



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 1077 of 1998**

**(From Original Conviction and Sentence in Criminal Case No. 12488 of 1996 of the**

**Principal Magistrate's Court at Kibera: J. Ondieki (mrs))**

**JOSEPH GACHOMO MWANGI.....PLAINTIFF**

**-versus-**

**REPUBLIC.....RESPONDENT**

**Coram: Oguk J.**

**Mitey, J .**

**Appellant in person (unrepresented)**

**Mrs Oduor (state counsel) for the Republic**

**JUDGMENT**

The appellant, Joseph Gachomo Mwangi (original A1) was convicted on 10 counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code by the learned Principal Magistrate, Kibera. Upon his conviction on each of the said counts, he was sentenced to death. His appeal to this court is against conviction and sentence.

The evidence adduced by the prosecution witnesses were quite clear. It is undisputed that on the night of 6<sup>th</sup> and 7<sup>th</sup> of October, 1996 there was a spate of robberies in Kiserian area of Kajiado District by a gang comprising of several people who broke into the houses of the complainants as specified in the charge sheet, beat them up together with the night watchmen in the area and robbed them of several goods. The said robberies went on for a long period of time covering several houses and a construction site. Some of the victims of the robbery went to Ngong Police Station that same night and reported the incident. A similar report was also made by some of the complainants to Senior Sgt Benson Barara (PW16) who was then on patrol duties with other police officers near Kiserian Police Post. It was then 1.30 a.m. As he accompanied the said reportees to the scene, he heard some screams from a distance and rushed there only to find that the gangsters had gone away but he found several people who had been injured among them a watchman at Nyakio construction site. While still there he heard more screams further a head and he decided to call for police reinforcement at the Post where he got three more police officers. They were all armed with G3 rifles. As more screams were heard from the people who were being attacked by the gangsters, they decided to lay an ambush by the road side where they suspected the gangsters were likely to follow.

While laying an ambush, PW16 testified that they saw a group of people approaching while carrying

some goods. He ordered them to stop and when they refused, by ordered his men to fire warning shots. The said gangsters realizing that they were police officers dropped their weapons and loot and ran away. He ordered his officers to shot at them. They disappeared in the thicket and tall grass nearby but they believed that some of them must have been caught by gun fire. It was then 3 a.m. It was then dark and the police officers combed the area till morning. They then noticed a trail of blood which they trailed through the thicket for about 300 to 400 meters from the scene of shooting. It led them to the place where they found the appellant lying down while bleeding heavily from a gun shot wound on the leg. In the same thicket, the police officers came across the appellant's co-accused (Original A2) who was also bleeding from a gun shot wound but he later died from the injuries sustained during the said incident.

At the time the Appellant was found lying in the thicket with a gun shot wound on the leg unable to move, the police officers found him wearing a white pair of shoes which they suspected to have been stolen. They removed it and it was later identified by one of the complainants, Judy Muthoni Muiruri (Ex. 26(a)). The 2<sup>nd</sup> accused (now deceased) was also found wearing a Jeans Jacket (Ex 29) and has some 5 compacts which were suspected to have been stolen. Both of them were arrested by the police officers and rushed to Kenyatta National Hospital for treatment. It was while they were at the casualty department at the hospital that one of the robbery victims, Jacob Nganga Njau (PW11) who was also at the casualty for treatment having been cut on the face during the robbery managed to see the 2<sup>nd</sup> accused who had been brought to the hospital together with the appellant while wearing his jacket (ex 29) which he had been robbed of in the same night. He also identified another jacket (ex 30) later at the police station among the recovered items.

The police officers collected the loot which had been dropped down by the said gangsters when they confronted them during the incident in which the appellant and his co-accused (original A2) were shot. The items were taken to the police station where they were identified by the complainants in counts 1, 2 and 7. In particular, in respect of count 1, the complainant identified Ex 1 to 11; in count 2, the complainant identified ex 25, 26 and 27; and in count 7 the complainant identified exh 23, 26 and 30 as belonging to him.

The appellant and his co-accused were later charged with the said robberies. None of the complainants were able to identify their attackers.

In his defence, the appellant denied any involvement in the said robberies. He testified that he does some casual work in Ngong and is also a dealer in several hand cloths. On the evening of 7<sup>th</sup> October, 1996 after he had closed his business at 6 p.m. he went to a bar for drinks where he stayed upto 10 p.m. He realized when he left the bar that there were no vehicles available to take him to Kiserian. He therefore decided to walk on foot. On the way, he met with a group of people who surrounded him and asked him to identify himself. The said men then broke his leg and robbed him of Shs 5,000/- before they disappeared into the nearby bushes when they saw a certain vehicle approaching. He then entered into a road culvert where he remained till 6 a.m. He was later at around 6 a.m. spotted by members of the public who surrounded him. Police officers later came and took him to Ngong police station and thereafter to Kenyatta National Hospital. He was later charged with the offences which he said he never committed.

We have given careful consideration to the evidence that was adduced in the court below. It is not in dispute that a large group of gangsters armed with assorted weapons went on a robbery spree in Kiserian area and attacked several people taking with them whatever goods they could lay their hands, on having wounded the victims. It was not possible for the said victims who were the complainants in the court below to identify any of the said gangsters as it was a dark night and the said gangsters were very many and ruthless. The incident started at around 1.00 a.m. and continued upto 3 a.m. when the police officers finally caught up with some of the said gangsters and opened fire on them when they refused to stop. They ran away into the nearby bushes having dropped their weapons and stolen goods which were collected by the police officers and taken to Ngong Police Station.

We are satisfied on the evidence that the police officers combed the bushes where the said gangsters had ran into and in the process, they came across the appellant and another (original A2) who were lying in the bush with gun shots wounds and were bleeding profusely. In fact it was the trail of blood which the

police officers were following at day break around 6 a.m. that enabled them to reach the place where the appellant and his co-accused were lying.

The Appellant admits that he had sustained a broken leg during the said night on his way to Kiserian but he says that it was some thieves who had broken his leg after robbing him of cash Kshs.5000/-. We have considered his defence but we are not inclined to believe him. We are satisfied that he must have been one of the gangsters whom the police officers had met with during the night and shot at when they refused to stop and ran into the bush dropping down their weapons and some of the stolen goods they were carrying. That those goods were on the following day identified by some of the complainants confirms that the people who had been shot at by the police officers during the night must have been the same gang of robbers that were terrorizing the people of Kiserian area that night. We find that the Appellant who had been shot during the said incident must have been one of the said robbers. Indeed his co-accused (original A2 - now deceased) was found wearing one of the stolen Jackets (Ex. 29) by one of the victims of the robbery when he was taken to the hospital casualty while the appellant was wearing stolen shoes (Ex. 26(a)).

Although the Appellant was convicted on all the 10 counts charged, and even though we are satisfied that he was a member of the gang that had committed the said robberies, we are satisfied that only three counts - counts 1, 2 and 7 had been satisfactorily proved as the goods stolen had been recovered from the fleeing gangsters and positively identified by the three complainants. With respect, we find that there was nothing on record to connect the appellant and his co-accused (Original A2) with the offences that were charged in counts 3, 4, 5, 6, 8, 9 and 10. We find that the conviction of the appellant in these counts were unsafe.

For reasons stated, we allow the appeal against convictions in respect of counts 3, 4, 5, 6, 8, 9 and 10. We quash the said convictions and set aside the sentence that was imposed on the appellant in respect of each of those seven counts.

We are satisfied that it has been proved beyond doubt on good and reliable evidence that the appellant had committed the robberies in counts 1, 2 and 7. However, the offences committed in our view, amounted to robbery contrary to Section 296(1) of the Penal Code. We substitute the conviction of the appellant in respect of counts 1, 2 and 7 with robbery contrary to section 296(1) of the Penal Code and set aside the sentence of death that was imposed on him in respect of each of these counts.

We sentence the appellant on each of the three counts – 1, 2 and 7 to serve five (5) years imprisonment plus two (2) strokes corporal punishment in respect of each count. The sentences to run concurrently effective from the 12<sup>th</sup> of August, 1998 when he was convicted in the court below.

Dated and delivered at Nairobi this 30th day of November, 2001.

**S.O. OGUK**

**JUDGE**

**J. K. MITEY**

**JUDGE**