REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 311 of 2003

GABRIEL MWANGI GICHERU…………………………………..APPELLANT

Versus

REPUBLIC……………………….……………..………RESPONDENT

(Being an appeal from the judgment of J. N. Nyagah, Senior Resident Magistrate, dated 31st July 2003 in the Senior Resident Magistrate's Court at Karatina, Criminal Case No. 76 of 2003)

JUDGMENT

The Appellant was charged in count 1 with robbery with violence contrary to *Section 296(2)* of the Penal Code and in count 2 with attempted robbery with violence contrary to *Section 297(2)* of the Penal Code. The offences were alleged to have been committed on the 23rd day of January 2003 at Kagochi Village in Nyeri District where in count 1 it was alleged that the Appellant jointly with others not before court and while armed with dangerous weapons, namely pistol, axes, rungus they robbed Millicent Muthoma Matimu of 100 U.S. Dollars using violence in which they shot dead Livingstone Murage Kabui.

In count 2 the same robbers at the same place, on the same day, the same time, were alleged to have attempted to rob, with violence, Veronica Waihuini Murage.

The prosecution's case was that on the material night at about 9.30 p.m. Veronica Waihuini Murage was in her house with her sister in law Millicent Muthoma Matimu, P.W.2, and Millicent's maid Everlyn Wanjiru, P.W.3, and their children. They were attacked by a gang of robbers who were armed with a pistol, axes and clubs. They demanded for money from the victims. Veronica said that they had no money. One of the robbers hit her on the right knee with an axe, then below the right knee with a heavy shoe and on the left ankle. They ransacked the house. They stole notes of rupees from the bedroom of Millicent. When they did not get more money they asked where the husband of Veronica was. The victims said they did not know. The robbers said they will wait for him. They waited.

Later when there was a bang from outside, the robbers went out of the house. The complainants later went out of the house and found Veronica's husband lying outside the house with injuries on the forehead. He was taken to Jamii Hospital where he was pronounced dead on arrival.

When Millicent's maid, P.W.3, subsequently recorded her statement, she said she had recognized one person called "Hiti" among the robbers. The said "Hiti" was later arrested and charged, tried, convicted and sentenced and is the Appellant in this appeal.

In his defence the Appellant had said he was attending, on the material night, to a sick patient at home.

He denied that he was one of the robbers. He called one witness his father, D.W.2 John Gicheru Wandeto, who testified that on that night he was sick and that the Appellant was taking care of him over the night.

During the hearing of the appeal before us, the learned Provincial State Counsel, Mr. Orinda, conceded the appeal, and we think rightly so, pointing out that the learned trial magistrate relied on the evidence of a single identifying witness, P.W.3, without warning himself of the danger of doing so. Nothing had been recovered from the Appellant who was arrested on 24th January 2003 in Ruiru area.

We may add that from the evidence on record, the said single identifying witness had not identified the Appellant at a Police identification parade and there is no clear evidence showing that the Police arrested the Appellant as a result of the information received from P.W.3 identifying the Appellant.

It appears the Appellant while under arrest, was one day taken to court for a mention where P.W.3 saw him and somehow started claiming the Appellant was one of the robbers who had robbed P.W.1 and P.W.2 as alleged. P.W.3 gave some names about the Appellant including the name "Hiti" as it appeared the two had seen each other some other days prior to the date of the robbery. Thereafter all that followed was dock identification during the trial and the learned trial magistrate relied on that identification to convict the Appellant.

Further, when was the offence committed? The charge sheet says the offence was committed on "the 23rd day of January 2003." No time of that day is given. But one would be left thinking the robbery took place during the day and not at night until one is further informed otherwise. On the other hand, the 24 hour long day which would include the 23rd January would start at midnight immediately after the end of the 22nd January and would go on up to the next midnight on 23rd January.

But look at the evidence of P.W.1, P.W.2 and P.W.3. The alleged robbery took place on the 22nd January at 9.30 p.m. Further, P.W.6 Police Constable Barnabas Kimeru was in his office at Ruiru Police Station at 2.30 a.m. on 23rd January 2003, when Police officers from Karatina Police Station went and reported to him that on 22nd January 2003 a group of robbers had raided the home of one Livingstone Murage at Kagochi Village where the said Livingstone was shot dead.

From the evidence of P.W.7 Police Constable Joseph Muindi, he was in his office at Karatina Police Station on 23rd January 2003 when he received a report from Nyeri Control Room that there was a robbery taking place at the home of Livingstone Murage.

Furthermore, what was robbed? While the charge sheet says 100 U.S. Dollars, witnesses particularly P.W.2 told the court that what was robbed were "notes of rupees". Not how much. The charge not having been amended, that evidence did not support the charge. But the learned trial magistrate used that defect as a reason to purport to

> ***"substitute the offence committed in count 1 to be attempted robbery with violence c/s 297(2) of the Penal Code"***

and went on to convict the Appellant for attempted robbery on count one.

The offence under *Section 296(2*) of the Penal Code is just as serious as the offence under *Section 297(2)* of the Penal Code. Which power did the learned trial magistrate have to substitute the offence under *Section 296(2)* with the offence under *Section 297(2)*, especially after he had looked at the evidence on record and found that there was no evidence on record supporting the offence under *Section 296(2)*? We find he had no power to do that and ought not to have done that substitution.

Last but not least, who was the complainant in count II? If she was Veronica Waithuini Murage, that person was not called to give evidence in the trial. Yet the Appellant was convicted and sentenced on count II.

From the foregoing, we hold that the Appellant ought not to have been convicted and sentenced on any

of the two counts in the trial. We do thereby allow his appeal. Quash his conviction on each count and set aside the sentence on each count.

We order the Appellant be released forthwith unless lawfully detained on some other cause.

Dated this 15th day of December 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE