



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**CRIMINAL APPEAL 38 OF 2004**

**JAMES MAINA NJOGU .....**  
**APPELLANT**

**AND**

**REPUBLIC .....**  
**.....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nyeri*

*(Juma & Ombija, JJ) dated 13<sup>th</sup> August, 2003*

**in**

**H.C.CR. APPEAL NO. 250 OF 2001)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is a second appeal from the judgment of Juma and Ombija JJ. in High Court Criminal Appeal No. 250 of 2001. The appellant is James Maina Njogu who was the second accused and who was charged together with Nicholas Muriithi (the 1<sup>st</sup> Accused) and Henderson Murimi (the 3<sup>rd</sup> Accused) with robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence were:-

***“On the 10<sup>th</sup> day of November, 2000 at Mutuma village, in Kirinyaga District, within Central Province, jointly with others not before court while armed with dangerous we open (sic) namely knives and similes (sic) robbed Mark Wachira Kangangi he (sic) pair of shoes valued (sic) to Kshs.500 and cash 250 Kshs and at or immediately before or immediately after the time of such robbery wounded the said Mark Wachira Kangangi.”***

The Principal Magistrate who tried the appellant at Kerugoya came to the conclusion in his judgment with regard to the appellant that:-

***“I found overwhelming evidence that accused 1 and 2 were involved in the robbery.”***

The Principal Magistrate came to this conclusion on the basis of the evidence of PW1 Mark Wachira Kangangi who testified that he saw these two accused persons amongst the four men who robbed him. PW1 testified that there was bright moonlight enabling him to see the appellant clearly.

The superior court in its judgment arrived at the same conclusion as to the involvement of the appellant in the robbery as one of the gang of four robbers. The basis for this conclusion was a careful analysis of the evidence resulting in the finding that the appellant was arrested in a nearby tea plantation very soon after the robbery and was found to be in possession of two biro pens which had been stolen, in the course of the robbery, from Mr. Julius Munene Miano the complainant and had his initials on them.

The superior court then dealt with the correctness or otherwise of the learned trial magistrate having convicted the appellant on the lesser offence of robbery under **section 296(1)** of the Penal Code and not under **section 296(2)** as was the charge against them.

In coming to that conclusion, the learned magistrate had said in his judgment:-

***“I invoke section 179(2) of the Criminal Procedure Code. I convict the first accused and second accused of the lesser charge of robbery contrary to section 296(1) of the Penal Code in count 1 and 2 ..... The first and the second accused are sentenced to serve five (5) years imprisonment, plus five strokes of the cane on each count. On completion of sentence accused 1 and 2 be placed on police supervision for five years. Sentence to run concurrently.”***

The superior court after analysing the evidence found that:-

***“The evidence against the appellant was overwhelming in the circumstance. He was properly convicted. As regards the sentence the learned magistrate had no jurisdiction to reduce the mandatory death sentence to imprisonment of five years and five strokes.”***

It is not clear whether the superior court realised that the conviction by the Principal Magistrate was of the lesser offence under **section 296(1)**. This is, however, immaterial as the trial court had no jurisdiction either to convict of the lesser or to sentence the appellant to anything other than death. **Section 179** of the Criminal Procedure Code Cap 76 provides as follows:-

***“179(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitute a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence.***

***(2) When a person is charged of an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”***

It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the “*remaining particulars are not proved*”, the “*remaining particulars*” being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence.

Where, as here, the court finds that all the particulars necessary for conviction of the major offence have been proved, **section 179** does not permit the substitution of a conviction of the minor offence in place of the major offence.

Having found, as he did, that the appellant was involved in the robbery while armed with dangerous weapons the learned magistrate had no option but to convict the appellant of the major offence of robbery with violence contrary to **section 296(2)**. The magistrate’s invocation of **section 179(2)** of the Civil Procedure Code to reduce the conviction to an offence under **section 296(1)** was erroneous. We note that before embarking on the hearing of the appeal, the judges of the superior court repeatedly warned the appellant of the position that if his appeal against the conviction failed, he risked being sentenced to death.

In the circumstances, the order made by the superior court dismissing the appeal from the trial court and setting aside the sentence of 5 years imprisonment plus 5 strokes of the cane and substituting the same with the sentence of death was correct. We uphold the conviction as entered by the superior court and

hereby dismiss the appeal.

*Dated and delivered at Nyeri this 27<sup>th</sup> day of October, 2006.*

**R. S. C. OMOLO**

.....

**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**W. S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**