



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU**

Criminal Appeal 202 of 2006

GEOFFREY LEMANGARA

JOSEPHAT NJOROGE GACHAU.....APPELLANTS

AND

REPUBLICRESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Nakuru (Apondi & Kimani, JJ.) dated 22nd May, 2006 in H.C.CR.A. NOs. 181 & 225 OF 2002)

JUDGMENT OF THE COURT

The two appellants, **Geoffrey Lemangara** (1st appellant) and **Josephat Njoroge Gachau** (2nd appellant) together with another man called **Francis Njuguna Kimani**, were tried before a Senior Resident Magistrate at Nyahururu on two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. There was also an alternative charge of handling stolen property contrary to **section 322 (2)** of the Penal Code but at the end of the trial, the magistrate found the 1st and 2nd appellants guilty on the two counts of robbery with violence while **Francis Njuguna Kimani** was acquitted on all the charges. The 1st and 2nd appellants were sentenced to death but the magistrate did not specify whether the two were so sentenced on one count or on both counts. On their first appeal to the High Court, the two learned Judges of that court (Muga Apondi and Kimaru, JJ.) simply stated: -

“..... We dismiss the said appeals. Their conviction and sentence is hereby confirmed. It is so ordered.”

In other words, the learned Judges saw nothing wrong with the manner of sentencing adopted by the trial magistrate. This Court will have to deal with that issue.

The two robberies, the subject of the convictions, occurred on the night of 19th November, 1999 at a shop called Corner Shop at Ol-kalou Township in Nyandarua District. The shop belonged to **Beth Nyatoro** (P.W.1) and Beth had employed a watchman called **Philip Mutua Musyimi** (P.W.2) to guard the shop. Another watchman **Kezia Mutua** (P.W.4) was employed to guard the next shop belonging to one **Wangombe**. At about 3 a.m. on 19th November, 1999, Philip and Kezia were on duty. They were each armed with bows and arrows. They were attacked by a group of four men who tied them up and took them about half a kilometre away from the shops. One of the four men was left to guard the two watchmen while three went to the shop of Beth, cut the padlock on the door with a pair of calipers, entered the shop and stole numerous shop-goods like school uniforms, towels, shoes and so on. The first

count related to the robbery in the shop and as Beth was not present in the shop, the goods therein were in the constructive custody of Philip and the prosecution rightly charged the two appellants with having robbed Philip of the shop-goods. Philip was, in the circumstances, the special owner of the goods. We have said that Philip and Kezia were each armed with bows and arrows; in addition each of them also had a torch to help them in their guard duties. The robbers took away these items and the second count of robbery related to the taking away of those items from Kezia Mutua. Having completed their mission, the robbers passed by the two watchmen and Philip and Kezia saw them carrying various bags among them a white sack. Kezia managed to untie himself; he then untied Philip and the two of them ran to Ol-Kalou Police Station and reported the robbery there. Police Constable **Francis Kimathi** (P.W.5) was among the officers who accompanied the two watchmen back to Beth's shop and having seen what had happened there, Pc. Francis and his team decided to put up a road block on the nearby road. The time was then around 5.30 a.m. A "matatu" came by and its driver reported to the police officers that two men had been seen by the road side but he had refused to stop fearing that the two men were up to no good. Then the "matatu" in which **James Mureithi** (P.W.3) was the driver and who appears to have been acting as a conductor came upon two men near some bridge. The two men waved down James and he stopped. He helped the two men with their luggage, a white sack and two other bags, into the vehicle. About a half a kilometre away, Pc. Francis flagged down the vehicle and asked James if he had carried some two men from the bridge. James pointed out the two appellants and their luggage. Pc. Francis arrested the two appellants and took them together with their luggage to the police station. Beth subsequently identified all the items carried in the sack as having come from her shop. Philip and Kezia also identified their weapons and torches from another bag. The appellants were then charged.

Put on their defence the 1st and 2nd appellants while admitting that they were arrested in the circumstances stated by James and Pc. Francis, each denied that they had anything to do with any of the items found inside the bags which were in the vehicle. Each explained to the magistrate how they had boarded the vehicle, where each of them was going to and each denied possession of the three bags found in the vehicle. The learned trial magistrate believed the evidence of the two watchmen that each of them had identified each appellant during the robbery. The magistrate also believed the evidence of James and Pc. Francis that the appellants were found in possession of the items stolen from the shop of Beth and the weapons and torches stolen from the two watchmen.

On first appeal the High Court rejected the evidence of the purported identification of the two appellants by the two watchmen. We think the two learned Judges were right in doing so. The two watchmen did not know the appellants before and for some unexplained reason the police chose not to put the appellants on identification parades to see if both or any of the watchmen would be able to identify both or any of the appellants on the parade. The evidence of the two watchmen with regard to the identification of the appellants remained merely that of dock identification and while this Court now takes the position that such evidence is not wholly worthless, the High Court rejected that evidence and there is not much the Court can say on the rejection. But as we have seen, the High Court, like the trial magistrate, accepted the evidence of James and Pc. Francis that the appellants were arrested in possession of the stolen items barely two or so hours after the robbery and that each appellant offered no explanation as to how they had come by the items. Mr. Kisilah, learned counsel for the two appellants, while recognizing that there were two concurrent findings of fact that the appellants were arrested in possession of the stolen items, nevertheless submitted before us that there was no evidence upon which the two courts could so find. Mr. Kisilah submitted that James, the driver of the matatu, agreed that it was dark when the two men boarded the vehicle and it is correct that James specifically agreed he was not able to recognize the faces of the two men who boarded his vehicle. Mr. Kisilah also submitted that the High Court and the trial magistrate misunderstood the evidence with regard to the allegation that the 1st appellant was found wearing a pair of new shoes which Beth identified as having been stolen from her shop. No such pair of shoes is listed among the items which were produced as exhibits which ranged from Exhibit 1 to Exhibit 43. No new pair of shoes was shown to be among those exhibits and Beth herself did not specifically talk about a new pair of shoes being worn by the 1st appellant. She did, however, say that old shoes and clothes had been discarded in her shop by the robbers.

While we agree with Mr. Kisilah that the High Court and the trial court must have misunderstood part of the evidence on record, we do not agree that there was no evidence from which the two courts could

have come to the conclusion that the two appellants were arrested in possession of the stolen items. There was in fact the evidence of James the driver who opened the door for the two men and helped them with their luggage into the vehicle. James was clearly an honest witness; he agreed that because it was still dark, he was not able to see the faces of those whom he helped into the vehicle. But he saw where they sat and the luggage they came in with. He saw a white sack and two hand-bags. After five minutes from the spot where the two men boarded the vehicle, i.e at Hill Side School, Pc. Francis stopped the vehicle. There was no evidence that any other person came into the vehicle after the two men had boarded the vehicle. In other words, the two men were the last to board the vehicle and when they did so, they were carrying the white sack and the two hand-bags. The vehicle was stopped after five minutes and James immediately pointed out the two men to Pc. Francis. Pc. Francis had himself received information that two men had attempted to stop another vehicle which had failed to stop and James' evidence was that the two men boarded his vehicle at the bridge.

James stated as follows in his evidence: -

“Reaching Hill Side School after five minutes drive, a vehicle ahead flashed lights to stop us. The police came out of the other vehicle and asked if we had carried any people between Ol-Kalou and Kwa Council. I then told the police that there were two. I pointed out the two people and their luggage. The police then arrested them.”

For his part, Pc. Francis stated: -

“We went to the matatu bus park and were given a Nissan matatu to use. We suspected that the robbers were bound to use the first vehicle. We alighted at Kaptan and set up a trap at the barrier. We started stopping vehicles. A Nissan matatu came and the driver told us that two people with a sack had stopped them but they did not stop as they suspected those people could be robbers. A lorry came carrying goats and two of my colleagues boarded it to go back to the scene but they did not see the robbers. A Nissan matatu then came and I stopped it. It was KAR 921 K registration. I asked the turn-boy if he has carried two people at the bridge and he said he had them. It was P.W.3. The people are accused 1 and accused 2. I arrested them then searched the vehicle. The luggage was pointed out to me. They were a sack and two hand-bags.....”

That evidence could not have been contrived between James and Pc. Francis. None of the appellants told James that after picking them at the bridge some two other passengers entered the vehicle. In the face of this evidence, we cannot appreciate how it can be said, as Mr. Kisilah did say, that there was no evidence upon which the two courts below could find as they did that the appellants were in fact arrested in possession of the stolen items. There was clearly evidence which a reasonable tribunal, properly directing itself, could come to that conclusion. In our view, not only was there evidence, but in fact there was overwhelming evidence that the two appellants boarded the vehicle of James at the bridge and that at the time they so boarded the vehicle, they had with them the white sack and the two hand-bags. Their denial to the effect that they were not found in possession of the sack and the other two bags having been rejected, and, in our view rightly rejected, the position remained that they were found in possession of the items stolen from the shop of Beth and from the two watchmen and they offered no explanation for that possession. They were in possession of the goods barely two hours after the robbery. It is true, as we have pointed, that the two courts below misdirected themselves on certain aspects of the evidence, but despite such misdirection the two courts came to the right conclusion with regard to the possession of the stolen items by the two appellants. Their appeals against their conviction on each of the two counts accordingly fail and we order them dismissed. On sentence, we set aside the sentence of death imposed on count two leaving only the sentence of death imposed on count one. Those shall be our orders in the appeals.

Dated and delivered at Nakuru this 2nd day of October, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.