



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

**Criminal Appeal 15 of 2003**

**JOSPHAT GATURI MAINA alias WANUGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

Josphat Maina Gaturi alias Wanugu hereinafter referred to as the Appellant was jointly charged with one Peter Kimotho Muriuki hereinafter referred to as the Co-Accused before the Senior Resident Magistrate's Court at Nanyuki for the offence of Robbery with violence under Section 296 (2) of the Penal Code. It was alleged that on the night of 29<sup>th</sup> and 30<sup>th</sup> November 2001 at Nanyuki Township in Laikipia District jointly with others, while armed with dangerous or offensive weapons namely knives they robbed Musa Tarus cash Kshs.4,000/- and at or immediately before or after the time of such robbery they used personal violence to the said Musa Tarus.

During the trial a total of six witnesses testified for the prosecution. The evidence of the prosecution was that on the night of 29<sup>th</sup> and 30<sup>th</sup> November 2001, the Complainant Musa Tarus who is a Senior Private with Kenya Army was drinking with friends at Sarafina Bar in Nanyuki Town. At about 3.00 a.m. they decided to leave Sarafina Bar to go to Impala Bar. As the complainant was leaving Sarafina Bar he met Elizabeth Wambui (P.W.2). They talked for about 15 minutes after which the complainant moved aside to relieve himself.

In the meantime the complainant's friends had moved ahead. P.W.2 who was waiting for the Complainant then saw three men emerge. She recognized two of them as Appellant and one Kingori. The three men stood next to the Complainant who turned round and saw them. The Complainant asked them what they wanted, and Kingori responded that it was him that they wanted. The Appellant then kicked the Complainant on the leg and the Complainant fell down. The three men quickly searched his pockets and took Kshs.4,000/- from his wallet and threw back the wallet at the Complainant. At that stage P.W.2 run to inform the Complainant's friends of what was going on.

They came back to where the complainant was and found that the robbers had taken off. P.W. 2 informed the Complainant and his friends that he knew two of the robbers as "*Maina*" (*the Appellant herein*) and "*Kingori*". The Complainant and his friends decided to go to the police station to report the matter. Before they reached the police station, they heard someone coming from behind and P.W.2 recognized him as the Appellant.

The Complainant and his friends got hold of the Appellant and demanded the Complainant's money. The Appellant however denied having robbed the Complainant. The Complainant and his friends decided to take the Appellant to the police station where the Appellant was identified as a police officer. The Complainant and his friends left Appellant at the report office when they went to record their statements.

On coming back however they found that the Appellant had disappeared.

IP. Ephraim Itote (P.W.3) an officer attached to Nanyuki police station was the officer to whom the Complainant and his friends handed over the Appellants and reported the robbery. The Appellant introduced himself to P.W.3 as a police officer from Doldol Police Station. P.W.3 explained that He went to attend to a telephone call giving instructions that the Appellant be booked in the cells. When he returned he found that the Appellant had disappeared from the station. P.W.3 and P.C. Peter Nyaga (P.W.5) started looking for the Appellant. P.W.3 traced the Appellant at Bagdad Bar. He arrested the Appellant and the Appellant identified his Co-Accused. Investigations were carried out and it was established that the Appellant was a police officer attached to Kimanju Police Post. He had been given a sick off by P.C. Festus Mugambi (P.W.4) on 28<sup>th</sup> November 2001 at 6.15 p.m. to seek medical treatment at Doldol.

In his evidence the Appellant gave a sworn statement in which he explained that on the 28<sup>th</sup> November 2001 he was given permission by P.W.4 to go to the dispensary at Kimanju as He was feeling unwell. He did not find the Doctor and was advised to go to Nanyuki. The Appellant got a lift from a UN vehicle and arrived at Nanyuki at 12.30 a.m. He looked for accommodation and slept. The following morning Appellant went to Mt. Kenya Chemist where he found a Doctor who prescribed and sold some drugs to him.

At about 8.00 p.m. Appellant then went to River Side Bar where he watched pool table competition until 11.30 p.m. He then went to Impala Bar. On the way he met P.W.2 with a girl who used to be his girlfriend but they had later disagreed after the Appellant's wife discovered the relationship. The Appellant exchanged greetings with P.W.2 after which they returned to Impala Bar. While they were in the bar drinking, P.W.1 the complainant entered. P.W.2 then stood up and confronted the Complainant as to why he had disappeared. The Complainant pleaded that he had traveled upcountry and he had now returned. The Complainant attacked the Appellant and the two got into a fight but were separated by other people present. The Complainant warned the Appellant that He would see. The Complainant, P.W.2 and three other men left the bar.

At about 4.00 a.m. the Appellant left the bar. As he was walking He saw about ten people laughing. When He got to 10 metres from them He realized the Complainant and P.W.2 were among them. As he was about to pass the group the Complainant confronted the Appellant and demanded to know the relationship between the Appellant and P.W.2. The Complainant told the Appellant that He was an officer and threatened him saying He would know who He was.

The Appellant told the Complainant that He had lost Kshs.500/- during their quarrel. The Appellant told the Complainant that He was also a police officer and that they should settle the matter at the police station. The argument went on as they went to the police station. At the police station they found P.W.3. to whom the Appellant explained that the Complainant was making false allegations that he had stolen his money. The Complainant alleged that he had lost Kshs.4,000/-. P.W.3 then instructed that the Complainant's report be entered in the O.B. and his statement be taken by the C.I.D. The Appellant was also required to bring his witness to make a statement. The Appellant went to Impala Bar and brought one witness. P.W.3 however informed the Appellant that the O.C.S. had quarreled him for having given him permission to get his witness. He told the Appellant to get into the cells and the witness to get into the O.C.S.'s office and wait for him. The witness was then released and the Appellant was escorted to the cells. Later the Appellant was charged.

The Appellant's co-Accused also gave unsworn evidence in which He denied having robbed the Complainant. He explained that he was called by some people who asked him whether He knew Kimotho and having identified himself as Kimotho he was arrested and taken to the police station where he was locked in and later charged.

In her judgment the trial magistrate found that there was no dispute as to the fact that the Complainant and the Appellant had met, but the dispute was the circumstances in which they met. The trial magistrate accepted the Complainant's version that the Appellant attacked and robbed him of Kshs.4,000/= as

opposed to the Appellants version that the Complainant accosted the Appellant because He found Appellant with P.W.2 who was an ex-girlfriend of the Appellant. The trial magistrate appears to have dismissed the Appellant's version because the Appellant did not call evidence in support of the same as she claimed "***If indeed there had been a commotion at the bar between P.W.1 and the 1<sup>st</sup> Accused, it would have been easy to even call the evidence of the Impala Bar Staff.***" The trial magistrate failed to note that apart from P.W.2 whom the Appellant claimed to be having a grudge with, no other independent evidence was called from the Complainant's pals who were alleged to be in the company of the Complainant at the material time. The trial magistrate relied on the O.B. report which was obviously based on the Complaint made by the Complainant.

It is evident that a lot of capital was made of the fact that the Appellant who was a police officer had left his station ostensible to see a Doctor but was instead found in night spots in Nanyuki. That was however a matter which ought not to have influenced the criminal proceedings.

We note that the trial magistrate disbelieved the Complainant's allegation that He was accosted by a person who was holding a knife. Having found that the Complainant had exaggerated his evidence or outrightly told a lie regarding the knife, the credibility of the Complainant was brought in question.

We find that in the circumstances of this case there was a doubt regarding the version of the events as put forward by the Complainant. The evidence adduced was therefore not sufficient to prove the case against the Appellant beyond any reasonable doubt.

We note that learned Principal State Counsel Mr. Orinda did not support the Appellant's conviction on the grounds that the Appellant's conviction was partly conducted by an incompetent prosecutor. In that regard the record speaks for itself. The participation of Corporal Kabogo in the prosecution of the Appellant rendered the trial a nullity. We nevertheless found it necessary to fully consider the evidence with a view to determining whether it was necessary to order a retrial. We come to the conclusion that in the light of the evidence which was adduced against the Appellant an order for a retrial would not be justified.

On the above premises we allow the appeal, quash the conviction and set aside the sentence imposed. The Appellant shall be set free unless otherwise lawfully held.

***Dated this 8<sup>th</sup> day of June 2006.***

**J. M. KHAMONI**

**JUDGE**

**H. M. OKWENGU**

**JUDGE**