# REPUBLIC OF KENYA

# IN THE HIGH COURT OF KENYA

# AT NAIROBI

# CRIMINAL APPEAL 20 of 2002

**PETER MUNIU GAKURU……APPELLANT**

**VERSUS**

**REPULBIC…….……..……..RESPONDENT**

**JUDGMENT**

The appellant, PETER MUNIU GAKURU, was convicted for ROBBERY WITH VIOLENCE, contrary to section 296(2) of the Penal Code. He was then sentenced to suffer death, as by law prescribed. He has appealed to this court against both conviction and sentence.

It was the prosecution case that the appellant was a member of a six man gang which went to Kamirithu Village on the night of 29th September 2000. While there, the gang stole three tyres from one motor vehicle. While they were dislodging the tyres from the vehicle, the car alarm was triggered. The noise of the alarm caused the complainant to wake up. When she noticed the gang, the complainant screamed. That caused the gang to go to the complainant's bedroom window, which they smashed. At that point, the appellant is said to have pulled aside the curtains, and then demanded the complainant's bag. The complainant handed over her said bag, which contained cash, amounting to Kshs 22,000/=, two ATM cards, one Visa card, one Barclays card, one Master card, and the complainant's Identity card. After getting the bag, the appellant demanded the keys to the complainant's vehicle. That too, he was given. Thereafter, the robbers went away.

Later, the police arrived at the scene, in response to a telephone call from the complainant's neighbour. With the help of a police dog, the police officers traced the appellant at his house, where he was arrested. A search was conducted at the house, but nothing was recovered.

When the police conducted an identification parade, the complainant picked out the appellant.

After the trial court received evidence from five prosecution witnesses and two defence witnesses; and after analyzing the said evidence, the trial court found the appellant guilty. The appellant was not satisfied with the verdict, hence this appeal. In his **"Memorandum of Appeal",** the appellant set forth the following grounds;

> **"1. THAT the learned trial Magistrate erred in both law and fact in convicting me on the evidence of a single witness in that;-**
>
> **(a) circumstances at the locus were inconclusive**
>
> **(b) The ID parade was improperly conducted**
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> **(c) No warning or caution was administered**
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> **2. That the learned trial Magistrate further erred in law and in fact in believing the evidence of a dog handler which was doubtful and further erred in acting upon prosecution contradicting evidence. (sic!)**
>
> **3. That the learned trial magistrate further erred in convicting me, the appellant, as charged yet the evidence adduced, though also not established, disclosed a lesser offence.**
>
> **4. That my defence was not given an adequate consideration yet it dislodged the prosecution case.**

We understand the first ground of appeal to mean that the appellant was challenging his alleged identification. In that regard, the appellant

first pointed out that his identification was by a single witness. He also said that as the incident occurred at 3.00a.m., the circumstances were not conducive for positive identification. What were those circumstances?

PW1, Alice Wanjiku Kageni, testified that she was asleep at her house on the night of 29th September 2000. At about 3.00 a.m. PW1 heard the alarm of a vehicle, outside her house. She peeped out of the window but did not see the Toyota Starlet at the parking. PW1 called her neighbour, asking him to call the police, but the call was not answered. Then the alarm went on again. At that point when PW1 looked outside the window, she saw six people. PW1 started screaming. The robbers broke windows to PW1's bedroom. According to PW1, the appellant pulled the curtain and saw a handbag on the floor, inside PW1's bedroom. The appellant demanded the said bag, and PW1 handed it over. It contained all the items which are listed in the charge sheet

It was submitted by the appellant that as the incident happened at 3.00 a.m. the complainant could not have identified the intruders. He also says that that was confirmed by the failure of PW1 to describe the attackers to the police, when PW1 made her first report. But the state contends that the identification was very positive. Learned State Counsel, Mrs Gakobo, pointed out that although the incident happened at 3.00 a.m. PW1 was fully awake. The learned State Counsel said that as the alarm systems for a vehicle had been triggered on two different occasions, both which attracted the attention of the complainant to her bedroom window, PW1 was alert.

There is merit in the state's submission. PW1 did go to her bedroom window on both occasions when the vehicle alarm was triggered. In our view, therefore, she was not awoken from her sleep by an attack on her or her house. She heard the alarm of the vehicle, got up and went to her bedroom window. But it is also noted that on the first occasion, PW1 did not see anybody. On the second occasion when the alarm was triggered, PW1 looked out through the window and saw six men. Her reaction was to scream. And the intruders then broke PW1's windows

All through the attack, the security lights were on, outside the house. PW1 said that there were security lights at the top of every window. It is the said lights which enabled PW1 to clearly see the appellant when the latter came up to the window at PW1's bedroom. The same security light also lit up the inside of PW1's bedroom, thus enabling the appellant to see a handbag which was on the floor.

PW1 testified that the appellant demanded the bag, money and the motor vehicle key. The demands were made in Kiswahili and Kikuyu languages, when the appellant threatened to enter the house unless PW1 handed over the various items demanded. Bearing in mind the fact that the window was only a metre above the ground, and that the appellant was standing outside it, in a place which was lit with the security light; and also considering that the appellant was able to look into the bedroom where he saw PW1's handbag, we believe that the circumstances were conducive for positive identification. Furthermore, we note that PW1 handed over her handbag and car keys. That would confirm that the appellant was close enough to the window to receive the said items.

The second limb of the appellant's submissions relates to the identification parade as well as to ground No. 2 i.e. about the dog and its handler.

It is contended by the appellant that the identification parade was irregular. He said so because , as far as he was concerned, the only reason why PW1 was able to pick him out, was because after the appellant's arrest, the police first took him to the compound where PW1 lives. That assertion was vehemently denied by PW1, who said that the police did not pass through her place after they had made the arrest. PW1 said that she only learnt of the arrest of a suspect, when she had gone to the police station on the morning after the incident. This issue was very contentious. PW1's testimony was corroborated by PW4 and PW5, who were the arresting officers. Both of them testified that after they had arrested the appellant, they took him straight to the police station. PW4 and PW5 denied suggestions that they took the appellant through PW1's compound. On the other hand DW1 testified that he saw the police talking to PW1, in her compound, after the police had arrested the appellant. How did the learned trial Magistrate deal with this issue?

He held that PW1 was a reliable witness, and therefore her testimony was believed by the court. In that regard, we as an appellate court, do accept the fact that we have not had the benefit of seeing the witnesses testify. And we also find no basis in law or fact for finding fault in the assessment of PW1's integrity, by the trial court. That being the case, the inescapable implication is that the learned trial Magistrate did not believe the appellant and DW1, when they said that the appellant was taken to PW1's compound after his arrest. It would therefore follow, that the identification of the appellant at the identification Parade cannot be faulted. To our minds, that explains the reason why the appellant not only told PW3 that he was satisfied with the manner in which the parade was conducted, but also signed the parade forms, to signify his satisfaction. We therefore find no merit in the attempt by the appellant to find fault with the manner in which he was identified by PW1, during the identification parade. As regards the police dog which led the police officers to the appellant's house, he says that the said dog could not have picked up his scent. It is noted, from the evidence of PW5, PC Waswa, that he is a dog handler. As at the time he was testifying in court, PW5 had been a dog handler for six years. He said that when the message about the incident was received at the station, he went to the scene.

He was accompanied with his police dog. Once at the scene, the dog picked up a scent. As far as PW5 was concerned, the police dog could only pick up the scent of one person, even if there were many people. The dog would then lead up to the person whose scent he picked up. On this occasion, the dog picked up the appellant's scent, and then led the police officers through a distance of 1 ½ kilometers, upto the appellant's door.

The main reason why the appellant challenges the evidence of PW5 is because he testified that he did not go next to PW1's window or house. Therefore, as far as the appellant was concerned, there was no way for the police dog to pick up his scent, considering that PW1 had said that the appellant had reached upto her curtains. Logically, the contention appears to make some sense. But on closer reflection, we note that PW1 had not testified that the appellant was only by the window to her bedroom at all times during the robbery. If that had been her testimony, the appellant's contention would be solid. But in this case, the appellant and his colleagues were within the compound where PW1 lived. They pushed one (starlet) vehicle from its parking. They also removed three tyres from the second vehicle, (a Peugeot).

In effect, the appellant's scent could possibly have been picked up at any place within the compound, where he may have passed. Also, it is not to be forgotten that after the gang robbed PW1, they left the compound, so as to get away. In those circumstances when it is noted that PW5 was within PW1's compound, we hold that it was very possible for the dog to have picked up the appellant's scent anywhere within the

compound. The dog did not have to go to the bedroom window to pick up the scent. The other significant factor is that the dog followed the scent for 1 1/2 kilometers. It then entered a compound which had several houses. However, the dog went straight to the appellant's door, and stayed there. The dog then made noise, while signaling with its fail that there was someone inside the house. And true enough, the appellant later emerged from the house. That fact was confirmed by none other than the appellant and his father (DW1). Having analysed the evidence, we are in agreement with the findings of the learned trial magistrate, to the effect that the police dog was neither mistaken nor misdirected when it led to the appellant. We are satisfied that the police dog picked up the appellant's scent from PW1's compound, and led to the appellant's house. Whilst its true that a search at the houses of both the appellant and his father (DW1) did not yield any of the items stolen from PW1, we do not find that to be significant. We say so because PW1 had testified that the gang had about six members. Therefore, it is quite conceivable that any of the other members of the gang could have escaped with the stolen property.

But the appellant also raises the issue of contradictions in the prosecution case. He submitted that the said contradictions indicated that the prosecution had failed to prove the case beyond reasonable doubt. What contradictions did the appellant refer to? He said that according to PW4, the police received a report about the incident, at a time when they were on patrol. On the other hand, PW5 said that he was at the police station when the report reached the police.

A perusal of the record reveals that PW4 received the report from the police station. This is what he said, during cross – examination;

> **"We were on patrol at 2.30 a.m. but I did not have a watch. The O.C.S came to us using a securicor van. The first report was received at the police station, then the report was made to me."**

It is clear to us that, as far as PW4 was concerned, the report was first received at the police station. Thereafter, the O.C.S relayed the information to PW4, who was on patrol duties. The O.C.S. used a securicor van to reach the place where PW4 was. Next, PW5 testified that he was at the station when the report was received there. He testified as follows:

> **"I recall 29.9.00 at about 3.00a.m. I was at the station when telephone came that a woman had been robbed. We entered security motor vehicle and proceeded to the scene."**

To our minds, the evidence of PW4 does not contradict that of PW5. We say so because as we understand it, PW5 was at the station when the report was received. He and the O.C.S boarded a Securicor vehicle, which ferried them to the scene. And it is the O.C.S who notified PW4 about the reported robbery.

The other contradiction cited by the appellant was that whilst PW5 testified that the appellant opened his door, PW4 said that he kicked the door. The record shows PW4 as saying:

> **"We are about 6 or 7 officers. The accused refused to open and I kicked the door. The door was noisy and the parents woke up and inquired what we were doing, and we informed them.**
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> Later, PW5 said:
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> **"We called out and the accused opened the door. We did not break the door. It is the accused who opened."**

It is true that PW5 did not make any reference at all to the door being kicked by PW4. To that extent, there is a discrepancy between the evidence of PW4 and PW5. But on the other hand, PW4 did not actually say that he kicked the door open. He said that he kicked the door, and it was noisy, prompting the appellants parents to wake up. It is therefore entirely possible that after PW4 kicked the door, it made noise, and was then opened by the appellant. At any rate the appellant himself testified that policemen knocked at his door on the material night, and he opened for them. Similarly, DW2, Joseph Gakuru, testified that police officers knocked the door to the kitchen, where the appellant was sleeping, and that the appellant opened for them. In the light of the evidence by PW5, Dw1 and the appellant, it is clear that the door was not kicked in. The appellant opened the door. We therefore hold that the discrepancy in the evidence of PW4, is not of any significance.

The other issue raised by the appellant was to the effect that the evidence adduced in court disclosed a lesser offence. He submitted that at no time was actual violence used against the complainant.

He said that **"the non-dispensation of any actual violence against the complainant was sufficient in itself to lessen the charge against me I ought not to have been convicted under S. 296(2) Penal Code."**

In his judgment, the learned trial Magistrate dealt with this issue as follows

> **: "Firstly, I would like to observe that an offence under section 296(2) of the Penal Code has three ingredients and that the offence is established if any one of the three ingredients is proven. That the robbers were more than one, or that they were armed or that the complainant was wounded.**
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> **In this robbery, there is evidence that there were six robbers, armed with axes, pangas and stones, two of the ingredients were established. The mere fact that the complainant was not wounded or injured is of no consequences."**

As far as our knowledge of the law on this point is concerned, we have every reason to find that the summary of it, by the leanred trial Magistrate, reflects the correct understanding of the legal position. In **OLUOCH V REPUBLIC ( 12985) KLR 549 at 556,** the Court of Appeal expressed itself in the manner following:

"Under section 296(2) of the Penal Code robbery with violence is committed in any of the following circumstances,

**1. The offender is armed with any dangerous or offensive weapon or instrument; or**

**2. The offender is in company with one or more other person or persons; or**

**3. At or immediately before or immediately after the time of the robbery the offender wounds, beats strikes or uses other personal violence to any person."**

Those three elements of the offence of capital robbery are lifted from the provisions of section 296(2) of the Penal Code. And it is clear from the wording that the offence is proved if the prosecution proves any one of the three elements which constitute the offence of robbery with violence. We therefore find no merit on this ground of appeal.

Finally, the appellant submitted that the learned trial magistrate did not give due consideration to his defence. His said defence was clearly an alibi, as the appellant contended that he was at all material times, inside his house. He denied having been anywhere near the scene of crime. DW1 also testified that the appellant was inside his (appellant's) house on the material night. According to DW1, who is the appellant's father, his son did not live the house that night. He said that the appellant went to sleep at 9.00 p.m., and did not leave until the police came for him.

That evidence, together with that of the appellant has to be weighed against the rest of the evidence on record., We have re-evaluated all the said evidence. As we said earlier, herein, we have no reason at all to hold that the learned trial magistrate's assessment of the integrity of PW1 was in doubt. In effect, and by necessary implication, the evidence of both the appellant and DW1 was not believed.

PW1 saw the appellant outside her bedroom window. The appellant was standing in a place that was properly lit by security lights. He was identified by PW1 both at the scene of crime, and later in an identification parade. Those facts placed the appellant firmly at the scene of crime. By so doing, the evidence of PW1, PW4 and PW5 negatived the alibi. Although the learned trial magistrate did not expressly state that the alibi had been negatived, it can safely be concluded that that must be so, following his rejection of the appellant's defence.

Having re-evaluated the evidence on record, we are satisfied that the appellant's conviction was well founded, and thus safe. Accordingly, the conviction and sentence are upheld.

The appeal is dismissed.

Dated at Nairobi this 16th day of February 2005

**J.L.A. OSIEMO**

**JUDGE**

**FRED A. OCHIENG**

**JUDGE**

Appellant in person

Mr. Odero/Mutwiri Court Clerks