



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NANYUKI  
CRIMINAL APPEAL NO.107 OF 2017

(Formerly Nyeri HC CR Appeal No 305 of 2010)

ANTHONY GACHUGU WANJAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Appeal from original Conviction and Sentence in Nanyuki SPM Criminal Case No 1536 of 2009 – H N Ndung’u, SPM)

J U D G M E N T

1. The Appellant herein, **ANTHONY GACHUGU WANJAU** (who was the 2<sup>nd</sup> accused before the trial court), was convicted after trial, along with his co-accused, **PETER NDIRANGU WAMBUGU** (1<sup>st</sup> accused) of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. It was alleged in the particulars of the offence that on 21/06/2009 at Nanyuki Sewerage area in Laikipia-East District within the Rift Valley Province, they jointly robbed one **LUCAS LUMANAT** of one mobile phone make Vodafone worth KShs 1,500/00 and keys, and that at or immediately before or immediately after the time of the robbery, they threatened to use actual violence to the said complainant.

2. On 19/03/2020 the Appellant and his co-accused were sentenced to suffer death as by law provided. This sentence of death was subsequently commuted to life imprisonment by executive clemency.

3. The Appellant and his co-convict appealed to the **High Court** at Nyeri against the conviction and sentence vide, respectively, **Criminal Appeals No 305** and **No 312 of 2010**. At the hearing, the appeals were consolidated and heard together as one by a **mixed bench** of a High Court judge and an **Environment and Land Court** judge (Ougo and Abuodha, JJ).

4. In the heading of the judgment of thee mixed bench delivered on 28/10/2013, **ANTHONY GACHUGU WANJAU** was referred to as the 1<sup>st</sup> appellant while **PETER NDIRANGU WAMBUGU** was referred to as the 2<sup>nd</sup> appellant. In the body of that judgment none of the two appellants was referred to by name; they were variously referred to as the 1<sup>st</sup> or 2<sup>nd</sup> appellant. The court stated that the learned State Counsel (for the Respondent) conceded the appeal of the “2<sup>nd</sup> appellant” , and at conclusion of the judgment his “*conviction and sentence (were) quashed*”. The conviction and sentence “*against the 1<sup>st</sup> appellant*” were affirmed and his appeal dismissed.

5. The proceedings and judgment of the mixed bench were subsequently declared by the **Court of Appeal** sitting at Nyeri to be a nullity in law. This was in **Criminal Appeal No 22 of 2014** filed by the present Appellant against the affirmation by the mixed bench of his conviction and sentence. The Court of Appeal directed that the Appellant’s appeal in the High Court be heard afresh by a properly constituted bench. That was how I came to rehear this appeal.

6. As already pointed out, in the heading of the judgment of the mixed bench **ANTHONY GACHUGU WANJAU** appears as 1<sup>st</sup> appellant while **PETER NDIRANGU WAMBUGU** appears as 2<sup>nd</sup> appellant. In the first paragraph of the judgment the mixed bench stated –

**“On the date of hearing these appeals, Criminal Appeal No 305 of 2010 and Criminal Appeal No 312 of 2010 were consolidated, with the appellants appearing as they were in the trial court. Learned State Counsel Ms. Maundu conceded the appeal of the 2<sup>nd</sup> appellant.”**

7. Quite clearly this statement by the mixed bench regarding the order in which the two appellants before them appeared before the trial court was wrong! **ANTHONY GACHUGU WANJAU** was actually the 2<sup>nd</sup> accused while **PETER NDIRANGU WAMBUGU** was the 1<sup>st</sup> accused. It is thus most likely that the appeal conceded by the learned counsel for the Respondent was that of **ANTHONY GACHUGU WANJAU**, who was the 1<sup>st</sup> appellant before the mixed bench but the 2<sup>nd</sup> accused before the trial court. It is also most likely that the appeal

the mixed bench meant to dismiss was that of PETER NDIRANGU WAMBUGU, who was the 2<sup>nd</sup> appellant before them but the 1<sup>st</sup> accused before the trial court!

8. It appears to me that the wrong appellant was mistakenly released by the mixed bench. In any event, what was alleged in the particulars of the offence was that

**“...at or immediately before or immediately after the time of the robbery (the accused persons) threatened to use actual violence to the (complainant)”.**

I have read through the record of the trial court. The complainant testified at PW1. He did not at all testify to any threat of use of actual violence. The other key witness was PW4 who ran to the scene as the two assailants of PW1 ran off from the scene and could not have witnessed any threat of use of actual violence.

9. The evidence placed before the trial court disclosed a low-grade mugging in which the complainant did not suffer any injury. The evidence also showed that the 1<sup>st</sup> accused (who was **not** the present Appellant) was the one who stole the complainant's phone and keys from his pocket. It is not just that the Appellant herein should suffer for that crime while the 1<sup>st</sup> accused was released.

10. In the circumstances, I will allow the Appellant's appeal in its entirety. His conviction is hereby quashed and the sentence of death imposed upon him (subsequently commuted to life imprisonment) set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 13<sup>TH</sup> DAY OF OCTOBER 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**