannot stand.

Accordingly, we do allow the Appellant's appeal. Quash his conviction and set aside the sentence imposed upon him. The Appellant be released forthwith unless lawfully detained in some other cause.

Dated this 31st day of March, 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE

Present:

Appellant in person

Mr. Orinda for the Republic

Martin Mwangi – Court clerk