REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 441 OF 2007

MICHAEL GACHANJA WANGARI……..…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 4145 of 2006 in the Chief Magistrate's Court at Kibera - Mr. Maundu (SRM) on 13/07/2007)

JUDGMENT

1. **Michael Gachanja Wangari** was convicted in two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** by Mr. Maundu Senior Resident Magistrate (as he then was) in **CM Cr. C. No. 4145 of 2006 at Kibera law court**.

2. Brief particulars were that on 12th July 2006 at the junction of Kibera Olympic and Ayany within Nairobi Province, jointly with others not before court while armed with pangas, they robbed Bill David Onyango of cash Kshs.2,500/= and a mobile phone make Erickson 528, all valued at Kshs.8,000/= in count I, while they robbed M/s Caroline Nyaguthe Bore of cash Kshs.4,300/=, motorolla mobile phone C200 valued Kshs.5,900/= and a citizen wrist watch valued at Kshs.1,500/= all valued at Kshs.11,700/=, in count II. It was stated that in both instances, at or immediately before or immediately after the time of such robbery, they used personal violence against the two Complainants.

3. The appellant was sentenced to suffer death, where upon he filed an appeal and raised four grounds of appeal which, in sum, stated that the source of light at the scene of the said robbery

was unreliable, that the evidence of **PW1** and **PW2** upon which he was convicted was contradictory, and that as a whole the prosecution evidence was unreliable.

4. The appellant in his defence denied the offence and stated that a confrontation arose between him and some young men in a bar on 10th July 2006 because he accidentally spilt their beer, and refused to pay for it. The said boys set upon him and beat him till he lost consciousness. Six days later he found himself in Kilimani Police Station where he was subsequently charged with an offence he did not commit.

5. On 21st May 2013 when the appeal came up for hearing the appellant put in written submissions, whereupon the respondent was given 14 days to respond thereto. At the time of writing this judgment one month down the line the respondent's submission had not been filed.

6. We have anxiously re-evaluated the evidence on record bearing in mind that a duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any question of law raised in the appeal. - See **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR**. In doing so we reminded ourselves that we did not have the advantage of seeing the witnesses as they testified.

7. The prosecution's case briefly stated is that the two complainants were walking from Ayany junction to Olympic Estate, on the night of 12th July 2006 at about 11.40 p.m. As they approached Olympic bridge, three people emerged from some makeshift sheds by the road side armed with a panga and demanded to be given the second complainant's hand bag. The 1st complainant took the hand bag and refused to relinquish it. The intruders set upon him and cut him on the head and arm using the panga. The 1st complainant relinquish the hand bag and fell down unconscious.

8. The intruders took from him a Sony Ericson mobile phone together with Kshs.2,500/= as set out in count I. The intruders dragged the second complainant to a field, where they ransacked her hand bag and took away her cash Kshs.4,300/=, a mobile phone make Motorolla C200, a wrist watch and a makeup kit, all comprised in the second count. **PW1** found his way home and was taken to hospital by his mother. He was hospitalised for two days. **PW2** went home separately. The matter was formerly reported to the police on 17th July 2006, by **PW1** but by then the appellant herein had already been arrested.

9. From the evidence the robbery occurred at night at 11.40 p.m. The appellant having not been arrested on the spot, and there being no recoveries made upon him to link him with the robbery, the crucial question for determination is one of identification. We therefore scrutinized and re-evaluated the evidence of identification to establish whether it was sufficient to form a basis for the appellant's conviction. As we analysed the evidence we warned ourselves to test the evidence with caution in the terms of the Court of Appeal decision in **Ogeto v Republic [2004] 2KLR pg 15,** in which the Hon. Judges of Appeal Omolo, Githinji and Onyango Otieno, JJA held, *inter alia*, that:

"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".

10. Both **PW1** and **PW2** testified that there were street lights from the lamp posts at the scene. One lamp post was behind them while the other was ahead of them. **PW1** told the court that he knew two of the three men by appearance because he used to see them around Kibera, but that he knew the third man by name as Gachanja also nicknamed **"Chanju".** Mr. Gachanja is the appellant now before court. In his detailed account **PW1** said he had known Mr. Gachanja from 1996 or 1997 because their sisters went to school together.

11. It was the testimony of **PW1** that the robbers also recognised him, and that one of them tried to plead his cause but only elicited a rebuke from the appellant who seemed to be in charge and to give orders to the other two. **PW1** testified that when one of the other two men commented that **PW1** was a resident of Kibera and should be allowed to go, the appellant retorted, **"Kwani hatutafanya kazi**?" (Are we therefore not going to work). The evidence is therefore that of recognition of the appellant by **PW1**. **PW2** did not know the appellant well before and the police did not arrange for any identification parade in her respect. Instead they showed the appellant to **PW2** at the police station.

12. The evidence showed that **PW1** knew the appellant well enough to be able to direct his friends to him for purposes of arrest. His friends arrested the appellant on 14th July 2006 in the absence of **PW1** who merely confirmed his identity to the police when he went to the police station on 17th July 2006.

13. There is no dispute that both **PW1** and **PW2** were robbed in circumstances which fall under **Section 296(2)** of the Penal code. Both witnesses were agreed in their evidence that they were attacked by three assailants who were armed with a machete (panga), and that it was the appellant who actually carried the said panga. **PW1** also saw one of the other two men wielding a club (rungu), but **PW2** did not seem to have noticed it, or if she did, she did not mention it. **Section 296(2)** of the **Penal Code** under which the appellant was charged and convicted will be satisfied in the following circumstances:

> **"If the offender is armed with any dangerous or offensive weapon or instrument,**
>
> **or is in company with one or more other person or persons,**
>
> **if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person ..."**

14. The three men did assault the two complainants wounding **PW1**, and inflicting superficial injuries on **PW2** in the cause of stealing from them. We are satisfied that the three ingredients of **Section 296 (2)** of the **Penal Code** have been proved even though proof of one ingredient alone, would have sufficed to enable us to reach a finding that an offence under **Section 296(2)** of the **Penal Code** had been committed.

15. This being a criminal trial, the appellant was under no burden to explain himself or to prove his innocence. We however examined the defence which he elected to give, in the context of the rest of the evidence and we were, of the same mind as the learned trial magistrate that his defence did not cast any doubt on the prosecution evidence. We are satisfied that the appellant was properly convicted.

16. On sentencing, the record reads as follows:

"Accused is sentenced to suffer death." without specifying whether the sentence was with regard to one count only or both counts.

We respectfully find that the learned trial magistrate was in error to sentence the appellant in such a manner. Where an accused person is convicted in two or more counts under **Section 296(2)** of the **Penal Code** in one file, the proper thing to do is for the trial court to sentence the accused person to suffer death in one count, and to order that the sentence on the rest of the counts remain in abeyance.

17. In **OSBON ONDITI OUKO AND ANOR. VS REPUBLIC CR. APPEAL NO. 173 OF 2006** (Unreported), two appellants were convicted on three counts and were sentenced to serve 5 years imprisonment for the charge of possession of firearm, and at the same time, to suffer death by hanging in respect of the two robbery charges. The honourable Judges of Appeal sitting at Kisumu had this to say:

> **"In passing, we must state that those sentences were improper as the appellants could not be hanged twice over and still serve a five year sentence. Only one sentence of death ought to have been imposed while the others would remain in abeyance."**

18. All in all we find that the appeals on conviction in respect of each of the two counts are wanting in merit. We dismiss the appeals and uphold the convictions in respect of each count.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **2nd day** of **July 2013**.

A. **MBOGHOLI MSAGHA** **L. A. ACHODE**

JUDGE **JUDGE**