



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APPEAL NO. 249 OF 2013**

(CONSOLIDATED WITH CRIMINAL APEAL NOS. 248 OF 2013 AND 505 OF 2013)

JOHN GITHAIGA RAHAB.....1<sup>ST</sup> APPELLANT

JOHN KABUTHA TURUNGA.....2<sup>ND</sup> APPELLANT

CHARLES KAMAU NJOROGE.....3<sup>RD</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Being an appeal against conviction and sentence in Kangema Senior Resident Magistrates Court Criminal Case No. 140 of 2011(Hon. D.Orimba) in a judgment delivered in court on 19<sup>th</sup> July, 2011)**

**JUDGMENT**

The appellants were jointly charged and convicted of the offence of robbery contrary to **section 296(1)** of the **Penal Code**. It was stated in the particulars of the offence that on 22<sup>nd</sup> day of April, 2011 at Ichihi sub location, within Murang'a County, the appellants jointly robbed Stephen Chege Njuguna one pair of long trouser, one sweater, one pair of gumboot, a cap, one shirt, a half kilogramme of sugar, cooking fat , one kilogramme of rice, inner wear, a plastic bag and that on or immediately before or immediately after the time of such robbery the appellants used actual violence to the said Stephen Chege Njuguna.

The particulars of the offence point to the more serious offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code** rather than the offence of simple robbery with which the appellants were charged. Be that as it may, the learned magistrate held that the State had proved the offence of simple robbery beyond reasonable doubt and convicted the appellants accordingly. He sentenced each of them to serve fourteen years imprisonment.

Being dissatisfied with the learned magistrate's verdict, the appellants filed separate appeals against it. Initially the court heard the appeals of the first two appellants and even set a date of judgment; however, before the delivery of the judgment, the third appellant informed the court that he had also appealed against the decision of the trial court and that his appeal had not been determined. The court directed that the three appeals be mentioned together with a view to consolidating them and they were so consolidated on 10<sup>th</sup> February, 2014.

The grounds raised in the petitions of appeal filed for the respective appellants include the contention that there was no proper identification of the appellants; that the learned magistrate erred in law and in fact in

convicting the 3<sup>rd</sup> appellant yet it is only the 1<sup>st</sup> and 2<sup>nd</sup> appellants who admitted being with the complainant on the material night and there was no evidence that the 3<sup>rd</sup> appellant was at the scene of crime. When the appeal came up for hearing the 1<sup>st</sup> and 2<sup>nd</sup> appellants argued their appeals orally; the 3<sup>rd</sup> appellant relied on written submissions.

The state opposed the appeal both on conviction and sentence though its counsel, Ms Kathambi, reminded the court that the second appellant had no issue with the conviction but had only appealed against the sentence.

Counsel for the state argued that it is apparent from the record that there was cogent evidence that the offence against the appellants had been proved to the required standard. According to counsel, the appellants were duly recognised as they were persons previously known to the complainant and the second prosecution witness who was with him on the fateful night. The light from the vehicle was sufficient and the complainant even called the 2<sup>nd</sup> appellant by name. The appellants' names were given to the chief by their victims.

The state counsel also argued that the learned magistrate was right to reject the appellants' defence as it was a mere denial and could not displace the prosecution case. Counsel asked the court to dismiss the appellants' appeal.

It is ideal at this stage to lay out and analyse the evidence with which the learned magistrate was presented before this court, as the first appellate court, can come to its own conclusions. In undertaking this task, the court is cautious that the trial court had the advantage of seeing and hearing the witnesses and was therefore better placed to make particular decisions based on such aspects of evidence as the demeanour of witnesses.

In his sworn evidence, the complainant, **Stephen Chege Njuguna (PW1)** testified that he was a charcoal dealer and that on 22<sup>nd</sup> April, 2011 at around 10 pm he was with one **Kimani (PW2)** walking back home from his business when he met three people; one of the three people held him while the other one held his friend Kimani. The third person frisked their pockets and robbed them of personal effects. According to this witness' evidence, the 1<sup>st</sup> appellant held Kimani while the 2<sup>nd</sup> accused person held the complainant. The third appellant removed personal items from their pockets.

This witness testified that he was able to identify the appellants with the help of lights from a motor vehicle which passed by. The witness testified that he was hit on the head by the 2<sup>nd</sup> appellant when he called him by his name; apparently, he lost consciousness and only regained it the following day at about 9 am when he realised that he had been stripped of all his belongings including clothes. He remained at the scene until about 5.30 pm when a herdsman found him; the herdsman then called the area assistant chief and a doctor. He also gave the area chief the names of the three appellants as the people who had attacked him.

The witness was treated at Murang'a District hospital and later referred to Thika General Hospital for x-ray. He reported the robbery at Kangema police station where he was issued with the P3 form that was duly filled and admitted in evidence.

Upon cross-examination the witness told the court that the 1<sup>st</sup> Appellant stabbed him with a knife because he had recognised him; for the same reason the 2<sup>nd</sup> appellant also hit him on the head.

**John Kimani (PW2)** testified that he was walking along with the complainant on the material night when the appellants are said to have struck. He testified the 2<sup>nd</sup> appellant held the complainant while he was held by the 3<sup>rd</sup> Appellant who also robbed them; he however managed to escape and reported the incident to the area chief whom he also gave the appellants' names the following day. The witness said that he knew all the appellants before they attacked them; he recognised the 1<sup>st</sup> accused as his former school mate while the second accused was his neighbour. He claimed to have worked with the 3<sup>rd</sup> appellant on a

road construction.

The clinical officer at Kangema sub district hospital, **Zakayo Mwangi Gatheri** testified as the third prosecution witness. According to his report, the complainant sustained injuries on the right side of the lower lips and on the right ear lobe. The complainant also sustained a cut on the left eye. The probable weapon used was indicated as blunt/sharp object. At the time of examination, the age of the injury was said to be 21 days.

The area chief **Samuel Kihanya (PW4)** testified on 23<sup>rd</sup> April, 2011 he received a report from a member of the public that he had stumbled upon a person in a forest while looking after his cows; the person had allegedly been assaulted. This witness testified that he went to the scene accompanied by his assistant chief, a doctor and members of the public. They all found the complainant at the scene wearing a t-shirt only; he is said to have been bleeding from one hand and had multiple injuries. The witness talked to him and the complainant is said to have mentioned the names of the three appellants as the people who had attacked him. The chief confirmed that the appellants hailed from his area of jurisdiction.

The police officer who investigated the case was police constable Maurice Ogada who was then attached to Kangema police station; he testified that the complainant reported the attack on 25<sup>th</sup> April, 2011 and that in his report he gave the names of the three appellants as the people who had attacked him. He also testified that before charging the appellants he interrogated them. The 2<sup>nd</sup> appellant told him that there was a fight with the complainant on the night in question but that he took the complainant home. He said that he found the 1<sup>st</sup> appellant assaulting the complainant and that he is the one who came to his rescue. He said that he took the complainant's cap away. When the officer asked for the cap, the 2<sup>nd</sup> appellant told him that it had been taken by his friend, one Simon. The officer confirmed that the 3<sup>rd</sup> appellant reported a case of damage to his property.

In their defence the appellants opted to give unsworn statements; however, the record reflects that the 1<sup>st</sup> and the 2<sup>nd</sup> appellants were cross-examined. The first appellant said that on 22<sup>nd</sup> April, 2011, he spent the night at his cousin's place and that he only came back at his home on 23<sup>rd</sup> April, 2011 at night. He identified his cousin as James Maina Kamau. This appellant denied knowing anything that could have happened on 22<sup>nd</sup> April, 2011.

On his part the 2<sup>nd</sup> appellant said that on the material night he was at Ichichi shopping centre drinking beer with his friends; he left at 11 pm and went to his home. On 24<sup>th</sup> April, 2011 he was arrested by members of the public who took him to the police station; he denied ever committing the offence with which he was charged.

The 3<sup>rd</sup> appellant said that he travelled to Nyeri on 22<sup>nd</sup> April, 2011 in the morning and stayed with his mother until 24<sup>th</sup> April, 2011; when he came back he found his house had been burnt. He was arrested and charged on 25<sup>th</sup> April, 2011.

Viewed in its entirety, the evidence at the trial reveals that the appellants were persons previously known to the complainant and his companion (PW2). The evidence of the investigations officer, which I find was not displaced, is that the first two appellants had some sort of physical confrontation with the complainant on the material night. The officer interrogated the appellants the second of whom told him that he rescued the complainant from the hands of the first appellant who was said to have been assaulting him.

While the burden is always on the prosecution to prove its case and not to rely on the defence case to fill the gaps in its own case, it is apparent to me that the investigating officer's evidence corroborated the evidence of the complainant himself and his friend Kimani (PW2) who testified that they were attacked by the three appellants on the material night. The two recognised them because they are people they knew before and indeed it is because of this recognition that the complainant was attacked and left abandoned in a forest. Kimani (PW2) spoke of the 1<sup>st</sup> appellant as a former school mate, the 2<sup>nd</sup> appellant as his

neighbour and the 3<sup>rd</sup> appellant as a person he had worked with.

The 1<sup>st</sup> and 3<sup>rd</sup> appellants put forth an alibi; they were not at the scene of crime at the material time. The 1<sup>st</sup> appellant testified that he spent the night at his cousin's place; he identified him as John Maina Kamau. On his part, the third appellant said that he had gone to visit his mother in Nyeri at the material time. None of these two appellants called the people they are said to have been with to corroborate their evidence. The learned magistrate was quite correct to reject their evidence.

The evidence that the complainant was found in the bush wearing a t-shirt only went to show that indeed the complainant had been stripped of his property, literally. He was found naked and again this evidence was not displaced. There is sufficient proof that he was robbed of the clothes which are some of the items that were listed in the particulars of the charge.

The circumstances under which the complainant was robbed and attacked clearly fit the description of the offence of robbery with violence; there was evidence that he lost property, he was attacked by more than one person and that immediately before or immediately thereafter the robbery he was physically attacked and injured. All the ingredients of the offence of robbery with violence were proved and had the state asked for the substitution of the conviction of the simple robbery with that of robbery with violence this court would not have hesitated to accede to that request.

I do not find any merit in the appellant's appeal and it is accordingly dismissed.

**Dated, signed and delivered in open court this 5<sup>th</sup> day of May, 2014**

Ngaah Jairus

**JUDGE**