REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 251 & 252 of 2004

[From the original conviction and sentence in Criminal Case No. 2569 of 2003 Senior Principal Magistrate's Court, Nyahururu – G.A. MMASI (S.R.M)]

GATHURI GITHINJI MENJU ……..……..…1ST APPELLANT

PAUL KARIUKI NJOROGE..……..……....……..…..…2ND APPELLANT

VERSUS

REPUBLIC ……...……....…….. RESPONDENT

JUDGMENT OF THE COURT

The 1st and 2nd appellants were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Co**de**. The appellants faced three counts of robbery with violence and each an alternative charge of **handling stolen goods** contrary to **Section 322 (2)** of the **Penal Code**.

The particulars of the first count stated that on the night of 19th and 20th day of June 2003 at Kaptein Village in Nyandarua District of Central Province, with another not before court, jointly while armed with dangerous weapons namely a rifle and sword robbed **Samuel Kariuki Gathungu** cash Kshs.500/-, two motor vehicle radios make Philips, one motor vehicle jack, one mobile phone make Siemens C35, one T.V make Niko black and white connected with radio all valued at Kshs.41,013 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Samuel Kariuki Gathungu**.

As regards the second count the particulars of the charge stated that on the night of 19th and 20th day of June 2003, at Kapteni Village in Nyandarua district within Central Province, jointly with others not before court, while armed with dangerous weapons namely; a rifle and swords robbed **Samuel Kingori Nderitu** cash Kshs. 33,000/-, a traveling bag, one pair of black sports shoes, one wrist watch make Orient, one packet of 2 kilogrammes maize flour (Jogoo) all valued at kshs.47,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Samuel Kingori Nderitu**.

As regards the third count the particulars are as follows: -

On the 16th day of July 2003, at Rurii Village in Nyandarua district within Central Province, jointly were found with dangerous or offence weapons namely an ammunition AK-47 rifle and an axe in circumstances that indicated that the appellants were so armed with intent to commit a felony namely

robbery.

The appellants also faced the alternative charge of preparing to **commit a felony** contrary to **Section 308 (1)** of the **Penal Code** and of **handling stolen goods** contrary to **Section 322 (2)** of the **Penal Code.**

After a full trial, the appellants were found guilty of a lesser charge of **robbery** contrary to **Section 296 (1)** of the **Penal Code**. The two appellants were acquitted of the alternative count of preparing to commit a felony and the 1st appellant was also acquitted of the alternative charge of handling stolen property. Both the appellants were convicted on the first and second counts and they were sentenced on both the first and second count to five years imprisonment and both sentences to run concurrently.

Being aggrieved with the conviction and sentence, the appellants have appealed to this court and in the petitions of appeal they have raised more or less the same grounds of appeal.

During the hearing of these appeals, both appeals were consolidated for purposes of hearing and determination as they arise from the same conviction. The appellants challenged the conviction which was based on contradictory and uncorroborated evidence which evidence did not prove a case against them to the required standard. The decision of the trial court was also faulted for relying on evidence of identification which did not meet the criteria set out for identification. The ability of the prosecution's witnesses to identify the accused persons in circumstances that were said to be difficult was also raised by the appellants as an issue in this appeal. The appellants further complained of having been arrested for another offence which is not connected to the present case.

Mr. Koech, the learned Counsel for the State, supported the conviction and sentence while relying on the evidence on record. The evidence that led to the conviction and sentence of the appellants may be stated briefly;

Samuel Kathungu, **PW 1**, was a driver of motor vehicle KAQ 547S Mitsubishi lorry. He was hired on 19th June 2003 to transport household goods by one ***Mr. Wachira*** from Nairobi to Ol Kalou. When they were about to reach the home of ***Mr. Wachira*** at about 7.00 p.m., the vehicle got stuck and despite there efforts to get it moving, their efforts were in vain. They slept in the vehicle with ***Samuel Nderitu***, **PW 6**. At about 2 a.m., they were woken by people who claimed to be the police. They were warned that if they resisted, they would be killed. **PW 1** told the court that he was robbed Kshs.500/- a mobile phone and was ordered to remove the car radio from the motor vehicle. He said he was able to identify the 1st appellant but he did not see the 2nd appellant.

During cross-examination, **PW 1** insisted that he was able to identify the 1st appellant as he had switched on the motor vehicle lights to remove the radio and within that time, he was able to identify the first appellant and when he reported the matter to the police, he described the 1st appellant as a black man and the way he was dressed. **PW 1** told the court how he was robbed of Kshs.500/-, a further Kshs.28,000/- which he had hidden in the vehicle. He was further ordered to count the money, his watch was also stolen, the motor vehicle jack, as well as a small T.V set. After the robbery, **PW 1** and **PW 6** reported the matter to the police. **PW 6** was able to identify the two vehicle radios which were stolen from the motor vehicles and a small T.V set. He also identified the 2nd appellant whom he said was tall and was wearing a long coat and a cap. He said he was able to identify the 2nd appellant with the light from the torch which the 2nd appellant was flashing at them.

The other crucial evidence was by Police Constable Reserve, **Danson Kamwangi** who spotted the appellants at a bus stage. They were carrying two bags. He became suspicious and went for reinforcement at Ol Jolok police station where he was given police officers. They were able to catch up with the appellants whom they arrested and from the bag which was carried by the 1st appellants, they recovered several items amongst two vehicle radios, an axe, an A.K 47 rifle, a wrist watch.

The other evidence that connects the 1st appellant with the robbery is that of **APC Stephen Gachomba**

who told the court how he arrested one, Paul Wahome Gathuru who was riding a bicycle and upon inspection, he found him with a small T.V set. The boy said the T.V set belonged to his father. He arrested him and took him to Marmanet Police Station with the small T.V set which he later identified as the one which was before the court. This young boy was charged but the charge was later withdrawn when the 1st appellant said the small T.V set belonged to him. The boy was the son of the 1st appellant.

Further evidence was given by Police Constable **Teresia Wanjahi**, **PW 8**, who received the reports of robberies from the complainants, that is, **PW 1** and **PW 6.** On 16th July 2003, she told the court how the two appellants were arrested within Rurii area and they were brought to the police station with the luggage from which they removed two vehicle radios which tallied with the description of the radios that had been reported stolen from PW 1 and **PW 6**. That was the summary of the prosecution's case.

Put on their defence, the appellants gave a sworn statement of defence and both denied having been involved in the robbery. The 1st appellant said that the two vehicle radios which were found in his possession were his, he claimed to have purchased them from a person from Nyeri without notice they were stolen properties. He however did not produce any receipts. As regards the 2nd appellant, he said that **PW 3** who arrested him, had a grudge against him and therefore he was framed up when he was charged with the present offence.

The trial court accepted the evidence of **PW 1** and **PW 6** who were the victims of robbery especially the identification which the trial court termed positive. As regards the 2nd appellant, the trial court was satisfied with the evidence by **PW 3** that when he was arrested, he had a bag that contained a long coat which **PW 6** identified as the one the 2nd appellant was wearing during the robbery. Thus, the trial court found the victims of robbery were not injured and therefore proceeded to convict the appellants with the first and second counts of simple robbery.

This being the first appeal, this court is mandated to re-evaluate the evidence before the lower court and arrive to its own independent determination as to the guilt or otherwise of the appellants. (*See* the case of **Okeno Vs Republic [1972] E.A L.R page 32**). The issues for determination arising out of this appeal basically turns on identification and whether the appellants were found in possession of stolen goods so soon after the robbery. During the hearing of this appeal, the 1st appellant submitted that he is only appealing against the sentence. He therefore has not challenged the conviction and we are of the view rightly so, as there was overwhelming evidence against him. The 1st appellant was identified by **PW 1** and was arrested with the two vehicle radios and the small T.V set was recovered from his son. After investigations he confirmed to the police that the small T.V set belonged to him. This small T.V set and the vehicle radios were also positively identified by **PW 1** and **PW 6**.

The 2nd appellant challenged the conviction and sentence. He argued that he was not identified and the evidence of identification by **PW 6** is not safe because the circumstances under which the said identification took place was difficult. It was at night and PW 6 said that he used the light from the torch that the 2nd appellant was flushing.

The other piece of evidence that connected the 2nd appellant with the offence was a long coat which was found in a bag and which **PW 6** identified as the one which the 2nd appellant was wearing.

According to the evidence of **PW 3**, who arrested the appellants, nothing was found in the bag that was carried by the 2nd appellant during the arrest. In this case, it is not clear that any stolen items were found in possession of the 2nd appellant. As it was held in the Court of Appeal decision in the case of **Isaac Nganga Kahiga Vs Republic CA. Cri. Appeal No. 272 of 2005 (Nyeri)** (*unreported*) at Page 7 of its judgment;

" ***It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is***

positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

Bearing the above principles in mind, we are satisfied that the conviction against the 2nd appellant is not safe. As regards the case of the 1st appellant, he was lucky that he was convicted of a lesser charge of simple robbery. The record and even the evidence show that the 1st appellant was armed with dangerous weapons. And in that case, he could have been convicted with the offence of robbery with violence. We are not satisfied that the sentence of five years imposed upon the 1st appellant should be reviewed as the law provides for fourteen (**14**) years imprisonment. Thus, the sentence of five years is lenient in the circumstances. The appeal by the 1st appellant is dismissed, the conviction and sentence is confirmed. The appeal by the 2nd appellant is allowed, the conviction and sentence is quashed and the 2nd appellant is ordered to be set at liberty unless otherwise lawfully held.

Judgment read and signed on 14th day of December 2006.

MARTHA KOOME

JUDGE

L. KIMARU

JUDGE