REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 543 of 2002

(From original conviction and sentence in Criminal Case No. 2283 of 2002 of the Senior Principal Magistrate's Court at Thika: Mrs. H.A. Omondi, SPM

REUBEN NGUGI MUIKIA……..……..…APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

IN CONSOLIDATION WITH CRIMINAL

APPEAL NO. 544 OF 2002

DANIEL GUCHU MWANIKI…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From originalconviction and sentence in Criminal Case No. 2283 of 2002 of the

Senior Principal Magistrate's Court at Thika: Mrs. H.A. Omondi, SPM

IN CONSOLIDATION WITH CRIMINAL

APPEAL NO. 545 OF 2002

ELIUD GUCHU MUIRURI……..APPLICANT

VERSUS

REPUBLIC…….PROSECUTOR

(From originalconviction and sentence in Criminal Case No. 2283 of 2002 of the

Senior Principal Magistrate's Court at Thika: Mrs. H.A. Omondi, SPM

JUDGMENT

The 3 appellants herei**n, REUBEN NGUGI MUIKIA** Criminal Appeal No. 543 of 2002; **DANIEL GUCHU MWANIKI** Criminal Appeal no. 544 of 2002; and **ELIUD GUCHU MUIRUR**I Criminal Appeal No. 545 of 2002; were jointly charged with two counts of **ROBBERY WITH VIOLENCE** contrary to Section 296 (2) of the Penal Code, in Criminal Case No. 2283, of 2001, at the Senior Principal Magistrate's Court, Thika.

The particulars of the charges were as under:

Count 1:

On 20/4/01 at Githunguri Village in Maragua District, Central Province, jointly with others not before the court robbed **DOUGLAS GITAU NJENGA** of one T.V. Set make Kondio, two hats – goD father, one hunters knife, one mattock and cash 7,200/- and at or immediately before or after the time of such robbery wounded the said **DOUGLAS GITAU NJENGA.**

Count 2:

On 20/4/01 at the same place, jointly with others not before the court, robbed FRANCIS MBURU NJENGA one power saw make Hagarvana valued at 43,000/- and cash Shs.4,000/- all valued at Shs.47,000/- The three were convicted on each of the two counts and sentenced to death, as by law prescribed.

Being dissatisfied with both the conviction and sentence, they have appealed in this court on the following grounds:

1. That the lower court erred in relying on identification by recognition by P.W. 1 and P.W. 2 when the two did not give the names in their 1st Report to P.W. 3, the Investigating Officer.

2. The lower court failed to consider the defences of a grudge between the appellants and the complainants, P.W. 1 and P.W. 2.

3. In addition, appellant No. 1 objected to the evidence regarding his having been found in possession of an iron bar when that was not in the charge sheet.

The prosecution's case is as follows: P.W. 1, a businessman, runs a cycle repair in Kabati, Githunguri Village. On 20/4/2001 at 1.00a.m, he was asleep in his house when he heard his dog barking a lot. He peeped through his glass window AND by the help of solar power lights, which were on, saw 10 people outside IN his compound. The people were about 20 feet away, and they ordered him to open, alleging that a motor vehicle tyre had been stolen and they wanted to carry out a search. They wore police uniforms – coats, berets, and said they were police from Kabati. Apart from the security lights, there was also moonlight. The people were armed with crowbars, axes and pangas. When P.W. 1 said it was late, the people insisted on his opening. One of the people was handcuffed and he kept on saying he had sold the tyre to P.W. 1, so P.W. 1 believed they were police and opened the door; and as P.W. 1 did so, one of the people said "**ni ahingura**" – he has opened. They ordered P.W. 1 to accompany them into the house, (the sitting room), where they ordered him to be on the ground. Then one of them hit him on the side of his face with an axe, he fell down and began bleeding. He pleaded with them not to kill him. The assailant shone a torch on P.W. 1 and ordered him to stand up and when he did he saw the face of Reuben Ngugi – appellant 1. P.W. 1 picked out appellant 1's feet because they have major swelling on the upper part. He was able to see well because the solar light was till on in the house. The assailants demanded money and he gave them Shs.3,000/. Appellant 1 was behind and was being addressed as Corporal. He insisted on more money but P.W. 1 had none. P.W. 1 was returned to the sitting room and hit on the face again and ordered to give more money. One of the assailants placed a pistol on P.W. 1's face. That person was not in court. Then the assailant with handcuffs rushed to the T.V and carried it away. This person was appellant 2; who P.W. 1 had known since childhood as they came from the same area. The other people continued ransacking the entire house and took two godfathers hats, wrist watch, T.V. set and a hunters knife. P.W. 1 gave them the car keys when they demanded. Then appellant 1 hit the bulb with an axe and

broke it. P.W. 1 opened the car bonnet and they said the mattock P.W. 1 had in there was his and they took it. P.W. 1 was then ordered to load the property taken into the vehicle boot, which he did.

As the assailants were about to leave, P.W. 1 peeped outside and saw that there were many other people outside and he pretended to be opening the gate and pushed it hard, throwing them off balance, then he fled. After a while, he heard screams from his house and returned to his house, accompanied by people from the neighborhood. They tried to track the attackers in vain but went and reported to the police who went to appellant 1's house, found the door locked from outside, surrounded the house and ordered him to open and when he did, they found him washing off blood which had splattered on appellant 1's clothes. He was arrested and taken to the police station.

Appellant 2 and 3 were apprehended by a mob. Appellant 2 is the one who pretended to be handcuffed and appellant 3 is the one who took the mattock from the boot. The incident lasted about 30 minutes.

P.W. 1 stated that he knew appellant 3 from childhood, while appellant 1 wore a berret and had a large torch. Appellant 2 wore a purple jacket just like appellant 3. P.W. 1 was injured (P3 form produced) but none of his property was recovered.

P.W. 2, brother to P.W. 1, was asleep on 20/4/01 and at about 1.00a.m. he heard noise outside and people's voices talking in Swahili saying **"hapa ndiyo kwa Gitau (P.W. 1**)" and saying they were police searching of stolen property. The people entered into P.W. 1 house while others stood outside armed with iron bars and pangas. P.W. 2 heard screams from P.W. 1's house and when he peeped out, he saw many people running about. There was moonlight and solar powered security lights. P.W. 2 came out and met other people who forced him back searching his house. They took P.W. 2's power saw, and 4,500/-. Many of the attackers were strangers, but he recognized 3 – appellants 1, 2 and 3. He had known Appellants 2 and 3 since childhood in the same village, while he knew appellant 1 since 1988.

It was P.W. 2's testimony that his power saw was taken by appellant 1, and it is also appellant 1 who took P.W. 2's 4,000/- P.W. 2 recognized appellant 1 as they pushed P.W. 2 into his house. There was moonlight and P.W. 1's solar lights which were lighting, were on. P.W. 2 also said he identified a crowbar as one of the weapons the appellants had.

P.W. 3 (P.c. Franklin Baby) of Kabati Police station testified that he recorded a statement and a report from the complainants on 20/4/01 at about 1.30a.m. regarding the robbery, and gave a note to P.W. 1 to take with him to the hospital. He said that P.W. 1 had told him that during the robbery, P.W. 1 was able to identify 3 people who posed as police officers from Kabati Police Station. P.W. 3 proceeded to the scene, then went to the 1st appellant's home, found him, and recovered a crowbar. He, P.W. 3, went to appellant 2 and 3's houses but they were not in, but he escorted appellant 1 to the police station. P.W. 3 further stated that appellant 2 and 3 were brought to the police station by members of the public and they were re-arrested and jointly charged.

P.W. 3 said he did not search Appellant 2 and 3's houses that night because they were not in P.W. 3 also testified that P.W. 1 told him he managed to recognize the 3 appellants because the 3 came from his village, and he, P.W. 1, gave their names as Ngugi (Appellant 1) and Guchus (Appellant 2 and 3).

P.W. 4, Joseph Mukoma, Clinical Officer at Thika District Hospital, testified on how, on 20/4/01, he checked on P.W. 1 after the latter alleged to have been assaulted at about 1.00a.m. that same night. P.W. 4 stated that subsequent upon his checking on P.W. 1, he found that P.W. 1 had a cut on left cheek, and a cut wound on the left shoulder, caused by a sharp weapon. He assessed the degree of the injury as harm, and filed and signed P3 form.

In his defence appellant 3 said that he was awakened on 28/4/01 at 7.30a.m. by P.W. 1 and P.W. 2 who told him he should accompany them to the quarry as there had been some theft there. Appellant 3 said he had not been to the quarry for some time as his site had been filed with water, and that P.W. 1 and P.W. 2 told him that some of appellant 3's tools had been stolen. He then said upon reaching the police station he was locked up in cells and on 7/5/01, he was charged with offences he did not know about. Appellant 1

said that on 19/4/01, in the evening, he went to the Trading Center and had a few drinks. Then at 10p.m. P.W. 1 came there with his wife and greeted all except appellant 1 because there had been family differences between him and P.W. 1. Appellant left the bar to his house, and at night he heard a knock, and it was the police who searched his house, recovered nothing, but still arrested him.

Appellant 2 said that on 28/4/01 he had gone to the shops, when a vehicle came and stopped. There were 2 people inside and they asked him to accompany them to go and cut grass, and he obliged. When they got to the police gate, the vehicle drove to the police station and the driver alighted and said "**we have arrested one of those who had been to my home."** So, he was placed in cells and later charged.

We have perused, and re-evaluated, the evidence on record from the lower court, in light of the grounds of appeal by the three appellants. We begin with the key ground of identification by recognition which has been challenged on the basis that P.W. 1 and P.W. 2 did not give the names of the appellants in their first report to the police. The two complainants – P.W. 1 in particular, had stated that they recognized the three appellants because there was sufficient light from solar powered security lights and moonlight. Further that as P.W. 1 was ordered to stand up, the torch light shone appellant 1's feet which had swelling on top, and that P.W. 1 knew the three appellants from childhood as they came from the same village and area.

Our review of the evidence clearly shows that the names of the three appellants were given to P.W. 3, the police officer to whom the first report was made. That is how the officer was able to go to the 1st appellant's house where the latter had locked himself from the outside, but upon being forced to open the house, which was by then surrounded, he, appellant 1, was found washing off blood from his clothes, arising from the robbery incident and the cuts inflicted on P.W. 1.

Appellant 2 and 3 were apprehended by members of the public upon screams by P.W. 2, and taken to the police station where P.W. 3 re-arrested them. But their names had been given to P.W. 3, by P.W. 1, when he first reported the incident before being given a note to go to the hospital for treatment.

On the basis of the above evidence, we reject this ground of appeal as one without foundation and one which constitutes no more than mere denial that the appellant's names were not given to the police during the first report.

On the ground that the complaints, by P.W. 1 and P.W. 2, were motivated by family grudges between the complainants and the appellants, we have failed to find the evidence in support of this allegation. Accordingly, we find no reason to disagree with the Learned Trial Magistrate who closely analysed, but rejected such defence. Appellant 1 raised an objection on the basis that the Charge Sheet was defective as it does not mention the weapon used. This objection has no merit in our understanding of the law and the provisions under which the appellant was charged. Failure to mention the weapon in the charge sheet does not constitute a defective Charge Sheet. What is required is that the evidence shows that the appellants were either armed or in company of one or more others, or that the complainant was wounded during the robbery incident If any of the above ingredients is established, that suffices for conviction under section 296(2) of the Penal Code.

From the evidence in record of the lower court, we have no doubt that the provisions of Section 296(2) of the Penal Code were proved by the prosecution. We dismiss that ground of appeal as without merit.

Finally, there is the ground, by appellant 1, that he was found in possession of an iron bar when that was not in the Charge Sheet. Once again, this ground of appeal suffers the same fate as the one we have just dismissed. Even if the evidence regarding the crowbar were ignored, that would not in any way weaken the prosecution evidence required to convict under Section 296(2) of the Penal Code.

All in all therefore, we dismiss the three appeals herein, confirm the conviction and uphold the sentence by the lower court.

DATED and delivered in Nairobi, this 26th day of July, 2005.

LESIIT J.

JUDGE

O.K.MUTUNGI

JUDGE