



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 634 OF 2003**

**(From original conviction (s) and Sentence(s) in Criminal case No. 871 of**

**2003 of the Senior Resident Magistrate's Court at Limuru (E.O. Awino-SRM)**

**ELIUD GITAU WANJIHIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**  
**CRIMINAL APPEAL NO. 645 OF 2003**

**(From original conviction (s) and Sentence(s) in Criminal case No. 871 of**  
**2003 of the Senior Resident Magistrate's Court at Limuru (E.O. Awino-SRM)**

**ANTHONY KOECH CICILIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The Appellants, ELIUD GITAU WANJIHIA and ANTHONY KOECH CICILIA (1st and 2nd Appellants respectively) had their Appeals consolidated for purposes of the Appeal having arisen out of the same case.

Before the Appeal commenced, both Appellants were put on notice that the State would apply for enhancement of the sentence if the convictions were to be upheld. Both Appellants opted to continue with their Appeal, the notice notwithstanding.

The 1st Appellant raised several grounds of Appeal which can be summarised thus: -

1. That the Prosecution evidence was insufficient to sustain a conviction.
2. That there was only a single identifying witness.
3. That the Appellant was not in possession of any of the stolen goods.
4. That his defence raised doubts

The 2nd Appellant on his part also raised several grounds of Appeal which I summarize thus: -

1. That he was not in possession of any of the stolen goods.
2. That there was no identification parade conducted.
3. That the evidence against him was that of a single witness.

Before we get to the evidence adduced in this case, it is important at this stage to state the charges facing the Appellants before the trial court. They were charged as follows: -

Count 1 both Appellants faced a charge of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. It is alleged that on 14th March 2003 at Ngaranga village, Kiambu District they jointly with others, being armed with dangerous or offensive weapons namely axes, simis and rungs robbed JOSEPH KARICHU MBURU of a radio, assorted batteries, one pair of shoes, one speaker and 12 pairs of socks and also wounded him.

In count 2 both Appellants are charged with BURGLARY contrary to Section 304(2) and STEALING contrary to Section 279(b) of the Penal Code. That on the night of 14th March 2003 at Ngang'a Village jointly with others broke and entered the house of JANE NYOKABI NJOROGE and stole assorted utensils, a jacket, 3 sweaters, a pair of shoes, handbag, nine table clothes and an identity card belonging to the same.

Both Appellants were charged separately with HANDLING STOLEN GOODS contrary to Section 322(2) of the Penal Code. The 2nd Appellant was charged of receiving or retaining 23 pairs of batteries, one pair of shoes, one radio make Sony, one speaker and shoe polish on 14th March 2003 at Limuru Township.

The 1st Appellant is charged of receiving or retaining one handbag, four cups and one wooden spoon. Both are alleged to have done so dishonestly knowing or having reason to believe them to be stolen goods or unlawfully obtained.

In a scantily written judgment, in which the trial magistrate failed to analyze the evidence, the Appellants were found guilty and convicted of SIMPLE ROBBERY under Section 296(1) of the Penal Code and BURGLARY AND STEALING contrary to Section 304(2) and Section 279(b) of the Penal Code. The 1st Appellant was sentenced to 5 years and 2nd Appellant to 10 years in count 1 and in count 2, 1st Appellant was to serve 1 year and 2nd Appellant 3 years.

MISS OTIENO, learned counsel for the State supported the conviction and sentence on grounds that the evidence adduced by the Prosecution was sufficient to sustain a conviction. Learned counsel submitted that PW5, the arresting officer, found the Appellants in possession of the stolen items and that both did not give explanation on how they came into possession of the said items.

One hour after the robbery, she submitted, that the doctrine of recent possession applied to the case. Learned state counsel further submitted that the learned trial magistrate erroneously reduced the charge in count 1 from Capital Robbery to Simple Robbery. Miss Otieno relied on OLUOCH vs. REPUBLIC 1985 KLR 549.

I will start on whether or not the offence of ROBBERY WITH VIOLENCE contrary to Section 296(2) of Penal Code was proved. The authority cited by Miss Otieno in an obiter set out the ingredients of Robbery with violence as follows: -

*“Robbery with violence is committed in any of the following circumstances: -*

- a) *The offender is armed with any dangerous and offensive weapon or instrument; or*

b) *The offender is in company with one or more other person or persons; or*

c) *At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person.*”

The Complainant in the capital robbery charge was JOSEPH, PW1. In his evidence, he said he did not identify any one of the 3 men who broke and entered his house on the night in question. He was clear of what each of them carried. He said one had a torch and another a wood plunk. He was also clear that he was hit with a wood plunk but that despite being given a P3 form, he did not visit any medical personnel to have it completed. He later identified some of the goods stolen during the incident. He identified one pair of shoes by a cut on one of them. The rest of the things he just picked out as his without going into basis of identifying them.

PW4, HALIMA GOLICHA, whom the trial magistrate said was the wife of JOSEPH in his judgment, contradicted Joseph. She contradicted JOSEPH as to the instruments the three robbers were armed with. She saw them armed with ‘Magongo’ rungu and panga. Even though ‘Magongo’ was not described by the learned trial magistrate, it is quite clear that a rungu and panga which GOLICHA saw do not fit the description of a wood plunk and torch which JOSEPH saw. Both contradicted the charge on that issue also. In addition to the contradiction in the evidence of the two witnesses as to the weapons the attackers were armed with, other ingredients for the robbery charge were not proved. The Prosecution did not prove that the Complainant, Joseph, was wounded as stated in the particulars of the charge. In TOROKE vs. REPUBLIC NAIROBI C.A. NO. 204 OF 1987, the Court of Appeal held: -

*“Medical evidence is necessary to establish the fact of assault on the Complainant and of the robbery itself.*

*In the absence of this evidence the case becomes one of simple theft. The prosecution had set out to prove assault and the only way they could do that beyond a peradventure was by calling medical evidence.”*

The case is an authority to hold that once the Prosecution sets out to prove that the complainant or some other person was wounded or assaulted in the course of the robbery, then the Prosecution must adduce medical evidence to prove it. In the instant case the Prosecution set out to prove assault on Joseph, and in addition, that the attackers were armed with axes, pangas and simis. The Prosecution did not prove both these ingredients and as held in TOROKE’S Case (Supra) once the Prosecution failed to prove ingredients of the offence relied upon in the particulars of a charge of Capital Robbery, that reduces the charge to that of simple theft.

In this case, the Prosecution relied on the evidence of recent possession for the Capital Robbery charge. That the Appellants were found in recent possession of goods stolen from the Complainant. There was no direct evidence against the Appellants in respect of the Capital Robbery charge.

As to recent possession, the learned trial magistrate did not state whose goods were found with which of the Appellant, for example a pair of shoes was stolen from Joseph in respect of the Capital Robbery charge and another from Jane in the Burglary and Stealing charge, yet one complete pair - exhibit 1 and one shoe - exhibit 10 were identified by Joseph. He claimed the complete pair was his. In the evidence of PW5 P.C. MASIBO, the arresting officer, he said clearly that he recovered 4 pairs of shoes among other goods recovered from the Appellants. PW5, who arrested the two Appellants, did not say which goods were found with which Appellant even though the particulars of the charges of HANDLING STOLEN GOODS against them specified which Appellant had what. The learned trial magistrate should have resolved that issue before finding the Appellants guilty. If PW5 is the only witness who recovered the exhibited goods from the Appellants, yet he never said which of the goods were found with which Appellant; on what basis were the Appellants charged with the Handling charges? More importantly, on what basis were they convicted? On evaluating the evidence adduced in support of Count 1, I am very clear in my mind that the evidence adduced fell far too short of the required standard of proof. I agree with the Appellants that the evidence adduced was insufficient to sustain the count of CAPITAL

## ROBBERY.

On the second count of BURGLARY AND STEALING contrary to Section 304(2) and 279(b) of the Penal Code, the Complainant, PW2 was not home when her house was broken into and things stolen. The Complainant, Jane, was later to identify certain goods as hers. Specifically she identified 4 cups and a bag – exhibit 12 and 11 respectively. PW3, her neighbour gave no evidence in regard to the burglary. Again, the Prosecution seemed to rely on the evidence of possession of recently stolen goods for the Burglary charge. However, as noted earlier, the Prosecution did not establish which of the Appellants were found with which items. It is not enough for the Prosecution to say that the goods were recovered, the Prosecution must establish to the required standard from whom the goods were recovered. The Prosecution has committed itself, in the particulars of the two HANDLING STOLEN GOODS charges, to prove that each of the Appellants had possession of specific goods. The Prosecution had to prove those particulars as pleaded and failure to do so, in the circumstance of this case, renders the charges un-established and unproven.

I find no evidence to prove the BURGLARY AND STEALING charges for reasons given herein above. For reason already given, I also find the alternative counts of HANDLING STOLEN GOODS unproven.

The upshot of these Appeals is that the Appeals do succeed. Consequently I quash the convictions, set aside the sentences and order that both Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 17th day of September 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE