

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

CRIMINAL APPEAL NO 168 OF 1985

NGUMI.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from the High Court at Nakuru, Bennet J)

February 20, 1987, Kneller JA, Platt & Gachuhi Ag JJA delivered the following Reasons for the Judgment of the Court.

The High Court confirmed the conviction of this appellant (who was the fourth accused at the trial), on the first account of robbery with violence contrary to section 296(2) of the Penal Code.

The learned judge in very economical terms set out the case against the appellant. It was that the complainant Wanjiku PW 1 knew the appellant as a barber in that area, and recognized him that night, when he entered Wanjiku's house, assaulted and robbed her. She described him to the police. Unfortunately, although the complainant recognized the appellant at the police station, in what seems to have been an unofficial identification parade, she did not tell her neighbour that she had recognized the appellant when she reported the incident to him on the night of the robbery. Neither the trial court nor the High Court considered this aspect of the appellant's identification. The trial court ought to have had Wanjiku recalled to explain why she did not complain to her neighbor, Kiunju Gachoka, who gave her shelter that night. It is noticeable that the Inspector Fredrick Mwaura PW6 did not give the details of the alleged description of the appellant to him. This is important evidence of consistency in the witness' identification or recognition of an accused. Indeed the learned judge stressed that Wanjiku had described the appellant to the police. Where is the record of that description and did it describe the appellant?

What one could have expected was that Wanjiku said that she had been robbed by the barber in Maringo Settlement Scheme. But the police officer did not say so. We agree with the appellant that his complicity was not satisfactorily proved.

The Principal State Counsel did not support the appellant's conviction. His conviction was therefore quashed, sentence set aside and the appellant was set at liberty unless held for any other lawful cause.

February 20, 1987

KNELLER JA, PLATT & GACHUHI AG JJA