

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 96 OF 2003

EPHANTUS MUTEMBEI MBAO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant herein was convicted of the offence of attempted robbery contrary to Section 297(1) of the Penal Code, particulars alleging that on the 19th August, 2001 at Rwanganga Village in Maragua District, Central Province he jointly with others not before court, while armed with dangerous weapons namely rungas, pangas and iron bars attempted to rob Stanley Gicharu Wanjuu of cash threatening to use force against the said Stanley Gicharu Wanjuu.

The conviction of the Appellant was based on the evidence of identification by P.W.1 Stanley Gicharu Wanjuu and his brother Joseph Njogu Wanjuu who gave evidence as P.W.2. From that evidence a group of people broke into the house of P.W.1 at night demanding money and as they were there with him and his wife, those of the group who were outside saw P.W.2 who was trying to find out what was happening to his brother and got hold of P.W.2. They took him into the house where P.W.1 and his wife were.

Both P.W.1 and P.W.2 told the court that a lump was on in the house and remained on as the Appellant and his colleagues confronted P.W.1 and P.W.2 who were therefore able to identify him as he called himself Corporal and P.W.2 added that the Appellant kept on smoking a cigarette and lit and gave one to P.W.1 after P.W.1 had asked for one from the Appellant when P.W.1 saw the Appellant smoking. P.W.1 himself did not talk of that important episode. However, both P.W.1 and P.W.2 claimed to have known the Appellant before that nasty event. They said they had known him when he was employed by a teacher or one old man.

When the group went away P.W.1 and P.W.2 slept and the following day they went to report the incident to their Chief's Office. It is at this stage that the prosecution's case fails because it brings out no definite link between the evidence of P.W.1 and P.W.2 on the one hand and the evidence of P.W.3 and P.W.4 the two Police Officers on the other. From what P.W.1 and P.W.2 told the court, they had gone to report the incident to the Police when they found information there that the Appellant had been arrested.

That suggests the Appellant had not been arrested after the Police had received information from P.W.1 and P.W.2 that they had seen him among the people who attempted to robe them at night on 19th August, 2001. P.W.3 Muiruri Kavugwa an Administration Police Officer who did not disclose his rank claimed he received a report of the attempted robbery from one Kamande who mentioned a suspect called Mutembei. But if that was so, why did Kamande himself not also put it that way in his evidence? And who was that Kamande whom P.W.3 refers to as "the Complainant"?

This is a witness who told the Appellant during cross examination that there were many complaints against the Appellant and seems to have arrested the Appellant in connection with a Mr. Kamande's Complaint but only came as a witness to say in this trial what he ought to have said as a witness in a different criminal case where Kamande was the Complainant – against Mutembei (not the Appellant). P.W.4 Moses Thurania only received the Appellant from P.W.3 and other officers at Sabasaba Police Station. That was on 29th September, 2001. P. W. 3 had received the report of attempted robbery on 20th

August, 2001.

A real robbery had been done affecting P.W.1 on 12th August, 2001 and suspects, by 20th August 2001, had either been arrested or were being looked for. On the whole, I do not find the evidence on record against the Appellant sufficient to sustain his conviction. Accordingly, I do hereby allow the Appellant's appeal. Quash his conviction and set aside the sentence imposed upon him. He be released forthwith unless lawfully detained in some other cause.

Dated this 10th day of June, 2005.

J. M. KHAMONI

JUDGE