



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL APPEAL 150 OF 2003

**(From original conviction and sentence in Criminal Case No. 1662 of 2002 of the
Principal Magistrate's Court at Nyahururu –Mr. Kathoka Ngomo)**

JAMES MAINA WANJIKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant has appealed against the original conviction and sentence in Nyahururu Principal Magistrate's Court Criminal Case No. 1662 of 2002. In that case, the Appellant had been charged for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The facts of the prosecution case as stated in the charge sheet are as follows:

“On the 28th day of May, 2002 at Maina Estate in Laikipia District within Rift Valley Province, jointly with others not before Court while armed with a home-made gun robbed PETER MACHARIA NDIRANGU of cash Kshs.500, two torches, two pangas and a wrist watch all valued at Kshs.1,500 and at or immediately before or immediately after the time of such robbery threatened to shoot the said PETER MACHARIA NDIRANGU.”

After a full trial, the learned Magistrate viz, **Mr. Kathoka Ngomo**, then Principal Magistrate, Nyahururu reduced the charge to that of simple robbery and found the Appellant “**guilty**” of the offence of robbery, contrary to **Section 296 (1)** of the Penal Code. The learned Magistrate later sentenced the Appellant to 5 years imprisonment. According to the learned Magistrate, he reduced the charge due to the following reason:

“Except for the Accused nobody else was injured.”

During the hearing of the appeal, the Appellant conceded that I had informed him of the right of the Court to evaluate the evidence fresh and to substitute the sentence to that of death.

Despite the above warning, the Appellant still opted to proceed with his appeal. Subsequently, the Appellant urged me to reduce the sentence imposed on him because he had really suffered and also that he had been rehabilitated from the mistakes that he had made. In addition to the above, the Appellant also complained that he has been suffering from epilepsy on account of the assault that he had been subjected to during his arrest. Besides the above, the Appellant also lamented that his father had died in 1989 and that his mother is sick and has been admitted in hospital.

On the other hand, the State through **Mr. Koech**, Senior State Counsel has opposed the appeal on the grounds that the ingredients of the offence of robbery with violence, contrary to **Section 296 (2) of the Penal Code** had been proved. Mr. Koech recalled the evidence on record which stated that the offence

was committed by the Appellant and four others – **not** before the Court. Apart from the above, Mr. Koech further submitted that the Appellant was armed with a home-made gun and that the robbers had also used violence on the property of the complainant. Further to the above, Mr. Koech also submitted that the Appellant had also threatened to shoot the people who were going to the rescue of the complainant. Later, it was realized that the Appellant could not fire the gun and hence he was later chased and arrested. In addition to the above, Mr. Koech also submitted that on being arrested, the Appellant recorded a statement under enquiry that was admitted. The said statement corroborated the evidence of the PW1 and PW2. In conclusion, Mr. Koech took issue with the reasons advanced by the Lower Court to reduce the charge. He termed the same to be erroneous.

This Court has carefully perused the above. Apart from the same, the Court has also perused **Section 296 (2)** of the Penal Code that states as follows:

“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.”

Being the first Appellate Court, I have the duty and obligation to evaluate the evidence afresh and reach my own conclusion. The evidence of the PW1 – **Peter Macharia Ndirangu** clearly shows that the robbers were five and they were armed with a gun and rungus. Apart from the above, the PW1 testified that he was beaten and ordered to lie down with members of his family. Similarly, the PW2 – Ann Wambui Macharia confirmed that the robbers were five and that they were armed with rungus and a thing that was like a gun.

From the evidence of the above two witnesses, it is very explicit that the following three ingredients were proved:

(a) The Appellant and his colleagues were armed with dangerous weapons viz, rungus.

(b) The Appellant was not alone – but accompanied by four other suspects who are still at large.

(c) The Appellant and the suspects at large had used violence by assaulting the PW1. Apparently, the learned Magistrate misdirected himself by failing to take into account and appreciating the evidence of both the PW1 and PW2.

In view of the above, I hereby concur with **Mr. Koech**, Senior State Counsel that the prosecution had proved its case beyond any reasonable doubt for the offence of robbery with violence, contrary to Section 296 (2) of the Penal Code. I find as a fact that the latter offence has been proved as provided by the law. The Appellant is hereby convicted for the offence of robbery with violence, contrary to Section 296 (2) of the Penal Code. In addition to the above, I hereby substitute the sentence of 5 years imprisonment with the mandatory death sentence.

Right of Appeal.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of the Appellant and Mr. Njogu, State Counsel.

MUGA APONDI

JUDGE

28TH SEPTEMBER, 2005