

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 289 of 2003

**(From Original conviction (s) and Sentence (s) in Criminal Case No. 576 of 2003 of
the Senior Resident Magistrate's Court at Kajiado (Sd. Ndungu H.N. (Miss) SRM on
23/9/03**

JAMES KAGOTHO BAIYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with four counts of robbery with violence Contrary to Section 296 (2) of the Penal code. He was convicted on all of the counts of simple robbery contrary to Section 296 (1) of the Penal Code and sentenced to 7 years imprisonment with hard labour in respect to each of the four counts, and with the mandatory police supervision. The honourable trial magistrate did not specify whether the 7 year sentence of imprisonment in each count was to be served concurrently or consecutively. To this court that means the sentences were to run consecutively. The appellant appealed against the convictions and the sentences.

The prosecution facts of this case are that on 21/6/2003 at about 9.00 p.m, the 1st complainant, PW1, Damaris Mugure, was in her house in company of PW2, Mary Wanja Kiarie, cooking. A hurricane lamp was burning on the table room as Damaris Mugure, was moving from the sitting room to the kitchen and sometimes walking out to poor away used water. As he was at one stage returning into the house from outside, she saw five people armed with pangas and rungu. She screamed as the people surrounded her and pushed her into the sitting room and ordered her to shut up. They then demanded money. She produced some money from her pocket as some of the people also demanded money from Mary Wanja Kiarie, PW2. Mary failed to produce any money as the people ransacked the house picking various items from all over including the bedrooms. As the various assailants looked for items to pick, one of them was left to guard the two complainants. During this transaction, the assailant assaulted PW1 with the flat side of the panga and at one stage and assaulted PW2 with a water pipe. At another time during the transaction, all the assailants went out on being warned that someone was coming into the house and shortly afterwards captured and brought into the house PW3, one Anthony Tschank. PW3, was in the meantime also robbed of his mobile phone, a wallet with Kshs.700/= in it, plus other documents. PW3 identified the person who was watching for others, outside the house but who apparently was not arrested.

PW1 Damaris Mugure had not seen any of the assailants before that night but had opportunity to look and see the face of the appellant whom he later also identified in a police identification parade organized at Loitoktok Police Station three days later. On the other hand, PW2 Damaris knew none of the assailants and identified none thereafter, even during the police identification parade. PW1, PW2 and PW3 reported the robbery to Loitoktok Police Station the same night.

There is evidence also that in the same night PW4, Alice Mwikali was in her house at Eukario Rokena in Loitoktok with her husband and children. At 10.00 p.m. her electric lights were on and although her husband had retired to sleep, she was still awake. She then heard some noise form outside the door and went to check. That is when three people pushed her into the house. She managed to run into the bedroom where she sat on the bed and the assailants followed here there. The assailants demanded money from PW3's husband who told them to peak the Kshs.1,200/= which was on the table in the bedroom. The electric light was deliberately put on by PW4 on orders of the assailants who wanted to see and pick the Kshs.1,200/=. It was as the lights were put on that PW4 saw the face of one of the assailants who was the appellant. She recognized him as she had known him before, as Nuthu, a nick-name. Nuthu apparently

was not covering his face as others did but was wearing a black cap. He ordered her to put off the lights after the several assailants had scrambled forward to pick the money on the table. The assailants then also stole a speaker, radio, knife, a bow, an axe and a Somali sword. After the robbery the husband of PW4 reported the incident to Loitoktok Police Station. PW4 in her police statement, mentioned the appellant's name. As a result of this information, appellant was allegedly arrested by PW5, No.48665, P.C Jacob Gichuru. PW5 in his testimony confirmed this piece of evidence.

On being put on his defence, the appellant denied the offence. He denied that he was at the robbery scene. He said that he was at his home after visiting the town during the day. His defence was an alibi.

None of the stolen properties were recovered. The honourable trial magistrate after evaluating the evidence as a whole, believed the evidence of Damaris Mugure, PW1, who although she had not known the appellant before, had opportunity to see the appellant that night during the attack. She noticed that he wore a black cap and did not cover his face as did the other assailants. The trial magistrate took into account the fact that complainant was able to identify the appellant three days after in a police identification parade which appellant did not dispute. The trial magistrate also accepted the evidence of PW4 who was attacked an hour later at 10.00 p.m. and who testified that she knew the appellant before the attack and because the appellant was not covering his face although he wore a black cap. She was also robbed of the several goods enumerated in the charge sheet. In his conclusions the honourable trial magistrate noted that PW1 had a long time with the assailants and had opportunity to see and identify the appellant using a hurricane lamp. The honourable magistrate therefore ruled out mistaken identity in respect by PW1. I however, observe that the trial magistrate did not evaluate the source, strength and effect of the hurricane lamp. She did not during the testifying of evidence examine the hurricane lamp light issue to confirm whether or not it was strong enough, although PW1's evidence was, to her judgement, satisfactory. But even after the trial magistrate was satisfied about the said evidence, she was in my opinion, under legal obligation to warn herself in relation to it and before relying on it, the same having come from a single or sole witness. This she failed to do and proceeded to convict the appellant of simple robbery against PW1.

Furthermore, the honourable magistrate purported to link the appellant to the two robberies which took place against PW1 and PW4 within a span of one hour. She argued that because the two robberies took place in one area within the hour, then it must have been committed by the same gang. I however, do not find any evidence supporting such a conclusion. That the two robberies could have been committed by two different groups is quite possible. On the basis therefore, that the trial magistrate convicted the appellant upon the evidence of a sole or single witness without first warning herself of the dangers of doing so, and secondly on the basis that there was no evidence linking the two robberies, this court finds no basis of supporting the conviction in relation to count 1, count 2 and count 3 relating to PW1.

As touching the robbery relating to PW4, Alice Mwikali, there is ample evidence that PW4 saw the appellant by the electric light switched on by the command of the assailants. Although the light lasted about two minutes only, it was in my view sufficient to enable PW 4 to recognize the appellant whom he knew before as Nuthu. I also note that it her description and first information contained in her police statement that led to the appellant's arrest. PW4 was not called to the police identification parade, rightly so in my opinion, as there could have been no basis for doing so since her identification of the appellant was by visual recognition. I am accordingly satisfied that there was adequate evidence before the honourable trial magistrate to convict the appellant in relation to the robbery which occurred against PW4, Alice Mwikali.

Having come to this conclusion the only issue that has bothered me is the honourable magistrate's reason to reduce the charges from robbery with violence under Section 296 (2) of the Penal Code to simple robbery under Section 296 (1) of the Penal Code. She argues that because the attackers did not use violence and did not injure her and those others in the house of PW4, then the offence committed under Section 296 (2) aforementioned was not proved. This argument and the trial magistrate's conclusion are not in my view supported by the definition of robbery with violence under that section. First, the facts in this case confirm that the assailants carried rungas and pangas which are weapons which can if used, to hit a person, cause serious injury including grievous harm. They ordered the complainant and others in

the house to lie down and one cannot doubt the risk created at that moment that if the victims did not obey, the appellant and his colleague would easily and likely have used the pangas and runkus against them. I have no doubt in my mind therefore, that the pangas and runkus were both offensive and/or dangerous weapons. The presence of such weapons in their possession and possible ready use of them, is in my view, created the element of violence anticipated or envisaged in the section. In my understanding and opinion, the presence of the pangas and runkus in the possession of the assailants during the relevant attack, satisfied the element of violence required under the Section in order to convict. The fact that the appellant and his colleagues who attacked PW4 did not use their weapons to injure the complainant and his family, should not have prevented the trial magistrate from convicting the appellant under Section 296 (2) of the Penal Code.

On the other hand, the presence of more than one attacker working in corroboration to steal violently from the complainant, itself formed the element of violence defined under the second arm of the section. In my view, the honourable trial magistrate all the time had in mind the description of violence under the third arm of that section. In concentrating on that arm alone, she ignored the earlier two independent arms of which one or the other alone, would lead to a conviction. In doing so, she erred in her interpretation of Section 296 (2) of the Penal Code. This court under its jurisdiction under Section 354 (3) (ii) of the Criminal Procedure Code will seek to alter the trial court's finding and alter the sentence, to increase it.

The end result therefore is that the conviction of simple robbery Contrary to Section 296 (1) of the Penal Code is hereby quashed in relation to all the four counts. The sentences of 7 years which should have been in relation to each, is set aside. The file will be placed before a bench of two judges in February 2006, to enter an enhanced conviction of the appellant and sentence him. It is so ordered.

Dated and delivered at Machakos this 19th day of December, 2005.

D.A. ONYANCHA

JUDGE