



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 258, 259, 260, 261 & 262 of 1997**

**(From Original Conviction and Sentence in Criminal Case No. 1029 of 1997 of the  
Principal Magistrate's Court at Nairobi)**

**GILBERT NGANGA MBUGUA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From Original Conviction and Sentence in Criminal Case No. 1029 of 1997 of the Principal  
Magistrate's Court at Nairobi)**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 259 OF 1997**

**(From Original Conviction and Sentence in Criminal Case No. 1029 of 1996 of the Principal  
Magistrate's Court at Nairobi)**

**GEORGE KAMANO WARENGA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL CASE NO. 260 OF 1997**

**(From Original Conviction and Sentence in Criminal Case No. 1029 of 1996 of the  
Principal Magistrate's Court at Nairobi)**

**GEORGE WAGURA KARANJA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 261 OF 1997**

**(From Original Conviction and Sentence in Criminal Case No. 1029 of 1996 of the Principal Magistrate's Court at Nairobi)**

**NICHOLAS NJOROGE KIARIE..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 262 OF 1997**

**(From Original Conviction and Sentence in Criminal Case No. 1029 of 1996 of the Principal Magistrate's Court at Nairobi)**

**JOHN MURIITHI NJOROGE..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

Originally in the Lower court there were 6 accused persons, charged jointly with others not in court of Robbery with Violence, contrary to Section 296(2) of the Penal Code, in counts one and two.

In the first alternative count, George Wagura Karanja, the original 1st accused was charged of Handling Stolen property, contrary to Section 322 (2) of the Penal Code - The property in question was 36 table clothes, 2 bed covers and a long trouser.

In the second alternative count, Joseph Njoroge Mburu, the original 4th accused was charged of Handling Stolen Property, to wit, 2 long trousers, two bed sheets, one blanket and one bed cover.

In a further alternative count headed count 4, Gilbert Ng'ang'a Mbugua was charged of handling stolen property to wit eleven album records, and 91 records, one Phillips record player.

In count seven Joseph Njoroge Mburu was charged of Resisting arrest, contrary to Section 254 (b) of the Penal Code.

In count eight, all the 6 were charged of Burglary and stealing from a Dwelling House, contrary to Sections 304 (2) and 279 (b) of the Penal Code.

In yet a further alternative count, Joseph Njoroge Mburu was charged of handling stolen property, contrary to Section 322(2) of the Penal Code. The property in question was one gas cooker, and finally on count 9 George Kamau Waringa was charged of handling stolen property, contrary to Section 322(2) of the Penal Code. The property in question was on serving dish, on tray and 2 plates.

Accused persons pleaded Not Guilty to all the counts.

The Learned Trial Magistrate found at pg 5 of the Judgement that the prosecution had "discharged its onus in as far as counts 1,2, are concerned". He proceeded to find accused persons Nos. 1,2,3,5 and 6 guilty and convicted them as charged. Having convicted the 6 on the main counts, he made no finding on the alternative counts. He acquitted all the 6 on count 4 of Burglary and Theft from a Dwelling House.

The Magistrate also proceeded to acquit George Kamau Wariuga of the offence on the alternative to count 4. The Learned Magistrate sentenced all the 5 accused persons to death in respect of counts I and II of Capital Robbery.

The appellants were dissatisfied with their conviction and sentence, and filed separate appeals to this court. Their grounds of appeal are on record. Apart from those, they filed amended grounds of appeal and written submissions which they handed over to the State Counsel. We had not asked for written submissions. The appeals were filed by 5 appellants only.

The prosecution tendered evidence to the effect that PW1 a messenger with Njenga & Co. Advocates lives with her sister M in U. On the nights of 15th and 16th March, 1996 she was in the house at U

with a family friend, one Michael Kariuki PW3. Her sister M was away from the house at that time. Before retiring to bed PW1 saw some lights outside the house. She asked who it was but there was no answer. She then went to sleep, and suddenly the door was smashed open. She screamed for help. A voice told her to shut up PW1 jumped on to the bed in which her friend was sleeping. By this time there was a second bang and people entered the room. The lights were on. The people started ransacking the room and ordered PW1 and her friend out of the bed, as they demanded money which PW1 and her friend did not have, so they could not give them. One of the men hit her with a hammer as the others ordered her to remove her clothes. She refused, but she was overpowered and raped by the 5 men who were in the room in turns. The incident took about one hour. The men removed PW1 from the bed room to the visitors room. The men left and after sometime, PW1 opened the door, and found one still standing in the room, she went back inside quickly.

Thinking that her attackers had left, PW1 went to the room where her friend was but still one man came and warned them to keep quiet. After about 30 minutes of waiting, she heard her sister screaming from outside. The main door and gate were wide open. PW1 reported the incident to her and together they went to Kabete police station to report the incident. They returned to the house with police and now took stock of all the things that were stolen from the house. After about one day, certain things were recovered. PW1 was called and she identified 16 table clothes which her sister made, blankets from her sister's room 3 or 4 tapes bearing the signature of her brother in law, 2 bedcovers.

PW1 was later called at an identification parade at Parklands police station. She identified the 1st accused George Wagura Karanja (now appellant No.3). She identified him as the first person to rape her.

In the second parade she identified accused No.4 Joseph Njoroge Mburu now appellant No. 5. She identified him as the one who was "the guard", who was ordering them to keep quiet.

In the 3rd parade, PW1 identified accused No.2 Nicholas Njoroge Kiarie, now appellant No.4. In the 4th and 5th parade, PW1 was unable to identify anybody. PW1 was treated in a private clinic and issued with a card. Later she was given a P3 form.

PW2 is a sister to PW1. They live together but on the night in question, she remained behind at the shopping centre and did not go home until 1.00 a.m. PW1 went earlier. On arrival at home, she found the gate wide open. The main door to the house was also wide open. In the compound she saw table clothes scattered all over. She screamed and PW1 and Michael, the visitor warned her that the house had been ransacked by robbers who had just left. Using the vehicle she had come in, PW2 took PW1 and Michael PW3 and they rushed to Kabete police station to report the incident. Back at the house with the police, PW2 noticed that all electrical gadgets were stolen. PW2 made a list of what was missing from her house.

PW1 also reported that she had been raped. ON 21.3.96, PW2 was called at Parklands police station where she identified many of her stolen items. These were all produced in court as exhibits.

PW3, Michael Ndongu is a friend of PW1 who was in the house of PW2 with her on the night of the incident. He recalled that it was PW 1 who first saw lights outside and screamed, and eventually the people entered the house. PW3 saw 3 people next to him. They demanded money and took his jacket, watch and also pulled PW 1 to another room, and locked him in the room in which he had been with PW 1. He was helpless as he could only hear PW 1 crying. The men stayed with PW 1 for over 30 minutes and after a long time, PW 2 arrived in the compound but he went to alert her that they had been attacked. Later they went to Kabete police station to report the incident. PW3 said he could identify 2 of their attackers. He attended 4 identification parades and in the 1st parade, he identified accused 1 George Wagura Karanja now appellant 3. PW3 also identified accused 3 in another parade. Accused 3 was George Kamanu Waringa, the 2nd appellant.

On questioning by the 1st accused (George Wagura Karanja), PW3 answered that he saw his face during the attack, and also the weapon he was carrying. PW3 also answered "I saw your ears and a mark on your mouth". He also recalled that accused No.3 had come to the bedroom where he (PW3 and PW1) were.

PW4 John Muchene was another complainant whose house was broken into on the night of 1st and 2nd March, 1996. He had left the house locked with a padlock on 1.3.96 but returned at midnight only to find it broken into and many of his property stolen. These included cameras and beddings and many other things. Later on 22.3.96, his sister identified her things at Pangani police station - these were a set of serving dishes a tray and 2 plates.

Pw5 accompanied PW4 to Parklands police station and was present as PW4 identified a set of serving dishes which had been stolen from his house. The dishes had been bought by PW5.

PW6 Inspector Henry Muchoka conducted identification parade in respect of the original 3rd accused, George Kamanu Waringa, now appellant No.2. At that parade, the appellant was identified by PW1 and PW3 as one of those who attacked and robbed them.

PW8 and PW9 arrested Nicholas Njoroge, the original 2nd accused, now 4th appellant, on 17.3.96 on information received. The 2 officers searched his house, but made no recovery. The 4th appellant gave information which led the police officers to Waithaka, to a group of people who tried to escape. From that group the original accused 1 and 3 George Wagura Karanja (appellant No.3) and George Kamanu Waringa appellant 2 were arrested.

From the house of 1st accused George Wagura Karanja, appellant 3, 36 table clothes were recovered, produced as Ex.23 in court. Also recovered was a pair of jeans Exh .24, 2 bed covers, Ex.36. From the house of George Kamanu Waringa, the 2nd appellant, the police recovered 2 plates radio player Ex.15, a tray, 11 albums Ex. 13, the compact records Ex. 12.

The 2 witnesses PW8 and PW9 made further arrests, this was on 18.3.96 when they arrested the original accused persons No.5 and 6 - ie Gilbert Ng'ang'a Mbugua, appellant No. 1 and John Muriithi Njoroge, appellant No.5.

It was PW10 who conducted the identification parade at which PW 1 and PW 3 identified the 1st accused George Wagura Karanja. He is appellant No.3 and PW 11 conducted an identification parade in respect of Nicholas Njoroge Kiarie, the 2nd accused now appellant No.4. He was identified at the parade by PW 1. PW 8's evidence showed that when they arrested accused 5 and 6, they also arrested the accused 4 Joseph Njoroge Mburu whom then said is at large. He was not amongst the appellants who appeared before us.

All the 5 appellants who were accused persons in the Lower Court denied the offence. They gave their versions of how they were arrested. Most of them claimed the properties found in their houses, as their.

Arguing the appeal in court, the Learned Senior State Counsel Mrs. Oduor found that appellant No.2

George Kamau Waringa (Original accused 3) was identified by PW 1 and PW 2 at 2 identification parades which were properly conducted. That apart from that, recoveries of some properties were made in his house at the time of arrest - ie 2 plates, radio player compact records. These were identified by PW 1 and PW 2 some of them form part of the robbery charge in count I. Mrs. Oduor submitted further that appellant No.3 George Wagura Karanja, the original accused I, was also identified by PW1 and PW3 in 2 different identification parades. The evidence showed that he was satisfied with the parades and he signed the forms. That apart from this he was found to be in recent possession of goods.

For the original 2nd accused, Nicholas Njoroge Kiarie, the present 4th appellant. No recoveries were made at his house at the time of arrest, but he was identified at an identification parade by PW1, who saw his face well during the robbery and rape. There were lights in the house. Besides, he led the police to the hide out of the original accused 1 and 3. This showed that he was involved in the robbery.

The Magistrate accepted this evidence. We accept it too as evidence on record further that circumstances were conducive to positive identification of the appellant by PW1.

As for the 1st appellant Gilbert Ng'ang'a Mbugua, who was the 5th accused in the Lower Court, 6 table clothes were recovered from his house at the time of arrest. In defence in the Lower Court, he said nothing was recovered from him but the Magistrate rejected that defence, in light of the prosecution evidence to the effect that 6 table clothes were recovered from his house. These were identified by PW1 and PW2. In fact, in total they lost 136 table clothes.

And finally was John Muriithi Njoroge, appellant No.5, but original accused No.6. He was arrested on information received. His house was searched and aloud speaker, Ex.14 was recovered and four compacts Ex.13. These properties were identified as evidence shows, and again, they formed part of the 1st count of Robbery with Violence.

In court during the hearing, George Kamau Waruga challenged the evidence of PW3 who identified at an identification parade. He said PW3 saw him for only one minute. Nevertheless, evidence showed that both PW 1 and PW 3 identified him at the parade, because they marked his face during the robbery. The Magistrate accepted the evidence, and proceeded to convict him. We endorse the finding of the Learned Magistrate.

George Wagura Karanja appellant No.3 submitted in reply to the State Counsel's submissions that the 36 table clothes and 2 bed covers were identified by PW1. He also challenged his identification saying there was no light during the robbery.

However, reading the evidence of PW1, one will see quite clearly at what stage the lights were on in the room *or rooms*. That submission by the appellant has no basis, in our view. Further reading of evidence of PW1 shows that she reported that table-clothes were stolen and when she was shown some items which had been recovered, she identified them. These included table clothes which her sister PW2 made. At the request of the appellants, the O.B from Parklands police station was brought up on appeal. The appellants, especially John Muriithi Njoroge complained that details on the O.B were not read out in the Lower Court though O.B was produced. Reading the O.B the appellant submitted that according to O.B dated 19.3.96, the items recorded differ with the items in count 6 the alternative count of Handling Stolen Property. The appellant also complained that according the O.B, he was arrested in connection with a Robbery which was committed in the house of one J. Karanja in Kinoo. This submission was also made by appellant's Gilbert Ng'ang'a Mbugua, Nicholas Njoroge Kiarie, and indeed all of them that they were arrested in connection with a different robbery from this one. That it is that other robbery which was reflected in the O.B and not this one, where PW1 and PW3 are complainants. They challenged the failure by the Investigating Officer in this case to come to court and clarify the issue as to why they were brought to court and charged with an offence not booked in the O.B.

Mrs. Oduor, Senior State Counsel submitted in reply that is true the appellants were arrested with Robbery at Karanja's house, however, it is in the course of investigations they were found to have committed the Robbery, the subject of this case, and properties stolen from Grace's house was found with

some of them. Mrs. Oduor submitted further that the failure by the investigating officer to give evidence in court did not prejudice the appellants because the police officers who arrested them and made recoveries of stolen properties from their houses were witnesses and appellants had a chance to cross examine them. Also the police officers who conducted identification parades at which some of them (appellants) were identified by PW1 and PW3, gave evidence in court and confirmed that the appellants who were identified at the various identification parades were satisfied with the manner the parades were conducted. We accept the submissions by the Learned State Counsel.

As the Learned Magistrate made no finding in all the alternative counts of handling stolen property, in respect of all the appellants we did not find it necessary to consider the properties each appellant was said to have handled. It was enough for the counts of Robbery to show that the complainants were robbed of the properties or some of the properties listed therein.

We have considered the evidence on record both from the prosecution and the appellants, and have come to the conclusion that the Learned Magistrate arrived at the correct verdict in this case. We find no merit in the appeals lodged by the 5 appellants.

We therefore proceed to dismiss all the appeals.

Dated at NAIROBI this 29th day of October, 1998.

***JOYCE ALUOCH***

***PUISNE JUDGE***

***ERASTUS GITHINJI***

***PUISNE JUDGE***