



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

**(CORAM: TUNOI, O’KUBASU & GITHINJI, JJ.A)**

**CRIMINAL APPEAL 261 OF 2002**

**BETWEEN**

**JOHN MUGO KIMEMIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**( An Appeal from a judgment of the High Court of Kenya at  
Nyeri ( Juma, Mitey, JJ) dated 31st  
July, 2002**

**in**

**H.C. Cr. Appeal no. 34 of 2000**  
**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant **John Mugo Kimemia** was jointly charged with two other people **Stephen Kamau Gachihi** and **Elius Irungu Maina** with one count of “robbery with violence contrary to **section 296(1)**” of the Penal Code and on the second count of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. Each of the three people was separately charged with handling stolen goods contrary to section 322 (2) of the Penal Code.

The particulars of the offence in respect of the first count were that on the night of 13th and 14th day of May, 1999 at Njaini village in Murang'a District of the Central Province the three accused persons (John Mugo Kimemia, Stephen Kamau Gachihi and Elius Irungu Maina) jointly with another not before the court robbed Elizabeth Kimemia Gachui of two radio cassettes, 21 compacts, one wall clock, 17 jeans trousers, one Tagoro trouser, 12 lesos, 12 shirts, 3 dozens women underpants, 2 knives, 1 panga, 15 T-shirts, 1 vehicle battery and cash Kshs.100/- all valued at Kshs.48,000/- and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Elizabeth Kimemia Gachui.

The second count related to the offence of attempted robbery with violence contrary to **section 297 (2)** of the Penal Code and the particulars of the offence were that on the night of the 17th and 18th May, 1999 at Gichu village in Murang'a District of the Central Province the three accused persons (John Mugo Kimemia, Stephen Kamau Gachihi and Elius Irungu Maina) jointly with another not before court attempted to rob Lawrence Wachira Mwangi of cash money and house holds and at or immediately

before or immediately after the time of such attempted robbery wounded the said Lawrence Wachira Mwangi.

On the alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code it was alleged that on 21st day of May, 1999 at Gichu village Muran'ga District of the Central Province, otherwise than in the course of stealing dishonestly handled two jeans trousers, one Tagora long trouser, thirteen compacts, four women underpants, one shirt, two T-shirts and a nylon sack knowing or having reasons to believe them to be stolen goods. The evidence adduced before the trial court was that on the night of 13th and 14th May, 1999 at about 2.00 a.m. Elizabeth Kimemia (PW1) was attacked by a gang of robbers who broke into her house and carried away her clothes, two radios, a wall clock and a vehicle battery. She (PW1) was not able to identify any of the robbers. She reported the matter to the police and also to the Assistant Chief. On 22nd May, 1999 she was called to the police station where she identified her clothes which had been stolen during the robbery incident. These clothes were recovered in a sack hidden in the appellant's house. It was the police officers who dug up the floor of the appellant's house and recovered the stolen goods.

The foregoing facts constitute the prosecution's case against the appellant in respect of the first count of robbery with violence contrary to section 296(2) of the Penal Code, but in the charge sheet the charge was expressed as contrary to section 296(1) of the Penal Code.

As regards the second count, there was the evidence of Lawrence Wachira Mwangi (PW2) who testified that on the night of 17th and 18th May, 1999 at about 2.00 a.m. a group of robbers broke his door and entered the house. Mwangi (PW2) was cut on the head as he struggled with the attackers. His wife went out and managed to escape.

The attackers ran into the nearby banana plantation. Mwangi (PW2) recognized the appellant when a torch was flashed on him. Mwangi ran after the appellant but the appellant managed to escape into the tea bushes. A report was made to the police who went to the appellant's house and recovered a sack of clothes hidden in the ground in the appellant's house. When put to his defence the appellant, in his unsworn statement, told the trial court that on the 20th May, 1999 he was at home at 6.00 a.m. and that he spent the night at a place where there were burial arrangements. He denied having been involved in any of the offences with which he was charged.

The learned trial Magistrate (Senior Principal Magistrate, F.F. Wanjiku) considered the evidence before her and convicted the appellant on the alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code in respect of the first count.

As regards the second count (attempted robbery with violence contrary to section 297(2) of the Penal Code) the learned trial Magistrate convicted the appellant on a lesser offence of attempted robbery contrary to section 297(1) of the Penal Code.

In her judgment the learned trial magistrate observed as follows in respect of the first count.

***“There is no evidence however that, the accused were among those that robbed PW1 as she did not identify any of them during the robbery but there is no doubt they all handled her clothes knowing them to be stolen and that is why first accused had buried some of the clothes in a hole under his bed. The first accused led to the arrest of the other accused persons and from them a trouser was recovered from each of them and PW1 identified all he recovered as hers.”***

As regards the second count (attempted robbery with violence contrary to section 297(2) of the Penal Code, the learned trial Magistrate expressed herself thus:-

***“The court dismisses their defence as untrue, finds first accused guilty as charged in count II but under section 297(1) of the Penal Code as it is not clear how he was armed and***

**convicts him accordingly. The court acquits 2nd and 3rd accused of count II for lack of evidence.”**

When it came to sentencing the record of the trial court reads as follows:- “

**SENTENCE**

***The court has considered the facts and circumstances of this offence and first accused is to serve 8 years for attempted robbery. 2nd and 3rd accused fined 3,000/- in default 1 year for handling stolen goods but first accused 8 years for handling as he was found with the bulk of those clothes . Jail term to run concurrently.”***

The upshot of the foregoing is that the appellant was sentenced to 8 years imprisonment on the alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code and 8 years imprisonment on the second count (attempted robbery with violence contrary to section 297(2) of the Penal Code) which was reduced to attempted robbery contrary to section 297(1) of the Penal Code. The sentences were ordered to run concurrently so that in total the appellant was to serve a term of eight years imprisonment.

Being dissatisfied with the convictions and sentences ordered by the trial Magistrate the appellant filed an appeal to the High Court.

The appellant’s appeal to the High Court was considered and in its judgment the High Court (Juma & Mitey, JJ) stated inter alia:- “

***We have evaluated the evidence adduced in the lower court and we are satisfied that the Appellant was properly identified by PW2 Lawrence Wachira Mwangi, a person whom he had known for a long time. It was as a result of the information given by this witness to the police that the Appellant’s house was searched and the stolen goods recovered. The recovered goods had been stolen a few days from PW1 who is an aunt of the appellant.***

***The Appellant was lucky to have been charged with simple robbery though he was acquitted and he was also lucky to have been sentenced under section 297(1) of the Penal Code on the other count. His luck ran out when he decided to proceed with this appeal. The evidence on record is such that the Appellant ought to have been charged under section 296(2) of the Penal Code. He was however, charged on attempted robbery under section 297(2) which also carries mandatory death sentence.***

***The evidence shows that the Appellant was in company of other people. He was armed with an offensive weapon i.e. pangas and axes and PW2 was cut on the head during the robbery. All the ingredients of section 297(2) of the Penal Code were met. We therefore dismiss the appeal on conviction and set aside the sentence of eight (8) years imprisonment and substitute the same with a sentence of death.***

***The Appellant shall suffer death as prescribed by the law. The Appellant was charged with an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code . This alternative charge was in respect of count one where he had been charged with simple robbery contrary to section 296(1) of the Penal Code . This was a different transaction committed on a different date and involving different complainants. He was sentenced to a term of eight (8) years imprisonment and we shall not interfere with the said sentence.***

***The appeal on this alternative charge is also dismissed.***

It is from the foregoing that the appellant, through his lawyer, Mr. Ndirangu filed this appeal citing the following seven grounds of appeal in his Supplementary Grounds of Appeal:-

***“1. The Learned Judges of the superior court erred in law in not failing (sic) to come to the inevitable conclusion that the evidence of PW2 did not support the charge of attempted robbery.***

***2. The Learned Judge of superior court erred in failing to evaluate the evidence on record in relation to the charge sheet, failed to quit (sic) the appellant on the offence of attempted robbery.***

***3. The Learned Judges of superior court erred in failing to take into account, the position of learned State Counsel that no offence in count 1 was disclosed, but rather in (sic) offence of assault.***

***4. The first appellate court erred in law in finding that the presence of the appellant at the scene of necessity was connected with attempted robbery.***

***5. The Learned trial Judge failed to come to the inevitable conclusion that the circumstances of identification/recognition of the appellant were so difficult as to be positive and the 1st appellate court should have so found.***

***6. The first appellate court erred in law in not finding that there was no proper identification of the goods stolen as those belonging to Plot (sic) to warrant conviction on the alternate count of handling the stolen goods.***

***7. The appellate court failed to take into account the state’s stand in challenging legality of the findings of the trial Magistrate, on the charge of attempted robbery section 297 (2) and therefore came to the wrong conclusion.”***

When the appeal came up for hearing before us on 24th October, 2005, Mr. Ndirangu , the learned counsel for the appellant submitted that the trial court had made a finding that there was no evidence of attempted robbery and hence appellant was convicted of handling stolen goods. In Mr. Ndirangu’s view the appellant must have been acquitted on the main count. It was Mr. Ndirangu’s further submission that the superior court failed in its duty as it did not re-evaluate the evidence. He concluded by submitting that the identification of the appellant by PW2 was unreliable as the circumstances were not conducive to a positive identification.

Mr. Orinda, the learned Principal State Counsel, on his part stated that he conceded the appeal on technicality as the superior court failed to evaluate the evidence before coming to its conclusion. Mr. Orinda also pointed out that there was misjoinder of the charges which may have led to embarrassment and injustice to the appellant.

We must state on the outset that this appeal has caused us considerable anxiety. The charge sheet in the trial court showed that the appellant and two others were charged on the first count of “robbery with violence contrary to section 296(1) of the Penal Code. In that first count the particulars of the offence were then stated. From the particulars of the offence it would appear that the appellant and his co-accused were facing a charge of robbery with violence contrary to section 296(2) of the Penal Code as opposed to **section 296(1)** of the Penal Code as stated in the charge. That anomaly was never detected by either the trial court or the first appellate court. The trial court however, found the appellant guilty on the alternative charge of handling stolen goods contrary to section **322 (2)** of the Penal Code and sentenced him to eight (8) years imprisonment. The trial court convicted the appellant on the second count of attempted robbery with violence contrary to section **297(2)** of the Penal Code which was however reduced to attempted robbery contrary to section **297(1)** and sentenced the appellant to eight (8) years imprisonment. That sentence of 8 years imprisonment was illegal since section 297(1) of the Penal Code provides:-

***“Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or***

**overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.**” (emphasis provided).

In view of the foregoing the sentence of eight (8) years imprisonment imposed by the trial court for the offence of attempted robbery contrary to section 297(1) of the Penal Code was in excess of the lawful sentence of seven (7) years imprisonment. This is yet another error which was not detected by the superior court when it considered the appellant’s appeal before it.

Pausing here for a moment it can be said that there were glaring errors as regards the charge in the trial court and the sentence imposed in respect of attempted robbery contrary to section 297(1) of the Penal Code. In view of the foregoing can it be said that the superior court as the first appellate court discharged its duty in this appeal? We do not think so. In **Okeno v. R** [1972] E.A. 32 the predecessor of this Court made the following observation as regards the function of the first Appellate court:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570).***

***It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses , see Peters v. Sunday Post, [1958] E.A. 424.”***

The above has been cited with approval in **Kinyua v. R** [2003] KLR 301 at p. 303.

Having considered the submissions by counsel appearing for the appellant and the state and in view of the errors that we have pointed out we agree that purely on technicalities this appeal ought to be allowed. Due to the errors pointed out, we are of the view that the appellant was prejudiced by those errors. We therefore allow this appeal, quash the convictions recorded by the trial court and set aside the sentences imposed by the trial court and the death sentence imposed by the High Court. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 28th day of October, 2005.

**P.K. TUNOI**

**JUDGE OF APPEAL**

**E.O. O’KUBASU**

**JUDGE OF APPEAL**

**E.M. GITHINJI**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**