



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.166 OF 2001

**(From Original Conviction and Sentence in Criminal Case No.115
of 2000 of the Chief Magistrate's Court at Thika)**

MARTIN MWAURA WANJIKU APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.167 OF 2001

**(from Original Conviction and Sentence in Criminal Case 115 of
2000 of the Chief Magistrate's Court at Thika)**

SAMUEL NJOROGI KANGETHE APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The two appellants brought an appeal after they were dissatisfied when they were convicted and sentenced to 8 years imprisonment plus 8 strokes of the cane by the Principal Magistrate Thika one Betty Rashid Esquire for the offence of robbery contrary to section 296 (1) of the Penal Code on the 1st day of February 2001. Each of the appellants disputed their identification since the offence took place at night. The lighting at the scene was not adequate to support positive identification according to the appellant's written memo of appeal. The appellant's put in written grounds of appeal which I have had the opportunity to study. The state opposed the appeal and supported the conviction as well as the sentence meted.

In order to appreciate the prosecution's case as well as the defence case I have studied the proceedings of the lower court carefully. According to the evidence on record it is P.W.1 who identified the 1st and 2nd appellants during the robbery. He saw them with the help of security lights near by. Police arrested the two appellants immediately after P.W.2 raised an alarm. P.W.2 did not identify the two appellants during

the robbery.

P.W.3 who was a police officer found the 1st and 2nd appellants struggling with P.W.1 as they robbed him. P.W.3 and P.W.4 who were police officers were attracted to the scene by P.W.2's screams. P.W.4 arrested 2nd appellant as he tried to run away. The 2nd appellant was armed with knife. The 1st appellant was arrested by PC Mwenda P.W.4 corroborated the evidence of P.W.3. The 1st appellant in his unsworn defence did not address his mind to the evidence of P.W.1 P.W.3 and P.W.4 so that his defence appeared an afterthought when compared to the evidence of the prosecution witness. He raised a completely new defence which did not touch on the issues raised by P.W.3 and P.W.4 as to how they arrested him and the 2nd appellant. The 2nd appellant's defence had similar shortcomings as the 1st appellants defence. In her considered judgment I have noted that the trial magistrate addressed her mind to the defence of the two appellants which she rejected as untenable. She also considered the lighting at the scene and found it favoured the positive identification of appellants. Although she misdirected her mind as to the role played by P.W.2 in the identification of the appellants I find that the doubt raised by the testimony of P.W.2 who did not identify both appellants (yet the trial magistrate was of the view of that she did) was cured by the testimony of P.W.3 and P.W.4 who arrested both appellants as they fled from the scene. P.W.1 was sure in his mind that the two appellants were arrested almost immediately after robbing him and brought back with the same weapons that they used to rob him by P.W.3 and P.W.4.

Although the trial magistrate does not seem to have addressed her mind to P.W.3 and P.W.4's evidence, it is my considered view that she arrived at the correct findings all the same. Taking everything into account I am satisfied with the state counsels submissions that the two appellants were convicted on safe grounds. I will not therefore interfere with their convictions. I therefore dismiss their appeals in so far as the same touches on the issue of conviction.

As concerns sentence it is my considered view that the two appellants were sentenced to long prison terms more particularly the 1st appellant who was a first offender. I will review their sentences downwards. I reduce the 1st appellant's sentence to one of three years imprisonment plus three strokes of the cane. As for the (Samuel Jorge Kaneohe) 2nd appellant who was not a first offender I reduce his sentence from 8 years imprisonment plus 8 strokes of the cane to a sentence of four years imprisonment plus four strokes of the cane.

Order accordingly.

R.M. MUTITU

JUDGE

12/3/2003

Delivered, dated and signed in the presence of the two appellants and in the presence of Mr. Monad for the state.

R.M. MUTITU

JUDGE

12/3/2002