**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**
**CRIMINAL APPEAL NO.274 OF 2000**
**(Being an appeal from original conviction and Sentence in Criminal Case No.22 of 2000 of the Magistrate's Court at Voi –E.N. Maina, SRM)**

**JACKSON KICHINDA ……...…….. APPELLANT**

**VERSUS**

**REPUBLIC ……...…..... RESPONDENT**

## JUDGMENT

The appellant, Jackson Kichinda was charged in the Senior Resident Magistrate's Court at Voi with two counts of Robbery with violence contrary to Section 296(2) of the Penal Code, one count of Personating a person employed in the Public Service contrary to Section 105(b) of the Penal Code and one count of wearing unauthorised uniform contrary to Section 184(1) of the Penal Code. The particulars of the first count were that on the 1st day of April 1999 at Mengo Village in Mwatate Division of Taita/Taveta District within Coast Province, he jointly with others before court, being armed with pangas robbed Raymond Mwanyota one Camera S/No.352884, one wrist watch and some cash all valued at KSh.8,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Raymond Mwanyota. Particulars of the second count were that on the same day 1st April 1999 at about 9.00 p.m. at Mwambota area in Mwatate Division of Taita/Taveta District within the Coast Province, jointly with others before court, being armed with pangas, robbed Inos Munyoki assorted shop goods, clothes, one radio cassette and cash KSh.8,300/- all to a total value of KSh.25,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Inos Munyoki.

On count 3, it was alleged that on that same day at 7 p.m. at Mengo Village he jointly with others before the court, falsely presented themselves to be persons employed in the Public Service namely Police officers and assumed to carry search for a gun in the house of Raymond Mwanyota for the purpose of committing robbery by virtue of such employment, and particulars of the last count was that on the same day, at the same place at 7.30 p.m., not being a person serving in the disciplined forces or the Police force or any other armed forces for the time lawfully present in Kenya, more without the permission of the Minister or without other lawful authority the uniform of the disciplined forces two shirts, one jungle uniform and one long trouser having appearance of disciplined forces uniform.

The appellant pleaded not guilty to all counts but after full hearing, he was convicted of all counts and was sentenced to death on each of the first two counts. On count 3 he was sentenced to serve imprisonment for a period of three (3) years and on count 4 he was sentenced to prison for one (1) month.

He appealed against the conviction and raise fourteen grounds of appeal. We have carefully considered the appeal, each of the grounds of appeal, the evidence that was adduced in the subordinate court, the judgment of the learned Magistrate and the submissions by the appellant and the learned State Counsel.

The facts of this case are in our humble opinion fairly straightforward.

PW.1 is a teacher by profession but he also has a shop within his house. On 1st April 1999, at 7.30 p.m., he was at home watching television with his wife when four people approached them. Three went into the house while one remained outside. Two of the four people were wearing army fatigues. They told him they were police officers from Tausa. According to PW.1, the Appellant was one of the four . Appellant was dressed in army fatigue. The Appellant and another man also in army fatigue went into the kitchen. They said they had information that PW.1had a firearm. They handcuffed PW.1 and took PW.1's wife i.e. PW.3 in the case below to the bedroom and started searching, but PW.3 told PW.1 that the intruders were taking money which was in the shop. They also took PW.1's camera and wrist watch. They told Pw.3 to give PW.1 clothes as PW.1 had just come from the bathroom. After that they matched him outside ostensibly to an alleged motor vehicle. When PW.1 appeared with a torch, the gang started to run away. PW.1 and PW.3 gave chase but did not find them. PW.1 went back to the shop and checking, found that they had taken KSh.8,000/-. PW.1 reported the incident to Voi Police Station. The light in the house at the material time was the light of T.V. and a hurricane lamp. On the same day, 1.4.1999, PW.2 who is the complainant in count 2, was at home with her sister-in-law – PW.4, her house-maid Veronica and her children. The children and housemaid had gone to bed. At 9.00 p.m. she went to the toilet and on return to the house, a person she knew very well called Edwin, approached her. She was also running a small shop connected to the house. Edwin wanted Roster cigarettes and two half cakes. She served Edwin, but as she prepared to lock up, she heard Edwin speaking to somebody and Edwin called her to tell her that there were some other customers. She opened, a man wearing an army trouser and gray jacket approached her. She had hurricane lamp and she could see his face well. He told her they were police officers on patrol and he wanted 4 sportsmen cigarettes. He gave her KSh.20/-. After cigarettes were supplied to him, he said he wanted match box too, but before she could go for the match box, the same man went into the building and told her they were thieves. Another person stood at the door dressed in army fatigue and a police beret. He had a panga. The first man also had a panga and placed the panga to her neck and ordered her to give him not less than KSh.10,000/-. He threatened to butcher her when she said she had no money. She gave him a total of KSh.8,300/-. He took her bank plate and ID. They then made certain other demands, and in the end they took clothes, and gave them to the person PW.2 identified as the Appellant, who was dressed in military fatigues and hat. She identified the appellant at that stage when he was being given clothes. Whenever the appellant was given clothes, he would take them and pass them out to someone else outside. They then used a crow bar and broke into the other room and they took from that room which was a shop, goods, radio cassette – make Panasonic and six wrist watches which they took from the bedroom. They then took PW.2 to the shop, bound her with a leather belt and staffed pieces of cloth in her moth and tied her lesso across her eyes. Her sister in law PW.4 as well as her daughter were also bound. They then placed a 50 kg bag of sugar on her chest and the thieves left. After they had left neighbours untied her while PW.4and her daughter untied themselves. After the neighbours had come, they followed foot marks as it had rained and the same footmarks led them to the house of PW.6. In that house some people emerged from a house and escaped. When PW.2 and the people with whom she was entered the same house from where the people had escaped, she found the armed forces fatigues similar to the ones which were worn by her assailants and she found some of her stolen properties. The owner of the house PW.6 identified one of the people who had escaped from the material house as the appellant whom he identified as his son-in-law and who together with other people had visited him the previous day 31.3.99 and had left in the morning hours for what looked like a stroll but never returned back home till 3.00 a.m. on the fateful day. PW.2 and PW.5 and an AP from Tausa together with members of the Public reported the incident at Voi Police Station where they found PW.7 who had received a report from PW.1. PW.7 visited the scenes and went to the house of PW.6 where he recovered a camera, six watches, a jacket which was allegedly worn by the gang's ring leader. PW.6 was arrested and gave to police a full story of four people who had visited his home and had been accommodated in the house where the stolen properties were recovered. The appellant was not arrested till late December 1999 when PW.9 together with the other police officers arrested him at Majengo Mapya.

The above were the facts as presented to the learned Magistrate by the prosecution's witnesses. The appellant in his defence gave a sworn statement in which he stated that he was arrested on 26.11.1999. He was beaten and asked if he knew Raymond and Inos Munywoki. He further asked for KSh.50,000/- to

buy his release. On the day robbery is alleged to have taken place the said he had traveled to Mombasa and he produced bus ticket with which he traveled as exhibit.

The learned Magistrate carefully analysed the evidence, a summary of which is as above. She did appreciate rightly that the main issue before the court was the issue of identification and analysed the evidence before her with that in mind. Having done so, she came to the following conclusion:

> ***"I have evaluated the evidence adduced by both sides carefully and I am satisfied that the charges against the accused person have been proved beyond reasonable doubt.***"

We have also analysed the entire evidence in this case. We have also considered the grounds of appeal filed by the Appellant and the evidence adduced in Voi Court Criminal Case No.397 of 1999 which was evidence against the other co-accused of the Appellant who were arrested before the appellant was arrested and whose case was taken to court earlier and was heard separately. Having done so as we must do, we with respect do agree that the evidence before the court against the appellant was overwhelming.

We do agree that evidence of PW.1, PW.3, and PW.4 on identification were no more than dock identification and considered on its own, would not have been of much help to the court. Equally evidence of PW.2 which was recognition needed careful consideration as the light that was available was not sufficiently described to be strong enough. However any doubt that one may have entertained on identification and recognition of the appellant by these witnesses was clearly wiped out by the evidence that when PW.2 and members of the public visited PW.6's house, the same Appellant was again sported running out of the house where not only the stolen properties were found but also clothes similar to the ones worn by the thieves at the two scenes of robbery were recovered. PW.6 knew the Appellant very well and gave detailed evidence of how the Appellant came to be in the material house where the stolen properties were found and relationship of the appellant to him. It is true that one may consider PW.6 as an accomplice because of allegations that some properties were recovered later by PW.7 from the same house, but in our mind even if that were so, it is clear that none saw PW.6 at the scenes of robbery and he was not seen with the disciplined forces dresses so that the recovery of the same dressed and the recovery of the properties stolen from the scenes of the robberies in the house where his son in law the Appellant and his gang were accommodated for two nights and from where they were seen running out of at the time PW.2 and members of the public went to PW.6's house, do convince us that PW.6 told the truth as these incidences corroborated his evidence.

The Appellant did submit that as regards the attack on PW.1 the charge of robbery under Station 296 (2) was not proved as all was done to him was to obtain from him by false pretences and no force was used and the words offensive or dangerous weapon were not used in the charge. Section 296(2) states:

> ***"If the offender is armed with any dangerous or offensive weapon, or instrument, or is in company with one or more other person or person, o r 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."***

That definition makes it clear that if the Appellant was in company with one or more other persons, when they committed the offence he could still be charged with the offence under Section 296(2) and it is not necessary that there he a weapon if they are more than one person. This was the case here. We also fell that where a weapon used is a lethal weapon like a panga which was clearly seen during the said robbery then it is not necessary that a panga which is by its very nature a dangerous weapon be described in the charge sheet as such having been clearly named in the charge sheet as a panga. The court would in such circumstances take judicial notice that a panga is a dangerous weapon even if the charge sheet does not state so. We have also considered the evidence adduced in respect of the Voi Cr.C. No.397 of 1999. The discrepancies in the evidence in that case and in this case are few but they do not affect the overall view of the case and after considering them we are still clear in our minds that the learned magistrate came to a proper conclusion on the evidence before her.

We have also considered the Defence of alibi raised by the appellant. In our mind the evidence of PW.1, PW.2, PW.3 and PW.6 which the court below did believe and right too did displace the defence of alibi.

In conclusion, we do not find any good reason either in law or on facts to cause us to interfere with the decision of the learned magistrate. It will stand. The sentences on 1st and 2nd counts are mandatory and we will not disturb them. The sentences on counts 3 and 4 were merited and we note that they may have been served already.

Appeal on conviction dismissed. Appeal on sentence is also dismissed. Judgment accordingly.

**Dated and delivered at Mombasa this 9th Day of April 2003.**

**J.W. ONYANGO OTIENO**

**JUDGE**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**