



(Appeal arising from the original conviction and sentence in Criminal Case Number 698 of 1999 of the Senior Magistrate's Court at Kerugoya by Mr. W. N. Njage – S.R.M. delivered on 20th January 2000)

**MURIITHI MWAI MUGO alias MAJOR.....
.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NUMBER 18 OF 2000

(Appeal arising from the original conviction and sentence in Criminal Case Number 698 of 1999 of the Senior Magistrate's Court at Kerugoya by Mr. W. N. Njage – S.R.M. delivered on 20th January 2000)

**DANIEL WACHIRA KINYUA.....
.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NUMBER 19 OF 2000

(Appeal arising from the original conviction and sentence in Criminal Case Number 698 of 1999 of the Senior Magistrate's Court at Kerugoya by Mr. W. N. Njage – S.R.M. delivered on 20th January 2000)

**SAMUEL MUGO MUCHUGA.....
.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

CONSOLIDATED

Muriithi Mwai Mugo the Appellant in High Court Criminal Appeal Number 17 of 2000, (*hereinafter referred to as the 1st Appellant*), **Daniel Wachira Kinyua** the Appellant in High Court Criminal Appeal Number 18 of 2000 (*hereinafter referred to as the 2nd Appellant*), and **Samuel Mugo Muchunga** the Appellant in High Court Criminal Appeal Number 19 of 2000 (*hereinafter referred to as the 3rd Appellant*) were jointly tried together with one **Gichobi Gitari Nyaga** (*hereinafter referred to as the Co-Accused*) before the Senior Resident Magistrate Kerugoya Court. The 3 Appellants were jointly convicted of the offence of Robbery with violence and sent to suffer the mandatory death sentence. The 1st Appellant and the Co-Accused were also convicted of alternative counts of Handling Stolen Property contrary to **Section 322 (2)** of the Penal Code in respect of which the Co-Accused was sentenced to serve 10 years imprisonment.

Being dissatisfied each of the 3 Appellants has lodged an appeal against conviction and sentence, which appeals have been consolidated for purposes of hearing. The Appellants' grounds basically raised the same issues which can be paraphrased as follows: -

§ **That the trial magistrate erred in relying on the evidence of identification by a single witness which identification was not free from the possibility of error or mistake given that the circumstances were not favourable for identification and the Complainant had not described his attackers in his initial report.**

§ **That the trial magistrate erred in admitting in evidence the retracted confessionary statement.**

§ **That the trial magistrate erred in rejecting the defence.**

During the trial in the lower court, the 1st Appellant was the 2nd Accused, 2nd Appellant the 1st Accused and the 3rd Appellant the 3rd Accused.

The particulars of the main charge against the appellants alleged that on the 26th day of January 1999 at Kiamaina Trading Centre in Kirinyaga District jointly with others not before the court whilst armed with pangas and iron Bars they robbed Mwangi Gathundu (complainant) of various items and in the process of the robbery, wounded the Complainant.

A total of 8 witnesses testified for the prosecution, whilst each of the appellants gave sworn evidence in their defence.

The Complainant (P.W.1) identified the 3 appellants who were persons known to him as having been amongst the gang which broke into his Hotel, attacked and robbed him. He explained that He was able to see the appellants with the aid of a hurricane lamp which was on in the Hotel. The 1st appellant had been working at the Hotel and was aware that the Complainant was keeping some money in the Hotel. The Complainant reported to the police that He had recognised some of his assailants as persons known to him. He identified the persons as the 3 appellants. Efforts by the police to trace the Appellants were initially unsuccessful. Later with the aid of other villagers who included Evan Muthui Mugo (P.W.2) the villagers apprehended the 2nd appellant. The 2nd appellant led the villagers to a tea plantation where they recovered a Great Wall T.V. and some plates. The 2nd appellant was escorted to the police station. The next day police officers who included Cpl. James Kalonzo (P.W.3) conducted a search in the home of the 2nd appellant and recovered some more plates and forks. The 2nd appellant also led the police to a plantation where a bedcover, a pair of jeans and a jacket were recovered.

The 1st appellant was also subsequently arrested by members of the public and a Battery recovered from his house. Finally the 3rd appellant was also apprehended. Upon interrogation He implicated the Co-Accused who was arrested and a radio recovered from him. All the recovered items were identified by the Complainant as items stolen from him during the robbery.

The Complainant produced receipts for the Battery, Great Wall T.V. and the Radio with serial numbers

which tallied with the exhibits. Each of the appellants gave confessionary statements which each retracted but were admitted in evidence following a trial within trial.

In their sworn statements each appellant denied having committed the offence. The 1st appellant claimed He was arrested by the chief at Kigumo. Police officers and the Complainant later came assaulted him and forced him to sign a piece of paper. He maintained that He was innocent. The 2nd appellant maintained that He was stopped and arrested by a mob when He was on his way to his mother's house. He was hit on the head and led to the road where He was shown a T.V. and some clothes which it was alleged He had stolen. The next day his house was searched and the police recovered a jacket which they claimed He had stolen. The 3rd appellant maintained that nothing was recovered from his house. He was nevertheless, arrested and forced to sign some papers.

We have reconsidered and evaluated the evidence as we are expected to do in this first appeal.

The evidence against the appellants was primarily their recognition by the Complainant during the robbery. All 3 were known to the Complainant and although it was at night, the Complainant maintained that He saw them clearly with the aid of the hurricane lamp which was on. The Complainant made it clear in his first report to the police that He had recognised some of the robbers as persons known to him. Although He did not identify these persons by name in the O.B. report, the Complainant gave the names to the police and his neighbours. The police even made efforts to trace the appellants but were not successful. The Complainant's neighbours were however more determined and managed to apprehend all the 3 appellants.

Although all the appellants denied that any recoveries were made from them. It is apparent from the evidence of the Complainant, P.W.1, P.W.3 and P.W.4, that most of the items were recovered from the 2nd Appellant, whilst the Battery was recovered from the 1st appellant and the 3rd appellant led to the recovery of the radio from the Co-Accused. The items were all positively identified by the Complainant. The recovery of the stolen goods from the appellants fortified the Complainant's evidence that the 3 appellants were amongst the robbers who attacked and robbed him. The conviction of the appellants did not therefore rest on the identification alone but was supported by other evidence and the appellants' defence was therefore properly rejected.

There was also the confessionary statements alleged to have been made by the appellants. Even without these statements the evidence on record is sufficient to sustain the case against each of the appellants. For whatever it was worth the trial magistrate properly considered the admissibility of each statement and ruled that the same were admissible having been voluntarily given. The typed proceedings at page 26 contain a typing error at line 20. However the original record is clear that the trial magistrate stated that He was unable to believe that the statement was obtained irregularly. Moreover the statement made by 1st and 2nd appellants were detailed and sufficiently corroborated by the evidence of the Complainant and the recovery of the stolen items.

All in all we are satisfied that the evidence adduced against all the appellants was sufficient to prove the main charge of robbery with violence contrary to **section 296 (2)**. We accordingly uphold each of the convictions against each appellant in respect of this charge.

As regards the 2nd appellant the trial magistrate also convicted him of the alternative charge of Handling. This was wrong as the 2nd appellant having been convicted of the main charge the alternative charge did not come into play. We therefore quash the conviction against the 2nd appellant in respect of the alternative charge.

The appellants having been sentenced to the mandatory sentence, there is no substance in their appeals against sentence.

The upshot of the above is that we dismissal the appeals in respect of each of the 3 appellants.

Dated, signed and delivered this 26th day of September 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE