REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Criminal Appeal No. 156 & 153 of 2002

GEORGE MUCHEMO AKWALO ……..……. 1ST APPELLANT

ZAKARY KAIRI M'EKANDI ……..…. 2ND APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(Appeal from the conviction and sentence of N. Kimani, Principal Magistrate in Maua

Principal Magistrate's Court Criminal Case No. 2656 of 2000 dated 31.7.2002)

JUDGMENT OF THE COURT

The two appeals were heard together. The two appellants, **George Muchemo Akwalu** and **Zakary Kairi M'Ekandi** (referred to hereafter as the appellants) were charged before the principal magistrate's court at Maua with two counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. In the lower court, the 1st appellant was the 1st accused and 2nd appellant was the 2nd accused. They were charged jointly with another accused by the name of John Mutuma Mirwa, and with whom we are not concerned in this appeal. The particulars of the charge on the first count were that **on the 13th day of November, 2000 at Kitheo Location in Meru North District within the Eastern Province, jointly with others not before the court and being armed with dangerous weapons namely rifles and pangas, robbed CHARLES KALOTHI MBUI of cash Kshs. 52,150/= and at or immediately before or immediately after the time of such robbery used actual violence to the said CHARLES KALOTHI MBUI.**

The particulars of the offence of the second count were that on the 13th day of November 2000 at Kitheo Location in Meru North District within the Eastern Province, jointly with others not before court, being armed with dangerous or offensive weapons, namely rifles and pangas, robbed MARY IANANU of cash Kshs. 17,900/= and at or immediately before or immediately after the time of such robbery used actual violence to the said MARY KANANU.

After hearing the case, the learned principal magistrate found each of the two appellants guilty as charged and sentenced them to death. The learned trial magistrate summed up his findings in the following two paragraphs:-

"**Having satisfied myself that accused persons were a party to the perpetration of this offence, the other issue to resolve is whether an offence under section 296(2) of the Penal Code has been established against the accused persons herein. The ingredients of this offence are set out under**

section 296(2) of the Penal Code. They are three in number set there under. It is worthy of note that at the end of each ingredient the operative word is <u>OR</u> and not <u>AND.</u> What this means is that if any of the above ingredients is proved, then a conviction under section 296(2) of the Penal Code must lie. This is the holding in the now famous case <u>JOHN NDUNGU V REPUBLIC – Criminal Appeal No. 116/95 by Court of Appeal in Mombasa.</u>

In this case accused persons were more than one. They assaulted the complainants. They had rifles and even fired once. No doubt a gun is a dangerous weapon. In this case all the ingredients under section 296(2) of the Penal Code have been satisfied as against the accused persons. Accused's defences are sham and unmeritorious. I reject them as such. Case against them on both counts have been proved to the required standards by strong and overwhelming evidence. I saw the prosecution witnesses, PWI to PW5 testify. They impressed me as candid and truthful witnesses with respect for the truth. I accordingly convict the accused persons as charged."

Being dissatisfied with both conviction and the death sentence handed down to them, the appellants filed their appeals being criminal appeal Nos. 153 of 2002 – Zakary Kairi M'Ekendi, 155 of 2002 – John Mutuma Murwa – who died while awaiting hearing of the appeal (the appeal therefore abated) and 156 of 2002 – George Muchemo Akwalu.

The 1st appellant's petition of appeal contained six grounds of appeal, while the 2nd appellants petition of appeal contained five grounds of appeal. The main complaints by both appellants were that the appellants were not properly and positively identified; that the prosecution evidence had glaring contradictions and inconsistencies; and that the learned trial magistrate failed to consider the defence offered by the appellants, thereby occasioning a miscarriage of justice to the appellants and finally that the charge against the appellants was incurably defective as the same did not show the date of the robbery or the occurrence book number.

Briefly the facts of this case as given by the seven prosecution witnesses called by the prosecution are that on 13.11.2000 at about 12.30am, PWI – Charles Kalithi Mbui, and his wife, Mary Kananu PW2 – were asleep in their house at Kitheo Village. Robbers broke into their house after they (robbers) had ordered PW2 to open the door and so tell them where PWI was. On hearing the demands and the breaking of the door, both PWI and PW2 started screaming as PWI also climbed into the ceiling. The robbers were armed with two rifles, a panga and clubs. On entering the house, the robbers ordered PWI to come down from the ceiling. When PWI came down from the ceiling the robbers started beating him as they demanded Kshs. 100,000/=. Before the robbers entered the house, they shot once in the air.

The robbers who were about five in number had torches. PWI was taken outside the house by some of the robbers where there was moonlight and they continued beating him. Some of the other robbers remained inside the house terrorizing PW2 as they demanded to be given Kshs. 100,000/=. PW2 gave them Kshs. 17,900/=. A further Kshs. 52,150/= was recovered from under the bed. After taking these two amounts, the robbers went away. Neighbours came and helped to take both PWI and PW2 to hospital. The matter was reported to police and the two appellants, among others were arrested and charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

Some of the money stolen during the robbery was recovered – some Kshs. 5,000/= from the second appellant and some Kshs. 300/= from the 1st appellant.

From the facts of the case, the learned trial magistrate concluded that both PWI and PW2 witnessed the robbery visited upon them on that material night. PWI stated that the two appellants together with the other robbers, among them Stanley, Richard and another were well known to both PWI and PW2 before the night of the robbery, and that the robbers had torches which they shone around as they ordered him to come down from the ceiling. He also testified that there was moonlight outside where the robbers took him and continued beating him. He also stated that at the time of arrest, some Kshs. 300/= was recovered from the 1st appellant while Kshs. 5000 was recovered from the 2nd appellant. In answer to a question put to him by the 2nd appellant, PWI stated:-

"I know you quite well. you produced the 5,000/= from your mother's house. You were then taken to the chief and then Miathene Police Station ……. Identified you inside the house and outside the house. Outside there was moonlight. I even knew your voice quite well. After neighbours came I disclosed your names to them ……."

PW2 said she identified all the robbers who included the 1st and 2nd appellant. She also said that the names of the appellants were given to the police the day the robbery was reported. PWI also said so. Both PWI and PW2 denied that they had fabricated a case against the appellants.

PW3 Bernard Mburi responded to screams by PWI and PW2. Although he came out of the house, he did not get to PWI's compound because of the gunshot. Both him and PW4 (Francis Thiaine) who had also come out to answer the screams hid in the fence at PWI's home and after about an hour from the time they heard the screams, the two appellants, together with the deceased co-accused, came out of PWI's compound. Both PW3 and PW4 said there was enough moonlight and that they could see well, so they saw the 1st appellant carrying a rifle while the 2nd appellant carried a club and a panga. The deceased 3rd appellant also carried a rifle. PWI and PW2 also gave this very description of what each of the two appellants was carrying. PW3 and PW4 did not attempt to chase the appellants or raise alarm because the appellants were armed with rifles. PW5 went to PWI's home the following morning when PWI gave him the names of Zakary Kairi and Muchemo as some of the robbers. PW5 assisted in the arrest of the 2nd appellant whom he said he knew well and that after the 2nd appellant was threatened with lynching, he volunteered information on the 1st and deceased 3rd appellants. PW5 stated that Kshs. 300/= was recovered from 1st appellant while the 2nd appellant produced Kshs. 5,000/=. PW5 said he knew both 1st and 2nd appellants before and had no grudge with either of them. PW6, PC Pius Sawe of Tigania P/Station said he received a report of the robbery on 13.11.2000 from PWI who also gave the names of 1st and 2nd appellants to him that very morning as some of the people who robbed him during the night. That PWI had injuries on the head. He also stated that he re-arrested the 1st and 2nd appellants from members of the public on 15.11.2000 and also received Kshs. 300/= and Kshs. 5000/= recovered from the 1st and 2nd appellants respectively. On 17.11.2000, with the help of the 1st appellant PW6 arrested the deceased 3rd appellant. In response to questions put to him by both the 1st and 2nd appellants, PW6 stated that the complainant PWI gave the names of both appellants on the morning that he gave the report to the police. PW7, Dr. Nthanga from Miathene Sub-District hospital treated PWI on 15.11.2000. PWI's clothes were blood stained and he had a cut wound on the back of the head, and swollen part of left. The PW3 form in respect of PWI was produced as an exhibit.

It was the duty of the learned trial magistrate to analyze all the evidence adduced before him and to decide whether at 2.30 am, and with the help of the moonlight, both appellants or either of them was properly identified before convicting the appellants. The learned trial magistrate did so and reached the conclusion that the appellants had been properly identified and proceeded to convict them.

The 1st appellant gave sworn evidence in which he stated that on 15.11.2000, the complainant (PWI) went to 1st appellant's home at about 8.00pm and that when 1st appellant went out with PWI, PWI informed a group of about ten people that the 1st appellant was the one he had told them about. The people beat the 1st appellant and tied him with ropes. That the 1st appellant's wife gave the group Kshs. 300/= so that they (people) could stop beating 1st appellant. That he was taken to a place called Kithaita where he was beaten till morning. That the police at Tigania P/station also beat him up.

In cross-examination, the 1st appellant admitted he knew PWI well and that the knowledge was mutual. He denied the charge.

The 2nd appellant also gave a sworn statement stating that on 14.11.200, he went to the chief's place to report to the chief that one Bernard Mbui had not paid him for work done. Then on 15.11.2000 at about 9.00am he was arrested in connection with this case. His Kshs. 5000/= was taken by those who arrested him. In answer to questions put to him during cross examination, the 2nd appellant stated that he met the

1st appellant at Tigania Police Station. He also said that he had been splitting timber with Bernard Mbui using a power saw.

As the first appellate court, it is our duty to examine afresh the evidence before us, and especially the evidence of visual identification. This we have to do with greatest care to ensure that any possibility of error is eliminated. See the case of **CLEOPHAS OTIENO WAMUNGA V REPUBLIC** –Criminal Appeal No. 20 of 1989 at Kisumu. We are, also as the fist appellate court, to draw our own conclusions after evaluating and reconsidering the evidence afresh – see **OKENO V REPUBLIC (1972) EA 32** where it was held by the Court of Appeal, inter alia as follows:-

"(vi) It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

In this case, the robbery is alleged to have taken place at 12.30am on 13.11.2000. As earlier pointed out, the learned trial magistrate was satisfied that the recognition of the appellants was positively done and he thus proceeded to convict the appellants accordingly. The learned trial magistrate reached the conclusion that the evidence against the appellants was strong and overwhelming and noted that the evidence of PWI, PW2, PW3, PW4 and PW5 all pointed to the two appellants as part of the gang that perpetrated the robbery against the appellant on the material day. The learned trial magistrate believed the said witnesses' evidence all of whom he found to be truthful and candid.

We have ourselves evaluated and reconsidered the evidence on record and we are satisfied that the evidence against each of the two appellants was so clear and overwhelming that the learned trial magistrate was justified in reaching the conclusion that he reached.

PW1 identified the two appellants that night. He gave their names to the neighbours (PW3 and PW4) who came to the home later after the robbers had gone. He gave the same names to the police (PW5). The evidence of PWI is corroborated in every material particular by the evidence of PW3 as regards the arrest of both appellants and what each one of them was arrested with. We have also considered the defence case, which in a nutshell is to the effect that the case against them was a frame-up but we are unable to agree that this was so. Before the robbers broke the door and entered the house, they called out from outside and on entering the house, they kept on talking, asking for money and asking PWI to come down from the ceiling. PWI testified that he knew the voice of the 1st appellant when in answer to questions put to him by the 1st appellant he said:-

"Outside there was moonlight. I even know your voice quite well."

PWI's evidence is that he was taken outside by the robbers, and in particular the 1st appellant beat him there in the moonlight. PW3 said the robbers left PWI's home after about one hour from the time he heard the first screams. It is our finding that PWI had sufficient time to see his attackers in the moonlight and with the help of torches. He was able to see that the 1st appellant was armed with a rifle and so was the deceased 3rd appellant.

PW2 said of the robbers:-

"**They were asking me for money and they were shinning their torches as I was searching for money for them …… It is 3rd accused who took the Kshs. 17,900/= he is the one who had a gun plus 1st accused."**

We have also found that both PWI and PW2 took the earliest opportunity to give the names of the robbers both to the police and the neighbours. Money which was admitted to be part of the stolen cash from PWI was recovered from both 1st and 2nd appellants who also explained where the rest of the money had gone. PWI testified that it was the 2nd appellant who took the Kshs. 52,150/= from under the bed.

We have evaluated the defence case vis-à-vis the prosecution case against each of the two appellants. We have reached the conclusion that the appellant's allegation that the case against them was a frame up is an afterthought. No such suggestion was made when the appellants were cross-examining the witnesses and only sprang up the theory during the time of giving their testimony. We do find as did the learned trial magistrate that the appellants defence was an afterthought and we accordingly reject the same.

The 2nd appellant submitted that there were contradictions in the evidence of PW3 and PW4 as to whether the two witnesses were together or not. We have carefully examined and reconsidered the evidence of these two witnesses, but are unable to find any contradictions as would be weighed in favour of the appellants. PW3 was the first one to arrive at the fence of PWI and said he could not enter the compound because of the shot that had been fired in the air. PW3 was able to recognize the two appellants with 1st appellant carrying a rifle and the second appellant carrying a club and a panga. This was also the evidence of PWI and PW2 as the weapons each of the appellants was carrying. It was also the evidence of PW4.

We can now deal with the question as to whether the charge against the two appellants was proved. Mr. Oluoch for the respondent submitted that all the ingredients of the charge under section 296(2) of the Penal Code were proved. Under the provisions of the said sub-section, an offence of robbery with violence is committed in any of the following circumstances.

(a) If the offender is armed with any dangerous or offensive weapon; or

(b) If the offender is accompanied by one or more other persons; or

(c) If at or immediately before or after the time of such robbery the offender wounds, beats, strikes or uses any other form of personal violence to any person.

Each of the three circumstances if proved would constitute a complete offence. We have already found as a fact from the evidence that each of the two appellants was armed – the 1st appellant with a rifle and the 2nd appellant with a panga and a club. These, in our view were dangerous weapons. It is also in evidence which we have accepted from both PWI and PW2 that before, at and after the robbery the appellants beat PWI and PW2 inflicting injuries on them that led to the hospitalization of PW2 and treatment of PWI at the hospital. A P3 form was produced as an exhibit in that case. We are therefore satisfied as the learned trial magistrate was that all ingredients of the offence under section 296(2) of the Penal Code were proved.

The appellants have also complained that the first count is defective for containing information to the effect that PWI was robbed of Kshs. 70,050/=. The appellants were charged with two separate counts – under section 296(2) of the Penal Code, committed against PWI and PW2 respectively and during which Kshs. 52,150/= was stolen from PWI and Kshs. 17,900/= stolen from PW2. The learned magistrate found the appellants guilty on each of the two counts and convicted them accordingly. We do not find any basis for the appellants' complaint.

We have also been urged by the appellants to find that the case in the lower court was conducted by an unqualified person. We have carefully studied the record. The critical dates are first 9.5.2001 when PWI and PW2 testified. On that day, Inspector of Police Tanui conducted the prosecution. On 15.11.2001, PW5 and PW6 testified and on that day it was inspector of police Karemanu who conducted the case. Inspector Karemanu was also the prosecutor on 16.5.2002 when PW7 testified. It was the same inspector of police Karemanu who was the court prosecutor during the defence hearing.

We are therefore unable to find from the record any substance in the appellants' complaint that the case was conducted by an unqualified person.

The appellants also complained that the learned trial magistrate did not consider their respective defences. The learned trial magistrate's consideration of the appellants' defences was contained in the

following words extracted from judgment:-

"…… Accused's defences are a sham and unmeritorious. I reject them as such."

It is unfortunate that the learned trial magistrate did not say more particularly when the appellants had given sworn evidence and called witnesses. It is also unfortunate that treatment of the defence case came almost at the end of the judgment when the learned trial magistrate had probably already made up his mind to convict. We have ourselves independently evaluated and reconsidered the appellants' respective defences vis-à-vis the whole of the evidence on record. We are satisfied that each of the appellants was properly convicted. The evidence of identification was, in our view, free from error. We have noted that all the ingredients under section 296(2) of the Penal Code were proved beyond any reasonable doubt. The appellants were arrested with some of the stolen cash. No prejudice was thus caused to either of the appellants because of the brief treatment given to their respective defences by the learned trial magistrate.

In the result, we find no merit in the appeals and accordingly do dismiss the same. We uphold the conviction on both counts and confirm the sentence of death imposed upon each of the appellants. It is so ordered.

Dated and delivered at Meru this 15th day of March 2005.

D.A. ONYANCHA

JUDGE

15.3.2005

RUTH N. SITATI

Ag JUDGE

15.3.2005