



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**(CORAM: OMOLO, O'KUBASU & GITHINJI, J.J.A.)**  
**CRIMINAL APPEAL NO. 271 OF 2002**

**BETWEEN**

**1. MUIRU KARANJA**

**2. JOSEPH ONYANGO..... APPELLANTS**

**AND**

**REPUBLIC..... RESPONDENT**

**JUDGMENT OF THE COURT:**

*Muiru Karanja* , the first appellant, and *Joseph Onyango* , the second appellant, together with a third person David Macharia, were jointly tried before a Principal Magistrate at Malindi on two counts of robbery with violence contrary to **section 296(2)** of the Penal Code. All the three were convicted by the Magistrate on the two counts but on their first appeal to the superior court (*Onyango Otieno and Ouna JJ*), the appeal of David Macharia was allowed, the two convictions recorded against him were quashed and the sentence of death set aside. The convictions and sentences in respect of the first and the second appellants were upheld and the death sentence imposed on each of them was confirmed. Each of them now appeals to this Court for the second time and that being so, only matters of law can arise for our consideration.

The first matter of law which was raised on their behalf by Mr. Wameyo was that the two charges of robbery brought against each one of them was incurably defective. The charges stated in their particulars that on the 8th March, 1998 at around 7.30 p.m. at Mawani village in Malindi, the appellants jointly being armed with a pistol, iron bars and rungus, robbed David Yawa Mgoma of his bicycle, a paper bag containing two shorts, one vest, four pairs of socks, one tie and two exercise books all valued at Shs.7,280/= and that immediately before or immediately after the time of the robbery they used actual violence to the said David Yawa Mgoma (count one) and in count two the person robbed was named as Garama Katana, the time of the robbery was at 8 p.m. and the items stolen from Garama Katana were a Raleigh Bicycle Frame No. A421928 valued at Shs.5,200/= and that they also used actual violence on the said Garama Katana. Mr. Wameyo told us that since it was not alleged in the particulars of the charges that the weapons with which the appellants were armed were dangerous or offensive weapons, the charges were fatally defective. We have no quarrel with Mr. Wameyo's contention that section 296(2) of the Penal Code specifies three distinct modes or ways in which the offence created by that section can be committed. Those modes or ways are:

*(a) if the offender is armed with any dangerous or offensive weapon or instrument; or*

*(b) if the offender is in company with one or more other person or persons; or*

*(c) if, at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or rises any other personal violence to any person.*

Normally the prosecution would be required to, and must choose which of these modes they wish to pursue against an accused person and combining the three modes all in one count may well make the charge duplex. But as this Court has had occasion to point out before, the gentlemen who practise the crime of robbery are always in the habit of attacking their victims while they are in a group, are normally armed and in most cases use or threaten the use of violence all in one transaction.

That is what the prosecution alleged happened in this case. Both David Yawa Mgoma (PW3) and Garama Katana (PW2) said they were attacked by a group of persons who assaulted each one of them and that those persons were armed with various implements including a pistol. Even if a pistol is not described in the particulars of the charge as a dangerous or offensive weapon, everybody knows that a pistol is a dangerous weapon and failure to so describe it can cause no prejudice to anyone. But in this case the particulars of the charge clearly showed that the appellants, who were at least three people, were in the company of other persons. David Yawa Mgoma said they were about eleven persons. The particulars of the charge clearly brought the case within category (b) which we have set out herein, namely, when the offender is in company of one or more person or persons. The issue of the charge being defective must accordingly fail.

The second issue of law raised on behalf of each appellant was as to whether the bicycles were correctly identified in view of the discrepancy in the frame numbers given to the bicycles in the particulars of the charge and in the evidence of the witnesses in the Magistrate's court.

However, both bicycles were present before the trial Magistrate and Kashura Katana (PW1) Garama Katana (PW2) and David Yawa Mgoma (PW3) were able to point out to the Magistrate particulars on each bicycle which made each of them identify them as their property. None of the appellants claimed any of those bicycles as being his property. In fact the second appellant Onyango suggested to the owner of one of the bicycles that the owner had sold it to him for Shs.250/=. The trial Magistrate was satisfied with the witnesses' identification of the bicycles and the superior court confirmed that evidence. No question of law can arise there for our determination and there would be no basis for us to interfere with the concurrent findings of facts by the two courts below. The recorded evidence fully supported the conclusions of the two courts below.

Again the two courts below found and held that the second appellant Onyango was found riding one of the stolen bicycles and upon his being taken to the police station he subsequently led Police Constable Joseph Ringera (PW4) to some out-of-the way shelter where the first appellant and David Macharia were found and arrested. The second bicycle was found there. On these facts, which were fully supported by the recorded evidence, we do not think that the unfortunate acquittal of David Macharia by the superior court can in any way affect the convictions recorded against these two appellants. Each of them made a clean breast of the offences when charged and even though each of them retracted and repudiated his charge and caution statement, those statements were fully corroborated by the evidence on record.

In our view each of these appellants was convicted on sound evidence on each of the two counts and their appeals against conviction be and is hereby dismissed. The sentences of death on count one is confirmed. The sentences of death on count two ought to have been held in abeyance for it is not possible to hang a person twice – over. We suspend the sentence on count two. Those shall be our orders in the appeals.

**Dated and delivered at Mombasa this 23rd day of July, 2004.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

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

DEPUTY RERISTRAR