



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Criminal Appeal 204 & 205 of 2002**

**CHARLES KAGO WANJOHI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original Judgment and Conviction in Principal Magistrate's Court at Kerugoya in Criminal Case No. 2811 of 2002 dated 23<sup>rd</sup> April 2002 by Mr. W. N. Njagi – P.M. – Kerugoya)*

**HIGH COURT CRIMINAL APPEAL NO. 205 OF 2002**

**STANLEY KARIMI KAGO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original Judgment and Conviction in Principal Magistrate's Court at Kerugoya in Criminal Case No. 2811 of 2002 dated 23<sup>rd</sup> April 2002 by Mr. W. N. Njagi – P.M. – Kerugoya)*

**J U D G M E N T**

Charles Kago Wanjohi the appellant in High Court Criminal Appeal No. 204 of 2002 (hereinafter referred to as 1<sup>st</sup> Appellant) and Stanley Karimi Kago the Appellant in High Court Criminal Appeal No. 205 of 2002 (hereinafter referred to as the 2<sup>nd</sup> appellant) were jointly tried and convicted by the Principal Magistrate Kerugoya of 4 counts of Robbery with violence contrary to Section 296(2) of the Penal Code.

Being dissatisfied they have each appealed against their conviction and sentence which appeals have been consolidated for purposes of hearing.

During the trial in the lower court, the 1<sup>st</sup> Appellant was the 2<sup>nd</sup> Accused whilst the 2<sup>nd</sup> Appellant was the 1<sup>st</sup> accused. 9 witnesses testified on behalf of the prosecution. The gist of their evidence was that on the night of 18<sup>th</sup> October 2001 at around 1.20 a.m. a gang of robbers struck at Kimari Estate in Kerugoya town where Peterson Kinyua Mwangi (P.W.1) and his wife Tabitha Warauke Kinyua (P.W.2) were staying. James Wanjira Mali (P.W.3) and Anne Kawira Muturi (P.W.4) were also sharing a house in the same estate. Beatrice Wangechi Gatungu (P.W.5) was another Tenant in the estate.

The gang smashed open the door to the house of P.W.3 & P.W.4. P.W.3 hid under the bed and therefore did not see the faces of the robbers. P.W.4 who was robbed of Kshs.800/- was able to see the robbers as

the electricity lights were on. She identified the two Appellants as having been amongst the robbers. In particular she identified the 2<sup>nd</sup> Appellant as the person who took the money from her. The robbers also struck at the house of P.W.5 from whom they took a panga and Kshs.100/-.

Similarly the door to P.W.1's house was smashed and 3 men entered the house. The robbers hit P.W.1 with an axe on the forehead and started ransacking the house. They took Ksh.1,000/- from P.W.1. In the meantime P.W.2 managed to escape through the rear door and went to look for help.

P.C. Francis Chemweno (P.W.6) and other officers from Kerugoya police Station received information about the robberies and proceeded to Kimuri area. They met P.W.2 who led them back to her house. They challenged two of the robbers who were outside to surrender but instead the robbers started shooting arrows at the police who in return shot the two men dead. At that point the 1<sup>st</sup> Appellant who was also outside fell down and he was arrested.

The 2<sup>nd</sup> Appellant who was still inside the house of P.W.1, heard the shooting and tried to hide however P.W.1 struggled with him and managed to push the 2<sup>nd</sup> Appellant outside the house where he was also arrested by the police.

At the scene the police recovered an axe, metal rod, panga, quaver, bow and arrows. P.C. Francis Kundi (PW 9) who also visited the scene conducted a search on the Appellants. He recovered Kshs.429/- from the 2<sup>nd</sup> Appellant, A Seiko 5 wrist watch and Kshs.91/- from one of the deceased persons and Kshs.531/- from the second deceased person.

Sgt. Ernest Marinao (PW 8) of the scenes of Crime Embu took photographs at the scene showing the bodies of the two persons shot dead, the recovered weapons and the smashed doors. These were all produced in evidence.

In their defences each Accused denied having committed the offence and claimed to have been innocently arrested whilst on their way home.

In his judgment the trial magistrate found that all the 4 complainants who live in the same area were robbed. She also found that the police shot dead two of the robbers and that the 2<sup>nd</sup> Appellant was apprehended from PW 1's house by PW 1 who handed over the 2<sup>nd</sup> Appellant to the police, whilst the 1<sup>st</sup> Appellant was arrested within the same compound. The trial magistrate therefore rejected the defence of the Appellants that they were innocent passer-by. He also found that the robbers were armed with dangerous weapons and that one of the complainants was injured during the robbery. He therefore convicted both the Appellant of all the 4 counts of robbery with violence and sentenced each to the mandatory death penalty in respect of each count.

The Appellants have filed similar grounds of appeal basically contending that the trial magistrate erred in relying on the evidence of visual identification in circumstances which were not favourable for a positive identification. The Appellants also maintained that the prosecution evidence was contradictory and that the magistrate erred in rejecting the defence of the Appellants.

We have reconsidered and evaluated the evidence that was adduced before the trial magistrate. It is apparent from the evidence of the complainants and the photos produced in evidence that the houses of the complainants were forcefully broken into. The evidence of PW 1 and PW 2 that they were robbed is also consistent with the evidence of PW 6 who met PW 2 looking for help and upon going to the house of PW 1 found robbers some of whom were shot dead. The question is whether the two Appellants were properly identified as having participated in the robbery.

As regards the 1<sup>st</sup> Appellant only PW 4 claimed to have identified him during the robbery. She claimed the robbers not only switched on the electricity lights but also had torches. However PW 4 did not appear to be so positive about her identification of the 1<sup>st</sup> Appellant. This is evident in her evidence when she states, "***I personally saw the two Accused during the robbery. May be the second Accused***

***was guarding outside, but I am positively certain about the 1<sup>st</sup> accused person.”***

From the evidence of PW 6 and PW 2 it is clear that the 1<sup>st</sup> Appellant was arrested within the compound of PW 1 during the shoot out with the robbers. In his defence the 1<sup>st</sup> Appellant claimed that he was arrested by police officers whilst he was on his way home because he did not have an Identification Card. However both PW 6 and PW 2 testified that the 1<sup>st</sup> Appellant was arrested within the compound of PW 1's house during the robbery. PW 6 who confronted the robbers claimed that the 1<sup>st</sup> Appellant was in fact armed with a bow and arrow and that he fell down after the other two were shot. The trial magistrate who saw and assessed the demeanour of the witness chose not to believe the 1<sup>st</sup> Appellant. We concur with him that in the light of the evidence before him, the 1<sup>st</sup> Appellant's defence could not hold and was therefore rightly rejected. Although none of the witnesses positively identified the 1<sup>st</sup> Appellant, there was sufficient evidence that he was acting in concert with the robbers who were shot.

As regards the 2<sup>nd</sup> Appellant, he was basically caught red-handed whilst still in the house of PW 1 struggling with PW 1. This was testified to by PW 1, PW 2 and PW 6. His defence that he was on his way home when arrested by unknown persons was an unbelievable story which was rightly rejected. The arrest of 2<sup>nd</sup> Appellant was not based on identification but basically on the fact that he was caught in the act.

It is evident that the complainants were all living in the same neighbourhood and that all the robberies occurred around the same time. This was a clear indication that the robberies were committed by the same gang. We therefore find that there was sufficient evidence to sustain the convictions of both the Appellants on all the four counts.

The Appellants having been sentenced to the mandatory sentence provided for the offences of which they were convicted, we find no merit in the appeals. We accordingly dismiss each of the appeals except to add that the sentence imposed on the Appellants in respect of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts will be kept in abeyance.

***Dated, signed and delivered this 31<sup>st</sup> day of May 2006.***

**J. M. KHAMONI**

**JUDGE**

**H. M. OKWENGU**

**JUDGE**