REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 332 of 2002

MURIUKI NGURE MUNYI Alias KARAYA……...……APPELLANT

Versus

REPUBLIC…….……RESPONDENT

GEOFFREY (GODFREY) IRERI GITHINJI, Alias HASSAN…….....APPELLANT

Versus

REPUBLIC……RESPONDENT

(Being appeals against Conviction and Sentence

dated 20.6.2002 of W. N. Njage, Principal Magistrate, In the Principal Magistrate's Court at Kerugoya, Criminal Case No. 1896 of 1999

JUDGMENT

These two appeals were consolidated for hearing and in the appeal proceedings including this judgment, the Appellant in Criminal Appeal No. 332 of 2002 is referred to as the First Appellant while the appellant in Criminal Appeal No. 349 of 2002 is referred to as the Second Appellant.

Before the learned trial magistrate were three accused persons charged with robbery with violence contrary to *Section 296(2)* of the Penal Code. Particulars were that on the night of 7th and 8th February 1999 at Kerugoya Township in Kirinyaga District, Central Province, jointly with others who were not before the court and while armed with dangerous weapons namely, pangas, simis, rungus, stones and iron bars the three accused persons robbed Andrew Karari Kagiri of one radio cassette, make Fare mare and money in cash Ksh.4,000/= all valued Ksh20,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Andrew Karari Kagiri.

The third accused was Francis Muriithi Mwea who was subsequently acquitted.The Appellants were convicted under *Section 296(1*) of the Penal Code and were each sentenced to ten years imprisonment plus ten strokes of the cane to be followed by five years Police supervision after serving the prison sentence. The sentence against the Second Appellant was to run consecutively with the sentence he was serving.

We should point out here that although in the charge sheet particulars it was alleged that Ksh.4000/= was robbed, the Complainant Andrew Karari Kagiri in his evidence told the court that the following day he discovered that they had also taken money in cash Ksh.5000/= from his house in addition to the radio

cassette he the previous day that they had taken. We do not know why the prosecution decided to use the figure Ksh.4000/= instead of Ksh.5000/=, but we hold that that discrepancy is not fatal to the prosecution's case and results into no injustice in the circumstances of this case.

On the night of 7th-8th February 1999 robbers broke into the house of P.W.1 Andrew Karari Kagiri and robbed from him a radio cassette only, P.W.1 having failed to remember where he had kept the money he had in the house. He was then marched to his nearby shop to give the robbers money, which was in the shop. As he was opening the shop, light from an approaching motor vehicle forced the robbers to temporarily leave P.W.1 free as the robbers ran for cover. P.W.1 took that opportunity to open his shop, enter and lock himself inside so that when the robbers went back to where they had left him they could not know where P.W.1 was. At the same time members of the public had joined the Police who were rushing to the scene of the crime. As a result the robbers got scared and ran away to escape arrest.

Since there had been a spate of robberies in the area, accused persons were among suspects, and following investigations after their arrests, the Police connected the accused persons with the robbery at the house of P.W.1 whose report the Police had. Accused persons were therefore charged with the offence in this case and the two Appellants were subsequently convicted and sentenced.

During the hearing, a charge and cautionary statement taken from the 2nd Appellant, Godfrey (Geoffrey) Ireri Githinji (Alias Hassan), which was a confession, was admitted in the evidence after a trial within a trial. Similarly a statement under inquiry taken from the 1st Appellant Muriuki Ngure Munyi (Alias Karaya) was admitted in the evidence following a trial within a trial. It was also a confession.

Each confession implicated the maker as well as his co-accused who is now coappellant. But having been retracted, each confession needed corroboration. Taking the position that the two confessions cannot corroborate each other although similarity of their contents suggests correctness and reliability of those contents, what corroborative evidence is there?

Firstly, there is the evidence of P.W.1 that robbery at his house took place when his house was broken into and he was confronted by a number of robbers who took his radio cassette in the process. That corroborates what the Second Appellant said in his charge and cautionary statement as follows:

> ***"WE ONLY TOOK ONE RADIO CASSETTE, BUT THE ALLEGED MONEY WE DID NOT TOOK."***

We note that in his evidence P.W.1 said that apart from the radio cassette, he was also robbed of cash Ksh.5000/=. The Second Appellant may not have seen that money that is why he said in his statement that they did not take money. But P.W.1's evidence concerning the radio cassette was sufficient corroboration to the statement of the Second Appellant above quoted.

What P.W.1 said as referred to above also corroborates what the First Appellant said in his statement under inquiry as follows although he also talked of a radio cassette only:

> ***"We went straight to Karari's. Jack is the one who knew the house. Karari's house is second line from downwards.***
>
> ***Jack Kariuki and Citu are the ones who entered in the house because they were FORWARD.***
>
> ***Me and Hassan were guarding the upper side. Ruben and Revenge were outside.***
>
> ***When they came out Citu had carried a Radio Cassette……..."***

Secondly, what P.W.1 said as to what happened after robbery of the radio cassette from his house corroborates what the First Appellant said in his confession. P.W.1 told the court that when he was marched to his shop to open it to give the robbers money, (that must have been money other than the

Ksh.5000/= from his house), flashing bright light from an approaching motor vehicle made the robbers to run away from him to seek cover, thereby giving him the opportunity to open his shop, lock himself in and disappear from the robbers. That corroborated the First Appellant's statement under inquiry as follows:

> ***"Kariuki told us to go to the shop and take money. We all went towards the shop and when we reached near the shop, there came one vehicle and its headlights…….shone light on us and we escaped towards the garage near the river and we left Karari. Jack asked if there was any money found and Kariuki said that there was no money. We decided that we should go for the money. I, Ruben, Revenge and Hassan refused. Kariuki returned to the shop. They returned running and told us that things had become worse because the law enforcement officers were coming together with the watchman. We ran away. The radio went with Kariuki but I later heard that he damaged that radio after they quarreled with Jack. Kariuki is also called Kiviu."***

Thirdly, there was evidence that P.W.1 was able to identify the two Appellants by means of electricity light at the shopping area despite the fact that the assailants did not like such light around and were therefore smashing bulbs to remove lights. The Complainant told the court that as his assailants approached bulbs and smashed them, he had time to see two of them and identify them and when he subsequently met the Police he told the Police that he could identify two of his assailants if he saw them. He had not known any of the assailants by name and therefore it was necessary to have a Police identification parade even if the Complainant had been seeing the First Appellant in Kerugoya town prior to the incident because it was not the Complainant who had pointed out the Appellants to the Police for arrest of the Appellants. This was evidence of a single identifying witness in difficult conditions but it is believable evidence because there is nothing to suggest that P.W.1 was not reliable his claim to identify the Appellants at the scene having been boosted by his identification of the Appellants at the Police identification parade which was properly conducted with eight parade participants in each parade and the Appellants having voluntarily consented to take part in the parade and all that having been further boosted by the rest of P.W.1's evidence concerning the robbery as a whole the presence of the two Appellants being also indicated from sources other than P.W.1. In the First Appellant's statement under inquiry the Second Appellant is named as Hassan while in the Second Appellant's charge and cautionary statement the First Appellant is named as Muriuki Karaya.

What each Appellant said in his defence denying the offence is on record and each appellant has argued his appeal based on the grounds of appeal he filed. The appellants were not arrested immediately and P.W.5, P.C. Mule, who arrested the appellants on 1st March 1999 at Kutus was acting on information from an informer. Suspects, who included the appellants, were being arrested for various offences and it was after investigation, following arrests, that the appellants were found connected with this offence and charged. The First Appellant who admitted that he knew the Complainant and the Complainant also knew him first talked as if the Complainant was present at the time of the Appellant's arrest but later talked as if the Complainant came later and said he had not seen the First Appellant at the robbery. He claimed P.W.1 did not identify him and that the charge against him was a frame up. That was during his defence. But during his cross-examination of P.W.4 Inspector Jacinta Wangechi who conducted the identification parade, this appellant did not say that he was not identified. Instead he seems to have been saying that he was identified twice at such a parade by the same witness. He also said the same witness had first failed to identify him. But he said the witness knew him.

The Second Appellant who had also consented to participate and participated in the parade and was not able to offer any challenge to the evidence of P.W.4 also, in his defence, denied the robbery. But accepted the Complainant had identified him on the identification parade.

The First Appellant called a witness Jackson Kariuki Mungima, who gave evidence as D.W.4. He said he was in prison for a murder case and participated in a Police identification parade conducted on 13th March 1999 in which the witness at the identification parade identified nobody the First Appellant included. He did not say who the witness at the identification parade was and did not specify the case in which the identification parade was being conducted at that time when the Police at Kerugoya Police

Station were investigating several criminal cases in which several suspects had been arrested. Such a situation should not be used to confuse evidence, and it should be noted that the name of D.W.4 does not appear anywhere among members of parade who participated in parades concerning these two appeals. D.W.4 does not seem to have participated in these particular parades.

On the whole therefore we find that the learned trial magistrate rightly rejected the defence of each Appellant when he went ahead to convict the Appellants. There was sufficient evidence to sustain a conviction and it was safe to do so. From our own analysis of the evidence on record, we have come to the same conclusion on the issue of a conviction, as the learned trial magistrate did. But we wish to point out that we do not agree with his reasons for reducing the offence in this case from one punishable under *Section 296(2)* to one punishable under *Section 296(1)* of the Penal code and Mr. Orinda is also applying for reinstatement of *Section 296(2)*. The reasons the learned magistrate gave were that:

> ***"No P3 form or any material evidence was adduced to prove that accused suffered any injury during that attack. Neither did it come out clearly during the hearing as to the nature of the weapons the accuseds were allegedly armed with. The only ingredient that can be said to have been established in respect of S. 296(2) Penal code is how the robbers were more than two. But taking into account the circumstances under which the offence was committed and that no injuries were occasioned on the Complainant at the time of the attack, I find that the facts proved reduce the offence of robbery to one of Robbery C/S 296(1) of the Penal Code."***

With all due respect, we hold that in so saying the learned magistrate gravely misdirected himself on a point of law and therefore erred in convicting and sentencing the Appellants under *Section 296(1)* of the Penal Code. The grounds advanced for reducing the offence from *Section 296(2)* to *Section 296(1)* of the Penal Code are not covered by any of those provisions. They simply amount to a refusal to apply *Section 296(2)* of the Penal Code which clearly states:

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

As it was said by the Court of Appeal in the case of **JOHN NDUNGU Vs REPUBLIC Criminal Appeal No. 116 of 1995 at Mombasa**, there are three sets of circumstances prescribed in Section 296(2) as given below:

> ***"(1) If the offender is armed with any dangerous or offensive weapon or instrument; or***
>
> ***(2) If he is in company with one or more other person or persons; www.kenyalaw.org Muriuki Ngure Munyi alias Karaya & another v Republic [2005] eKLR 9 or***
>
> ***(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."***

The Court of Appeal said that the presence of a single one of any of those circumstances is sufficient to sustain a conviction under Section 296(2) of the Penal Code. It said:

> ***"Analysing the first set of circumstances the essential ingredient, a part from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is, needed to be proved. Thus if the facts show that at the time of commission of the offence or robbery as defined in Section 295 of the Penal Code, the offender was armed in the manner afore-described, then he is guilty of the offence under Sub-section(2) and it is mandatory for the court to so convict him.***

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under Sub-section(2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two sets of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under Sub-section(2) proved and convict accordingly."

Those ingredients do not include the production of a P3 form or any evidence to prove injury on the complaining victim. That is because evidence relating to P3 form and injury to the complaining victim are ingredients in the definition of the main or core offence, namely, robbery, and that definition states in Section 295 of the Penal code as follows:

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

The term "violence" in that definition covers injury whether fatal or otherwise, proved by the assistance of a P3 form or otherwise bearing in mind that it is "violence" not only relating to a "person" but also to "property" and that therefore evidence of a P3 form, although useful, is not, in actual fact, necessary. That is more so when it is recognized that the "violence" referred to in that definition includes "threatened" violence which has not actually taken place. No sensible person will require a P3 form or actual injury as evidence of that "threatened" violence. Yet under Section 295 of the Penal Code, evidence of such a threat, without more, is sufficient to constitute a "felony termed robbery" provided that threat is done, at or immediately before or immediately after the time of stealing something and the threat is done by the thief in order to obtain or retain the thing stolen or to prevent or overcome resistance to the stealing or retention of that thing, whether that thing is a billion Kenya Shillings or is one Kenya Shilling as it is not uncommon for a person to injure another person and even kill another person because of something as small as ten cents or the smoking of a piece of one cigarette.

The conviction of an accused person under Section 296(1) of the Penal Code therefore means that the convicting court is already satisfied that a "felony termed "robbery" in terms of Section 295 of the Penal Code has been committed by the person being convicted and that none of the ingredients contained in Section 296(2) of the Penal Code has been proved. If any of the ingredients contained in Section 296(2) of the Penal Code is proved, then lawfully the conviction ought to be under Section 296(2) of the Penal Code.

It follows that when considering whether a charge or a conviction should be under *Section 296(1*) or *Section 296(2)* of the Penal Code, the ingredients of *Section 295* should not be mixed up or confused with the ingredients of *Section 296(2)* as the learned trial magistrate in this case did. That will be a sure way of getting lost and indeed the learned magistrate in the instant case may have got lost that is why he ended up where he stopped prompting us to say he refused to apply *Section 296(2*) of the Penal Code. If he got lost, did he also refuse to apply *Section 296(2)* of the Penal Code? We feel we need not answer that question.

However, we wish to emphasise the main point that for a proper conviction under *Section 296(1)* of the Penal Code to stand, ingredients of the offence must be confined to those found in *Section 295* of the Penal Code. In other words, robbery as punishable under S*ection 296(1*) is robbery by a single person in terms of *Section 295* without anything more. That cannot be used where *Section 296(2)* is involved

because a conviction under *Section 296(2)* is based on the fact that there is robbery in terms of Section 295 plus at least one of the three sets of ingredients from *Section 296(2).* Thus robbery as punishable under *Section 296(2)* is robbery in terms of Section 295 made pregnant by the addition of at least one of the three sets of ingredients we have seen are exclusively found in *Section 296(2)*. Robbery punishable under *Section 296(1)* cannot therefore be robbery like the robbery in the instant case where there were:-

(a) Offensive weapons, namely, rungus, whips, axes and pangas, according to the first appellant's statement under inquiry which the trial magistrate accepted; or pangas, simis, rungus, stones and iron bars, according to the charge sheet and were proved to have been with the assailants;

(b) More than one person as assailants;

(c) Hitting of P.W.1, the complaining victim, by

the first appellant or some of the assailants who also smashed security bulbs, window glasses and forcefully gained entry into the house through the window to do more harm to the complainant by robbing his radio cassette, and thereafter menacingly marching him towards his shop demanding money and would have robbed money and shop goods and perhaps caused injuries to the complainant had their programme not been spoiled by a God sent light beaming human driven motor vehicle which scared away the assailants thereby allowing space for rescuers to gain control of the situation and restore peace to the relief of the poor complainant.

In the circumstances, we are convinced that the proper Section under which the appellants in the instant case are lawfully punishable is *Section 296(2).* What we have listed under passages (a) to (c) just above, cover all the three sets of ingredients found in *Section 296(2)* and not in Section 295 or *Section 296(1).* That makes the robbery in the instant case lawfully punishable under *Section 296(2)* only. As we hold the view that the law must be correctly applied, we will apply *Section 296(2)*. That is consistent, and we entirely agree, with and adopt what the Court of Appeal said in paragraphs two and three on page 101 of the aforementioned judgment stating:

> ***"----------unless strong directions are sent to the subordinate trial courts and the judges of the 1st appellate court they will continue at their whim to tamper with the strict application of the law and thereby make a mockery of the purpose for which S.296(2) was introduced in the Penal Code.***
>
> ***If proved facts show that robbery under Section 296(2) has been committed then the trial magistrate is obliged to convict the accused under this Section and impose the sentence of death. Use of terms such as the one used in this case by the magistrate is not going to change facts so as to justify a conviction under Section 296(1) when the proved facts show that the charge under Section 296(2) has been proved. The same message also goes to the judges of the 1st appellate court who, because their judgments are binding authorities for the sub-ordinate courts to follow, have a duty to give correct guidance in strict accordance to law."***

The Court of Appeal termed the conviction under Section 296(1) unlawful and therefore we have no doubt in our minds that the conviction we are discussing in these two appeals was similarly unlawful and ought not to stand as it is. We note that the Attorney General had not appealed against the conviction to the High Court. But during the hearing of the appeals Mr. Orinda asked us to substitute that conviction with the conviction under Section 296(2).

Powers of the High Court with regard to an appeal like these ones are found in Section 354 of the Criminal Procedure Code. Relevant in these appeals is Subsection(3)(a) (iii) and (b). It states:

> ***"(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may:***

(a) in an appeal from a conviction:-

> ***(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or***
>
> ***(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or***
>
> ***(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;***

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence."

Sub-section(6) is important because it reminds the High Court that in handling an appeal under *Section 354, t*he High Court is not empowered to impose a greater sentence than might have been imposed by the court which tried the case.

In this case before us, the trial magistrate was empowered to pass the death sentence, which we are saying he failed to impose. That is the sentence we intend to impose. The Appellants before us appealed against conviction and sentence. That is why we are saying that the relevant part of *Section 354* of the Criminal Procedure Code is Sub-section 3(a) (iii) and (b). We are not concerned with the reduction or increase of the sentence as such. We are concerned with altering the finding and therefore altering the nature of the sentence.

We forewarned the two Appellants of these consequences. Despite that warning which had been given first on 11th August 2004 and was repeated on the hearing date 15th March 2005, the Appellants proceeded with prosecution of these appeals instead of withdrawing the appeals to remain serving the prison sentences the trial magistrate had awarded them.

The Attorney General had not cross-appealed but we hold the opinion that under Section 354 of the Criminal Procedure Code we are empowered to make the orders we intend to make once we have heard the appeals and are determining them – more so having found that the conviction under Section 296 (i) was unlawful.

Otherwise the Court of Appeal stated in Johana Ndungu's case (supra) that it mattered not that the Attorney General had not filed a cross petition to correct the error committed by the magistrate on a point of law which the High Court had completely overlooked. It is not clear whether the Court of Appeal was saying that it mattered not only when the appeal was in the Court of Appeal and that it could have mattered when the appeal was in the High Court. If the Attorney General were to crossappeal in Johana Ndungu's case, he should have cross-appealed when Johana Ndungu's appeal was in the High Court. But there was no such cross appeal filed. If it mattered not in Johana Ndungu's case, we take it that it also matters not in these appeals – more so since in these appeals, unlike in Johana Ndungu's appeal, the State Counsel orally asked the High Court to substitute the prison sentence imposed upon Appellants with the death sentence.

In any case, this court is entitled to rely on Section 65 (2) of the present Constitution of Kenya which states:-

> ***"(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts."***

To conclude this judgment therefore, we do hereby dismiss the appeal of each Appellant against conviction and sentence. We will, however, quash and set aside and do hereby quash the convictions of

the Appellants done by the trial magistrate under Section 296(1) of the Penal Code and do set aside the sentences thereof imposed by the said trial magistrate on 20th June 2002.

Consequently, we do hereby alter the magistrate's finding of guilty of robbery contrary to ***Section 296(1)*** of the Penal Code against each Appellant and substitute that finding with a finding of guilty of robbery contrary to ***Section 296(2)*** of the Penal Code and convict each Appellant and sentence him to death under the said ***Section 296(2)***. Right of appeal granted.

Dated this 14th day of April 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE