



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

CORAM: OMOLO, GITHINJI, JJ.A & DEVERELL, AG.J.A.

CRIMINAL APPEAL NO. 245 OF 2002

PETER NJOROGI MWANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a conviction and judgment of the High Court of Kenya at
Nyeri (Juma & Mitey, JJ) dated 31.7.2002**

in

H.C.C.R.A. NO. 171 OF 2000)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (*J.V.O. Juma and J. K. Mitey JJ*) as first appellate court in High Court Criminal Appeal No 171 of 2000.

The appellant **PETER NJOROGI MWANGI** was convicted of attempted robbery with violence contrary to *Section 297 (2)* of the Penal Code.

This was case in which there were concurrent findings of fact by the trial magistrate and the superior court that the appellant together with another man (hereinafter the deceased) entered Ngurunga Bar at Karugia Market in Kangema Division one morning for a drink. **PW 1 Esther Njoki Githuku** was in charge of the bar along with a man **Wallace Chege PW2**. While **PW2** was outside the bar attending to a lorry delivering sodas the appellant suddenly rose to his feet and tried to get behind the bar. **PW1** asked him what he was doing whereupon he pointed home made gun which was inside a black polythene bag at **PW1** saying that they wanted the money from the bar.

PW1 fell down and screamed. The appellant and the deceased ran out of the bar and the deceased threatened **PW2** with a knife so that he stepped aside and let them run in different directions.

The screaming of **PW1** was heard outside the bar and members of the public formed a mob which caught the deceased and killed him. The appellant escaped in a different direction by climbing over a wall from which he fell after which he was severely beaten by the mob but not killed. The Police were alerted and eventually the appellant was taken into custody from the mob.

The appellant's defence was that he was asked by a friend to have a drink early in the morning and got drunk so did not go to work. (It was not suggested that this was at the Ngurunga Bar) On his way home he saw a crowd of people running towards him screaming. He tried to run away but fell because he was drunk. He was beaten by the crowd and fell unconscious. After two days he came to and found himself in hospital. He was then taken to the Police station.

Mr. Kihagi, the learned advocate for the appellant stressed that there was no evidence whatsoever that the homemade gun was capable of firing anything and therefore could not be a dangerous offensive weapon. He also commented on the total lack of evidence as to how the appellant was arrested and who was involved in the murder of the deceased. He suggested that the prosecution were not candid with the court. He claimed that it appeared that the two witnesses had something to hide in respect to the killing of the deceased by the mob. Not a single witness from the mob came forward.

The homemade gun was found not at the bar but at the scene of the beating up of the appellant and deceased. There was no evidence as to how it got there. There was no evidence that the appellant was carrying it when the mob caught him – he of course made no mention of it in his unsworn statement.

In all these circumstances we are prepared to give the appellant the benefit of doubt that does exist as to what really happened that day.

The appeal is allowed and the conviction of the appellant is hereby quashed and his sentence set aside. The appellant is ordered to be released forthwith unless he is otherwise lawfully held.

DATED and DELIVERED at NYERI this 13th day of May, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR