

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 84 OF 2001
(ORG PM's KRGY CR. C. 869/00)

JOSEPH KABIRU WACHIRA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant, jointly with other four, were charged with robbery with violence contrary to section 296 (2) of the Penal Code particulars alleging that on the night of 8th and 9th February 2000 at Kerugoya town in Kirinyaga District, they with others not before court while armed with dangerous weapons namely pangas, axes, simis and crow bars robbed Tairus Mbogo Kuria of various assorted shop goods in the process of which they wounded the said Tairus Mbogo Kuria.

During the hearing of the case, PW 1 Tirus Mbogo Kuria, the watchman and key witness told the court that he knew the Appellant who was named by his co-accused persons. Otherwise PW 1 did not know how the Appellant was involved.

No other prosecution witness said anything about the Appellant except PW 3 P.C. Kizito Masimbwa who was merely stating what he claimed accused one had told him. That was no evidence against the Appellant.

What the learned trial magistrate relied upon was therefore mention of the Appellant in retracted statement under inquiry and retracted charge and cautionary statement of co-accused Paul Kariuki Gichobi. In the first place the statements having been retracted it became evidence of the weakest degree. Secondly that evidence was only evidence against the maker of the statements and not against the co-Accused persons the statement implicate. Thirdly assuming that it could be good evidence against the Appellant, the evidence definitely needed corroboration in relation to the Appellant. There was completely no such corroborative evidence and the learned trial magistrate clearly misdirected himself when he said there was corroboration and therefore failed to warn himself against the danger of convicting upon uncorroborated charge and cautionary statement or statement under inquiry.

From what we are saying, the learned State Counsel Mr. Obuo properly conceded the Appellant's appeal.

We accordingly, allow the appeal, quash the Appellant's conviction and set aside the sentence imposed upon him. The Appellant be released forthwith unless lawfully detained in some other cause.

Dated this 19th day of November 2003.

J.M. KHAMONI

JUDGE

H.M. OKWENGU

JUDGE