

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL 44 OF 1986

JOHN KARANJA GITONGI.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

On June 4, 1984, at the senior resident magistrate's court Kisumu, a trial before the senior resident magistrate this appellant and four others were jointly convicted of robbery contrary to section 296(1) of the Penal Code and each sentenced to 9 years' imprisonment with 9 strokes corporal punishment on each count, the sentence of imprisonment to run concurrently. Their appeals to the High Court (Aluoch) were dismissed.

John Karanja Gitongi who was the third accused and also the third appellant in the High Court now appeals against his conviction on the following point of law: the judge erred in holding that his statement to the police under charge and caution which was retracted and repudiated was corroborated by the evidence of PW1 and PW2.

learned state counsel Mrs Mule, supported the conviction and argued that the judge correctly held that the cautionary statement of the appellant, which was retracted and repudiated was corroborated by PW1 and PW2.

A short recital of the facts will assist us. On the evening of January 16, 1984 Mwega Gachungi PW1, the complainant in count one, was driving from Thika towards Nairobi. At Ruiru township PW1 lost his way and as he reversed his car to trace the correct road six young men, armed with simis and iron bars approached him, pulled him from inside his vehicle registration mark KML 821, caused him to lie on his stomach, then searched him and removed Kshs 91.70 from his pocket and then put him in his car's boot and locked the car boot. PW1 heard some shouting to the effect that some person should be killed. At that stage, some clothing was put inside the car boot and then the car was driven away but overturned after a short distance. The clothing was taken out of the boot and the men left. PW1 remained at the spot out of the boot until the next morning, when he reported to the police. Joseph Michuki PW2 who was the complainant in the second count was in his shop during the night of January 16 and 17 1984 when at 2.00 am he heard a vehicle stop outside his shop, followed by noises of people who went round the shop, cut the padlock, entered the shop, threatened PW 2 using simis, removed clothing and blankets from the shop, were given Kshs 5,000 by PW2 and also took stock worth Kshs 26,000 from the shop. When PW 2's neighbours approached, the robbers fled in a vehicle. PW 2 did not identify any of them. PW2 later reported to the chief of the area and to the police.

On January 17, 1984, at 8.00 pm Herman Njenga PW 5 the Assistant Manager Oakland Estates, was travelling towards his estate when some three people attempted to stop him. PW5 slowed down but the three gave way. PW 5 became suspicious as there had been a robbery at his estate. So PW 5 accompanied by a watchman returned to where he had seen three people. They found two. One ran away. PW 5 and the watchman held the two who had injuries and handed them to an inspector of police PW 3. The next day one of the two (the 5th accused) led PW 3 to the bush where they were hiding and where two dresses were found blood stained. He also led PW 3 to the shop which was robbed. The appellant was arrested at Ruiru on February 7, 1984. According to PW 4, the appellant was implicated by the first accused, and

again according to PW4, the appellant implicated by the first accused, and again according to PW 4, the appellant was implicated the 2nd and 4th accused. The appellant objected to the cautionary statement, saying he was beaten, but not by PW 8 who recorded the statement, and forced to sign the statement.

It is against that background of fact that we come to consider the legal position. Neither PW 1 nor PW 2 identified the appellant. Nothing was found in the possession of the appellant which belonged to PW 1 or to PW 2 or to PW 2's shop. However, PW 1's complaint that he was robbed of Kshs 90 and dumped in the boot of his car into which clothing etc were loaded finds support in the appellant's statement. The appellant and PW 1 both mentioned that the car overturned. The appellant said that three of them including the first accused and fifth accused, received injuries. That agrees with PW 5's testimony that the first accused had a broken thigh and the fifth a broken collar when PW 5 and his watchman arrested them on January 17, 1984. PW 2 who was a retail trader at Gatiiguru, Kibicho was robbed of clothes and blankets. The appellant's statement informs us that he and the co-accused drove to Gatiiguru trading center where the others entered a shop and got out carrying clothes etc and loaded them into the boot of the car. So this part of the statement tallies with a crucial part of PW 2's evidence. We take the view that the conviction is correct.

In the result, therefore, none of the original grounds of appeal and none of the further points avails the appellant and since the argument on the main issue has failed, it follows that the appeal against conviction must be dismissed and is dismissed.

That is the order of the court.

February 5 1987

NYARANGI, PLATT & GACHUHI JJA