

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 253 of 2004

(From original conviction and sentence of the Senior Resident Magistrate's Court at Nyahururu in Criminal Case No. 2549 of 2003 – G. A. Mwasi [SRM])

BERNARD MWANGI GICHINI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Bernard Mwangi Gichini was charged with two counts of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. Particulars of the offence were that on the 25th of December, 2002 at Kagongo village, in Nyandarua District, the appellant jointly with others not before court robbed John Mumbura Mwangi and Elijah Kamau Ndungu of cash and personal items listed in the charge sheet and at or immediately before or immediately after the time of such robbery used actual violence to the said John Mumbura Mwangi and Elijah Kamau Ndungu. The appellant pleaded not guilty to the charge and after a full trial was found guilty of the lesser charge of **Robbery with Violence contrary to Section 296(1) of the Penal Code**. He was sentenced to serve four years imprisonment on each of the two counts. The sentences were ordered to run concurrently. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted based on insufficient, contradictory and incredible evidence of the prosecution witnesses. He was aggrieved the trial magistrate had not considered the fact that the alleged incident took place during election campaigns where two rival groups met and fought. He faulted the trial magistrate for relying on hearsay evidence to convict him. He was further aggrieved that the trial magistrate had failed to consider his defence before arriving at the said decision convicting him. At the hearing of the appeal, the appellant, with the leave of the court, presented to this court written submissions in support of his appeal. He urged this court to allow his appeal. Mr. Koech for the State did not support the conviction of the appellant by the trial magistrate. He submitted that the evidence adduced by the prosecution witnesses did not establish the guilt of the appellant to the required standard of proof. He submitted that the appellant had not been positively identified by the victims of the robbery.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses before the trial magistrate so as to reach an independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required in law to put in mind the fact that it neither saw nor heard the witnesses as they testified (**see Okeno vs Republic [1972] EA 32**). I have considered the submissions made by the appellant and the response thereto by Mr. Koech on behalf of the State. I have also re-evaluated the evidence adduced by the witnesses in the trial before the

subordinate court.

Certain aspects of this case are very disturbing. The complainants in this case PW1 John Mumbura Mwangi, PW2 Joseph Chege and PW4 Elijah Kamau claimed that they were attacked by a group of between three and five people. The incident is said to have taken place on the 25th of December, 2002 at about 9.00 p.m. It is important that this juncture to state that this was during the campaign period of the last general elections. According to the complainants, they stopped the vehicle which they were traveling in when they saw three men who appeared to be drunk staggering on the road. When they stopped their vehicle, they were attacked by the same people who apparently were pretending to be drunk. PW1 testified that he was hit by an object on his face through the side window of the motor vehicle which he had not wound up. He testified that he was pulled out of the vehicle, beaten and robbed of Ksh.2,800/= cash which was in his pocket. When PW4 attempted to rescue him, he was hit by a stone on his head. PW4 lost consciousness and when he regained it, he discovered that he had also been robbed of his hat, torch and Ksh.3000/=. PW1, PW2 and PW4 testified that they recognized the appellant as being among the men who robbed them. The appellant was known to them before the robbery incident.

After the robbery, the complainants reported the incident to PW5 Daniel Mwaura, the area assistant chief of Geta sublocation of Nyandarua District. PW5 however contradicted the version of how the events took place as narrated by the complainants. He testified that the complainants did not know the persons who had attacked them but suspected that the attackers had gone to a bar in a nearby trading centre. PW5 accompanied the complainants to the bar whereby they found the appellant with a torch which PW4 identified to be his. However it is clear from the evidence adduced that the said torch did not have any distinguishing mark or marks that could have made PW4 to be positive about its identity. The appellant was arrested and taken to Kipipiri Police Station. The appellant was however released on a police bond and told to return to the police station at a later date.

On the 28th of July 2003, the appellant was arrested by the police and charged with the offence of Robbery with Violence. When the appellant was put on his defence, he explained that he was arrested on the 25th December 2002 because of the campaign violence in the area. He testified that the complainants were in a rival camp to the one which he belonged. He recalled that the two sets of supporters fought and threw stones at each other. When the appellant was arrested, he was released on a police bond and told that the likely charge that would be brought against him was that of creating disturbance likely to cause a breach of peace. He was therefore surprised when he was charged with the offence of robbery with violence, seven months after the incident.

Having carefully evaluated the evidence, I am inclined to agree with the submission made by the appellant that he was wrongfully charged with the offence of robbery with violence. As I stated earlier, I was disturbed by certain aspects of the evidence adduced in this case by the prosecution witnesses. It is clear that the appellant was arrested due to the disturbance that took place between two rival groups of supporters in a political campaign. When the report was made to the police, it was understood that the appellant was arrested as a result of the fight that took place between the two sets of political supporters. The complainants in this case were injured when the two rival supporters met at night on a public road.

The appellant was released after a day in police custody on a police bond and told that he would be charged with an offence of creating disturbance likely to cause a breach of peace. This court is surprised, just as the appellant was surprised, that seven months after the incident took place, the appellant was arrested and charged with committing the offence of robbery with violence contrary to **Section 296(2) if the Penal Code**. It is clear from the facts of this case that the ingredients of robbery with violence were not established. No evidence was adduced by the prosecution to establish that the appellant participated or had the motive of robbing the complainants. The fact that the police understood the complaint made by the complainants to be as a result of a fight between two rival political groups is a clear pointer to the fact that the appellant could not have robbed the complainants. This is court is disturbed that the police made a decision to charge the appellant with capital robbery seven months after the heat of the election campaign period had cooled down. There is more than meets the ordinary eye in this case.

It is clear from the above reasons that this appeal shall be allowed. Mr. Koech for the State did not think

that there was sufficient evidence to sustain the conviction of the appellant on the charge of robbery with violence. I agree. The conviction of the appellant by the trial magistrate is therefore quashed. The sentence imposed is set aside. The appellant is acquitted of the charge of robbery with violence. He is ordered released from prison and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 10th day of November, 2006

L. KIMARU

JUDGE