



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Appeal 271 of 2002**

**THOMAS MBUGUA KIMANI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Appeal from original Judgment and Conviction in Senior Principal Magistrate's  
Court at Murang'a in Criminal Case No. 1908 of 2001 dated 28th  
October 2002 by Mr.  
Abdul El-Kindiy – P.M. – Murang'a)**

**J U D G M E N T**

Thomas Mbugua Kimani is the appellant in this case. He was convicted by the Principal Magistrate Murang'a Court for the offences of Robbery Contrary to Section 296 (1) of the Penal Code, and the offence of attempted Robbery with violence contrary to section 297 (2) of the Penal Code. He was sentenced to serve 3 years imprisonment with 5 strokes of the cane on the first count and death by hanging on the second count. Being dissatisfied the appellant has brought this appeal raising 6 grounds, which can essentially be paraphrased into the following:

***· That the trial magistrate erred in basing the appellant's conviction on the evidence of a single witness which lacked corroboration. ·***

***That the evidence for the prosecution was contradictory and insufficient to sustain a conviction. ·***

***That the trial magistrate erred in rejecting the appellant's defence without giving any reason.***

The appellant was tried for two counts the first one being Robbery with violence contrary to section 296 (2) of the Penal Code in which it was alleged that on the 21st day of October 2001 at Nyagachachi village in Murang'a District jointly with others not before court while armed with pangas and rungus they robbed Gabriel Karumba Mwangi one wallet and a Kenya National identity card all valued at Kshs.170/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Gabriel Karumba Mwangi.

In the second count the appellant was charged with attempted Robbery contrary to section 297(1) of the Penal Code, the particulars being that on the 21st day of October 2001 at Nyagachaki village in Maragwa District of the Central Province jointly with others not before court while armed with dangerous weapons namely rungus and pangas they attempted to rob Everlyn Wanjiru Mwangi of cash and at or immediately before or immediately after such attempted robbery threatened to use force against the said

Everlyn Wanjiru Mwangi.

The evidence adduced before the trial magistrate was as follows:

On the night of 21st October 2001, Gabriel Karaya Mwangi (P.W.1) arrived at his home at around 1.00 a.m. He was accosted by a group of 6 men who removed his wallet containing his ID card. The men then asked him to knock at his mother's house. His mother Everlyn Wanjiru Mwangi (P.W.2) heard him knock, but before she opened the door her husband James Mwangi Warungo (P.W.3) armed himself with a panga. P.W.2 who had a hurricane lamp then opened the door at which point P.W.1 ran into the house followed by three men who were armed with sticks and iron rods followed him into the house. At that stage P.W.3 struck one of the men with a panga and the man ran away. P.W.3 grabbed the second man and as he was struggling with him P.W.2 poured hot water on him. They raised an alarm and neighbours came and meted out mob justice on the man beating him to death. The other men escaped, but P.W.2 had recognized one of the men as one Mbugua whom she had known before. She gave a description which was circulated and the appellant was subsequently arrested in Thika and charged with this offence. In his defence the appellant explained that two officers found him at Thika police station and brought him to Murang'a where he was charged with an offence which he knew nothing about.

It is evident that the appellant was not arrested at the scene. His conviction therefore rested squarely on his identification by P.W.2. In this regard P.W.2 testified as follows:

*"The police came and I informed them I had managed to see Mbugua. I used to see him at a place when (sic) I used to buy mboga. I had been seeing (sic) there for one week. He is from Ikuyu. He was arrested at Thika. I went to identify him."*

We note from the above that P.W.2 did not give any description of the appellant but identified him by name as "Mbugua". This is not consistent with the evidence of P.W.4 who stated that

: *"P.W.2 had given a description of one who lived at Ikenya village. He was not there so we circulated his name to all stations."*

The description given was so general as it is apparent that there are many persons called "Mbugua." Moreover no evidence was adduced to show that the appellant comes from Ikuyu or Ikenya village. The period of one week was also too short for one to claim to know someone well enough to recognize him at night under difficult circumstances. Further although P.W.2 had a hurricane lamp at the time of the incident, it is not clear how bright the light from the hurricane lamp was. No doubt P.W.2's contact with the robbers was very brief as they ran away immediately after P.W.3 attacked them. It is hardly surprising that neither P.W.1 nor P.W.3, could identify any of the robbers.

The identification by P.W.2 was therefore doubtful. Moreover although P.W.2 and P.W.4 both testified that P.W.2 identified the appellant in Thika as the said Mbugua, there was no evidence of any identification parade having been held, and the identification if any must have been very informal and inadequate for purposes of evidence.

Further although this case rested on the evidence of identification by a single witness the trial magistrate did not appreciate this and did not therefore appropriately warn himself. Had the trial magistrate warned himself as laid down in the case of **Abdalla Bin Wendo & Another v/s Republic (1953) 20 EACA 166 and Roria v/s Republic [1967] EA 583**. He would have found that the alleged identification by P.W.2 was not watertight. As concerns count 2, although the appellant was charged with attempted robbery contrary to section 297 (1) of the Penal Code, the trial magistrate convicted the appellant of attempted robbery with violence contrary to section 297 (2) of the Penal Code his reasoning being as follows:

*"Although there was no threat or demand made by the thugs, the weapons they carried made the offence grievous. The offence cannot be under Section 297 (1) I am opined (sic) the correct offence should be*

*attempted robbery with violence contrary to section 297 (2) Penal Code.”*

First the trial magistrate had no powers to convict the appellant of a more serious charge than that of which he was charged, more so where the serious charge attracted a mandatory death penalty. The magistrate’s action was highly prejudicial to the appellant who was thereby sentenced for an offence of which he had not been charged.

Secondly the trial magistrate having made a finding in respect of count I that the robbers were not armed with any dangerous implements, contradicted himself in finding in count 2 that the thugs “carried weapons which made the offence grievous.” The trial magistrate appears to have been influenced by the fact that although the appellant was charged with attempted robbery under section 297 (1) of the Penal Code, the particulars of the charge revealed the offence of attempted robbery with violence an offence under section 297 (2). This meant that the charge was defective as there was disparity between the charge and the particulars and ought therefore not to have been the subject of a conviction.

In the light of the above we find that the appellant’s conviction on both counts cannot stand.

We accordingly allow his appeal quash his convictions on both counts and set aside the sentences imposed. The appellant shall be set free unless otherwise lawfully held.

***Dated this 8th day of November 2005***

**J. M. KHAMONI**

**JUDGE**

**H. M. OKWENGU**

**JUDGE**