



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU  
CRIMINAL APPEAL NO.6 OF 2003

(From the original conviction and sentence in Case No.55  
of 2002 in the Resident Magistrate's Court at Siakago by  
Mr. John Onyiego – R. M.)

**GIDEON NYAGA MUTURI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

*Gideon Nyaga Muturi (hereinafter referred to as the Appellant)* was jointly tried with three others for the offence of Robbery Contrary to Section 296 (1) of the Penal Code. The other three were acquitted but the Appellant was convicted and sentenced to serve two years imprisonment with four strokes of the cane. He has now appealed against his conviction and sentence citing five grounds of appeal basically contending that the prosecution evidence was contradictory, incredible and generally insufficient to sustain a conviction, that the Appellant was not positively identified by any of the prosecution witnesses and that the prosecution failed to discharge the burden of proof.

The particulars of the charge against the Appellant and his Co-Accused were that on the 19th day of January 2002 they jointly robbed *Peter Kithumbu Nyaga* of cash Ksh.17,000/=, three underpants and one shirt all valued at Kshs.17,240/= and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said Peter Kithumbu Nyaga.

Six witnesses testified in proof of the prosecution case. Briefly their evidence was as follows:-

On 19th January 2002 the Complainant withdrew Ksh.19,100/= from the Bank. He then bought a shirt and three underpants. He was then accompanied by Edward Muchiri P. W. 2 and P. W. 4 *Bernard Mbogo Mugo* to *Mathiga Kenda Hospital*. After treatment it was late so the three being unable to secure transport back, P. W. 4 took them to his sister's house. On the way they were joined by P. W. 3 *Lucy Wanjiru Njiru*. They all proceeded to the house of P. W. 4's sister from where they went to Kavovore Market where they drank beer and ate meat a Bar belonging to Muriithi one of the Appellants Co-Accused.

At about 9.00 a.m. Muriithi told them He wanted to close the bar so they had to leave. Outside the Bar four people including the Appellant who claimed to be the area village elder confronted the Complainant and his colleagues demanding to know who they were and what they were doing in the area. They introduced themselves and explained the purpose for their visit. The four men walked with Complainant and his colleagues for a short distance, shortly thereafter they met another group of five men who included Muriithi the owner of the Bar where they had been drinking. It was then that hell broke loose, the Appellant hit the Complainant and his colleagues with a walking stick. Some of the other men also beat them using whips and stones. The Appellant accosted the Complainant searched him and removed Ksh.17,000/= from his inner coat pocket and also took the shirt and underpants which Complainant had

bought earlier in the day. The Complainant managed to escape and hid in a nearby dispensary. His colleagues also each separately managed to escape. The next morning they all went to the Chief's Office where they reported the matter. They were referred to Kiriti Police Station where P. W. 3 who was a resident of the area gave the names of their assailants.

On 21st January 2002, the Complainant, P. W. 2, 3 and 4 led the police to Muriithi's Bar where He was arrested. Accused three was also arrested around the Bar after being identified by the Complainant and his witnesses. Ksh.2,350/= was recovered from Muriithi whilst Ksh.1,420/= was recovered from one of the other Accused.

The Complainant, P. W. 3 and P. W. 4 were examined by P. W. 6 *Leonard Ngare Namu* a Clinical Officer who found each to have suffered injuries which He classified as harm. The P3 form in respect of each witness was produced in evidence.

The Appellant and the Co-Accused were subsequently charged. When put to their defence the Appellant and his Co- Accused all denied having robbed the Complainant. Muriithi admitted that the Complainant and his friends were drinking at his Bar and that they were very rowdy and were in the company of a young girl who became drunk and started vomiting. He therefore chased the Complainant and his colleagues out of the Bar. He continued selling to other customers until 10.30 p.m. when He closed the Bar and went home. He was surprised to later learn about the robbery allegations.

The Appellant confirmed Muriithi's evidence that the Complainant that the Complainant and his colleagues were drinking in Muriithi's Bar and were roundy so Muriithi chased them away. The Appellant who had gone to Muriithi's Bar at 7.30 pm continued drinking until 10.30 pm when Muriithi closed the Bar. The Appellant went to his home and slept. He was surprise when the Complainant went to his home in the company of police officers alleging that the Appellant had robbed him. He denied having robbed him.

The trial Magistrate having considered the evidence was satisfied that the Appellant was positively identified as one of the persons who robbed the Complainant. He therefore convicted the Appellant thereby giving rise to this appeal.

Learned State Counsel *Mr. Omwenga* supported the conviction and sentence and maintained that the Appellant was properly convicted.

I have carefully reconsidered and re-evaluated the evidence. It is not disputed that the Appellant was in the Bar at the time when Complainant and his friends were drinking in the Bar. It is evident that P. W. 3 who was a resident of the area knew the Appellant well. Although the Complainant and his colleagues were attacked outside during the night, they were able to identify the Appellant through the moonlight.

The Appellants spoke to them and introduced himself as a village elder and walked with them for a while. They had ample time to see him adjust to the moonlight and identify him. Moreover P. W. 3 who knew the Appellant well before, could not mistake him. The identification of the Appellant was positive and free of any mistake.

It is true that there were some minor inconsistencies as to the role each of the assailants played however there was overwhelming evidence that the Appellant participated in the assault on the complainant and his colleagues and that the Complainant was robbed of Ksh.17,000/= during the fracas. The trial Magistrate who saw and observed the demeanour of the witness believed the Complainant's evidence that it was the Appellant who removed the money from his pocket.

There was sufficient evidence to prove the charge against the Appellant. The conviction was therefore proper.

As regards the sentence it was extremely lenient and does not warrant interference of this court.

I do therefore dismiss this appeal in its entirety.

Orders accordingly.

*Dated, Signed and Delivered this 23 rd day of December 2003.*

*H. M. OKWENGU*

JUDGE