



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
Criminal Appeal 429 of 2000**

DAVID GICHIRA JUDY APPELLANT

VERSUS

**REPUBLIC RESPONDENT
(Appeal from original judgment conviction and sentence in Senior Resident
Magistrate's Court at Kerugoya in Criminal Case No. 1014 of 1999 dated 21st July
2000 by Mr. W. N. Njagi – S.R.M. – Kerugoya)
Criminal Appeal 43 of 2000**

PETER MUCHIRI NJAGI APPELLANT

VERSUS

**REPUBLIC RESPONDENT
(Appeal from original judgment conviction and sentence in Senior Resident
Magistrate's Court at Kerugoya in Criminal Case No. 1014 of 1999 dated 21st July
2000 by Mr. W. N. Njagi – S.R.M. – Kerugoya)
Criminal Appeal 467 of 2000**

MARGARET MUTHONI KARIUKI APPELLANT

VERSUS

**REPUBLIC RESPONDENT
(Appeal from original judgment conviction and sentence in Senior Resident
Magistrate's Court at Kerugoya in Criminal Case No. 1014 of 1999 dated 21st July
2000 by Mr. W. N. Njagi – S.R.M. – Kerugoya)
Criminal Appeal 314 of 2000**

PETER KARIUKI KIRII APPELLANT

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VERSUS

**REPUBLIC RESPONDENT
(Appeal from original judgment conviction and sentence in Senior Resident**

**Magistrate's Court at Kerugoya in Criminal Case No. 1014 of 1999 dated 21st July
2000 by Mr. W. N. Njagi – S.R.M. – Kerugoya)
Criminal Appeal 315 of 2000**

GEORGE KAMANDE MUIRURI APPELLANT

VERSUS

**REPUBLIC RESPONDENT
(Appeal from original judgment conviction and sentence in Senior Resident
Magistrate's Court at Kerugoya in Criminal Case No. 1014 of 1999 dated 21st July
2000 by Mr. W. N. Njagi – S.R.M. – Kerugoya)**

J U D G M E N T

David Gichira Judy the appellant in High Court Criminal Appeal No. 429 of 2000 (hereinafter referred to as 1st Appellant), Peter Muchiri Njagi alias Musa appellant in High Court Criminal Appeal No. 430 of 2000 (hereinafter referred to as 2nd Appellant), Margaret Muthoni Kariuki appellant in High Court Criminal Appeal No. 467 of 2000 (hereinafter referred to as the 3rd Appellant), Peter Kariuki Kirii alias Kaitingo Appellant in High Court Criminal Appeal No. 314 of 2000 (hereinafter referred to as 4th Appellant) and George Kamande Muiruri appellant in High Court Criminal Appeal No. 315 of 2000 (hereinafter referred to as 5th Appellant) were jointly tried together with 10 others for the offence of Robbery contrary to section 296(2) of the Penal Code. The 3rd Appellant also faced an alternative charge of Handling stolen goods contrary to section 322(2) of the Penal Code. In the lower court the 1st Appellant was 1st Accused, 2nd Appellant the 2nd Accused, 3rd Appellant the 15th Accused, 4th Appellant the 5th Accused and 5th Appellant the 6th Accused.

The subject of the case was 176 bags of dry coffee beans which the appellants and others were alleged to have violently robbed Harrison Irungu Chege and John Maina on the 1st day of March 1999 at Mununga coffee factory.

The trial magistrate heard the evidence of 12 prosecution witnesses whose evidence was to the effect that on the night of 28th February and 1st March 1999, five watchmen who included Harrison Irungu Chege (P.W.1), John Maina (P.W.2) and Joseph Kariuki Nyaga (P.W.3) were guarding the premises of a coffee factory referred to by some witnesses by as Mununga coffee factory, and by others as Muranga coffee factory. At around 1.00 a.m., the watchmen were accosted by a gang of robbers who tied them up broke into the factory store and stole bags of coffee which they loaded onto a lorry. The watchmen were also bundled into the lorry which drove upto Kinogo area and abandoned the watchmen there. The watchmen reported the matter at Kinogo Police Station. They were not however able to identify any of the robbers.

P.W.5 Julius Mugo Kariuki the factory manager of Iyego Farmers Co-Operative Society, reported to the office on 1st March 1999 and found the factory having been broken into and bags of coffee missing. He checked and confirmed that 138 bags of coffee were missing. On the same morning P.C. Antony Njiru (P.W.7) an officer from Kangema police station received a report of the robbery through Kirogo Patrol Base. He visited the scene and confirmed that a robbery had indeed taken place. On 19th March 1999 Inspector Samuel Karibu (P.W.8) and other officers were on patrol in Kerugoya area when they received a report of a robbery which had just taken place at Kigumoini coffee factory in Muranga.

Arising from information they had received earlier, they suspected motor vehicle KZZ 339 a Mitsubishi lorry to be involved in the robbery. As they were patrolling around Kangaru area they met with the suspected lorry. They attempted to stop the lorry but the driver did not stop. They overtook the lorry and forced it to a stop. The people seated in the cabin got out of the lorry and escaped. They managed to arrest the Driver of the lorry who was the 1st Appellant and 13 other people who were at the back of the lorry. The 2nd, 4th and 5th Appellants were among the people at the back of the lorry. Inside the lorry there were bags of coffee, bags as well as weapons such as pangas, swords and clubs. The appellants and others

were all arrested. On interrogation the 1st Appellant led P.W.8 and other officers to a home in Kimicha area where 37 bags of coffee were recovered. The 1st Appellant implicated the 3rd Appellant and she was also arrested by P.C. Dan Kaganpo (P.W.12).

Joseph Muriuki Njiru (P.W.4) who herds cattle at the home of Grace Gathangu, testified that 3rd Appellant who was known to him used to go to the home in a lorry with 1st Appellant with goods which they would keep in a store at the home. He recalled that the police went to the home in the company of 1st Appellant and removed bags of coffee from the store. He recalled that the lorry had been brought to the store at night in a lorry. On 22nd March 1999 the 1st Appellant gave a statement under charge and caution to Inspector Mutisya Mutuku (P.W.9). The statement was repudiated by the 1st Appellant, but admitted in evidence after a trial within trial.

On the same day P.W.9 also obtained a statement under charge and caution from the 4th Appellant. The statement was also admitted in evidence after a trial within trial. Inspector Patrick Karunyu (P.W.11) also obtained a statement under charge and caution from the 5th Appellant. The 5th Appellant did not object to the admission of the statement which in actual fact was a confession.

P.W.10 Patrick Mugambi who is a clinical officer in Muranga District examined Johnson Maina, Joseph Kariuki Nyaga and Harrison Irungu Chege and found all 3 to have suffered injuries which he assessed as harm. He produced the P3 form in respect of each person.

The 1st Appellant gave a sworn defence in which he claimed he was arrested from the lorry in respect of another robbery case. He was taken to Kerugoya police station from where CID officers took him to the house of 3rd Appellant. They then went to her store at Kimbimbi from where 37 bags of coffee were recovered. The 1st Appellant claimed he knew nothing about the bags of coffee. He admitted that 3rd Appellant used to hire him to transport goods to her house mainly maize and fertilizer.

The 2nd Appellant also gave a sworn defence in which he denied having committed the offence. He denied having been arrested from the lorry and claimed he had only gone to the scene as he had heard that there was an accident involving the lorry which belonged to his mother.

The 3rd Appellant also gave a sworn defence in which she denied having committed the offence. She claimed the police arrested her and took her to a house in Kathiga village where 37 bags of coffee were recovered. She claimed the 37 bags of coffee had been given to her by one Peter Kihanya as security in respect of refund of money for a failed land transaction. Peter Kahanya (D.W.6) testified and confirmed that he had given 38 bags of coffee to the 3rd Appellant to hold as a pien. He maintained that the coffee was actually his.

The 4th Appellant and 5th Appellant also denied in their defence having participated in the Robbery, 4th Appellant claiming he was arrested while walking at the Nairobi stage in Kagio, and the 5th Appellant claiming in a sworn statement that he was only involved in the Mununga robbery by bad luck as he was hijacked.

In his judgment the trial magistrate found that 1st Appellant, 4th Accused and, 5th Appellant were involved in the Robbery. He thereafter proceeded to convict the 12th Accused, 4th Accused (both of whom have not appealed) and the 5th Appellant of the offence of Robbery contrary to section 296(1) of Penal Code and the 3rd Appellant of handling stolen goods contrary to section 322(2) of the Penal Code. When it came to sentencing, the trial magistrate sentenced the 1st Appellant, 2nd Appellant and 4th Accused to 5 years imprisonment and 5 strokes of the cane, and the 3rd Appellant to 5 years imprisonment.

The 5 appeals have been consolidated for purposes of hearing. We do not find it necessary to recapitulate all the grounds of appeal as Learned Principal State Counsel has conceded the appeals in respect of all the appellants except for the 5th Appellant. We have on our part reconsidered and evaluated the evidence and the submissions of the defence counsel and we cannot but concur with the defence counsels and the learned Principal State Counsel that there was no evidence to support the charge against the Appellants.

None of the Appellants was identified by any of the watchmen as having participated in the Robbery. Indeed the watchman admitted that they could not identify any of the robbers.

The evidence regarding the recovery of the 37 bags of coffee was also contradictory P.W.8 testifying that the 1st Appellant is the one who led the police to where the coffee was kept and P.W.12 testifying that it was 3rd Appellant who led the police to where the coffee was stored.

The ownership of the 37 bags of coffee was also not established as neither the watchmen i.e. P.W.1, 2 & 3 nor the factory manager (P.W.5) identified the 37 bags of coffee as some of the bags of coffee stolen from Mununga Coffee factory. The defence of the 3rd Appellant that the coffee was given to her by D.W.6 as security was therefore not dislodged.

Further although in the charge sheet the appellants were charged with robbing the watchmen of 176 bags of coffee worth Kshs.352,000/= P.W.5 testified that only 138 bags of coffee were missing from the store. This contradiction was never resolved. The only available piece of incriminating evidence was the confessionary statements alleged to have been made by the 1st Appellant, 4th Appellant and 5th Appellant. However the statements of 1st and 4th Appellants were retracted and the same could not therefore be relied upon without proper corroboration. There is however no other independent piece of evidence linking either 1st or 4th Appellant with the commission of the offence.

As for the 5th Appellant although he did not retract his confessionary statement, the same cannot stand alone. It would be unsafe to rely on it given the inconsistencies and contradictions that have already been enumerated above.

Finally the trial magistrate convicted the 12th Accused, 4th Accused, 5th Appellant and 3rd Appellant, but erroneously proceeded to sentence the 1st Appellant, 2nd Appellant, 4th Appellant and 3rd Appellant.

We find that in the light of all these flaws the convictions of all the Appellants was unsafe and cannot stand.

We note that the 4th and 5th Appellants indicated a wish to withdraw their appeals given the risk that was involved in proceeding with the appeal as the trial magistrate had wrongly convicted them under section 296(1) of the Penal Code instead of section 296(2) of P.c. which would have attracted the mandatory death sentence. In the light of what we have stated herein however we think it is only fair that their appeals also be allowed. We do therefore allow all the appeals, quash the convictions and set aside the sentences imposed on each of the Appellants.

The appellants shall each be set free unless otherwise lawfully held in respect of some other matter.

Dated signed and delivered this 10th day of August 2005

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE