



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Gicheru CJ, Kwach & Owuor JJ A)**

**CRIMINAL APPEAL NO 71 OF 2002**

**CHARLES MAINA WAMAI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

(Juma & Mitey, JJ) dated 2nd May 2002 in HC Cr Appeal

No 248 of 2000)

**JUDGMENT**

Charles Maina Wamai, the appellant, was originally charged and tried before the Senior Resident Magistrate's Court at Nanyuki jointly with two other persons, with four counts of robbery with violence contrary to section 296(2) and two counts of shop breaking and committing a felony contrary to section 306(a) of the Penal Code. The appellant was convicted on three of the counts of robbery with violence and both the counts of shop breaking. He was accordingly sentenced to death as well as serve an imprisonment sentence of one year and to receive 2 strokes of the cane on each of the shop breaking counts. His co-accused persons were both acquitted on all the counts. His appeal to the superior court against both conviction and sentence was dismissed, hence the appeal to this court.

The charges against the appellant emanated from orgies and series of robberies and shop breaking committed by a gang of armed people, whereby shop goods valued at a lot of money and actual cash were stolen on the night of 15th and 16th September, 1999 at a small trading centre known as Matanya in Laikipia District within the Rift Valley Province.

Amongst the victims of the robbery was one James Karugu Munene (PW1) who owned a shop at the centre. On the evening of 15th September, 1999 he locked up his shop and went to sleep. At about 12.30 am, he was called by people from outside and ordered to open the door. He refused to open but immediately after that the door was hit, forced open and people entered. Several torches were shone at him. He was then hit on the head with an axe as money was being demanded from him. He began bleeding, and told the gang where the money was. They took his Ksh 4,500/= and left. His wife called for a vehicle and took him to a nearby clinic. He was attended to by William Miricho Ndonga (PW10), a clinical officer who testified that when he examined Karugu on that night he had sustained a cut wound on his forehead which he stitched. The injury was about one hour old. The following morning Karugu went to Matanya Police Station and made a report of the property that had been robbed from him. He was shown a carton containing about Ksh 446/= in coins, which he identified as some of his property plus 3

packets of cigarettes. He was not able to identify any of the persons that had robbed and injured him.

Another shop that was also broken into on that night belonged to Margaret Wangui (PW4). She locked her shop at 6.30 pm and went home leaving behind her brother Harman Nderitu Kiboi (PW2) who used to sleep in the shop. Nderitu testified that at about 2.40 am he was awakened and ordered to open the door which he did. A number of people entered the shop.

One person took Ksh 140/= that was on the table while the second person took a torch as the third man whom he identified as the appellant began questioning him as to where the money was. The same man then ordered him to accompany them to the shop of one Wilson Murimi Kuria (PW8).

While the rest of the people were trying to break the front door of the shop, the appellant and Nderitu entered through the rear door and once inside Kuria's bedroom, the appellant ordered Nderitu to sleep in Kuria's bed and cover his head with a blanket. He heard the people break the door of the shop. Immediately thereafter he heard a gunshot. On coming out he found the police had come to the scene and the appellant had been caught and was being beaten. Outside the shop he found most of the goods that had been stolen from their shop scattered on the ground.

According to Kuria, when he was woken up at about 3.30 am with bangs on the rear door of his shop he realized he was being attacked and began blowing his whistle. The gang managed to break the rear door of his building. He ran into the shop area and as he continued to blow the whistle, he heard gunshots, came out and found police had arrived and were holding a person he identified as the appellant. On the ground was an axe and goods in paper bags. He saw eight packets of cigarettes being removed from the appellant's pocket with a pair of rhino batteries. The goods which had just been taken from his shop were found abandoned outside the shop.

Paul Mwangi Chege (PW3), a cobbler, owned a shop in the same trading centre. He locked his shop in the evening of 15th September, 1999 and went home. When he came the following morning he found the shop having been broken into and a number of items including shoes stolen.

When he went to report at the police station he was shown eight pairs of shoes which he identified as some of the goods stolen from his shop.

The owners of the shops that were broken into had employed a watchman, John Gituara (PW5). He was attacked, beaten and left unconscious on that fateful night before the robberies were carried out. He regained consciousness in the hospital the following day where he stayed for five days. He did not know or identify any of the people that attacked him. Duncan Weru (PW6) was one of the owners of the shops that had employed Gituara to guard his shop. When he came in the morning he found the watchman absent and his shop having been broken into. Goods worth Ksh 5,700/= were missing. He identified some of his goods at the police station.

Following a report made at the police station at about 3.00 am, PC Paul Mwangi (PW9) and APC Joseph Wachira (PW11) rushed to the trading centre. They found a gang of five people breaking the external front door to Murimi's shop. They challenged the people to stop. Upon shooting in the air the people ran away. As they walked to the rear of the shop, they met the appellant coming from inside the shop. They ordered him to stop which he did, laid down and dropped an axe that he was holding. Upon being searched, he had in his pockets six packets of various brands of cigarettes, 2 pairs of rhino batteries and a torch. Outside Murimi's shop they also found a lot of the goods that had been stolen from the other shops having been dropped and left behind as the robbers fled. Upon being taken to the police station, the appellant offered himself and took the police to places where he pointed out the two people who he alleged were with him and were consequently jointly charged with him.

We have analyzed in great detail the evidence that was before the lower courts in order to appreciate and decide on the two main grounds of appeal that were argued before us namely that:-

"1. The judges of the superior court erred in law in not appreciating the fact that the essential elements of

robbery with violence contrary to section 296(2) were not proved in the subordinate court to enable the lower court to convict the appellant under that section.

2. The trial judges erred in law in their finding that there was enough light to identify the appellant.”

In as far as the identification of the appellant as one of the robbers is concerned, counsel for the appellant, Mr Mukunya has contended that the circumstances of the attack were such that the two eye-witnesses, Nderitu and Murimi could not have been able to see the appellant clearly if indeed he was one of the robbers. In that regard, their evidence should have been carefully tested which was not done. See *Wendo v Republic* (1935) 20 EACA 166 and as cited with approval by this court in *Ogaro v Republic* (1982 - 88) 1 KAR at page 260.

While it is true that the condition for identifying one or more of the gang were not ideal, there were a lot of other factors that supported the identification of the appellant as one of the robbers by Nderitu. He testified that he had identified the appellant because apart from seeing him by means of the torch-light the gang carried, the appellant was the one that talked to him a lot asking him where the money was kept when the gang got into the shop. He is also, the one and only member of the gang that led him from their shop to Kuria's shop and while inside the shop, ordered him to get into Kuria's bed. He stated thus:-

“The robbers were five but I can only identify the one who was questioning me and who had held me all the way from my shop as he is the first accused. I had seen him through the light from the torches which those people had as they did not cover their faces.”

This was the same man that was inside the shop with Nderitu while the others were breaking the door. When Nderitu came out he checked on the person that had just been arrested and was being beaten, recognized him and confirmed to the police that he was one of the robbers that had just been robbing them.

Counsel's contention is that this evidence of identification did not meet the required test in the light of the defence that the appellant put forward, that he was in the general area and had spent the whole day looking for a cow to buy and then settled to have a drink in the market. He was arrested when drunk and had nothing to do with the robberies.

In support of Nderitu's evidence was the evidence of the arresting officer,

PC Mwangi who actually saw the appellant emerge from the rear door of the shop and having in his possession some of the stolen items. PC Mwangi categorically testified that the appellant was not drunk as he claimed, at the time of his arrest.

We are satisfied as the two courts below were with the evidence of identification of the appellant as one of the gang that committed the series of robberies at Matanya trading centre. He was not drunk nor was he mistakenly arrested by the police. Those were the concurrent findings made by the two lower courts and in our view without any error of law or principle and therefore there is no justification for our departing from them.

In respect of the second ground of appeal as to whether the essential elements of the charge of robbery with violence contrary to section 296(2) of the Penal Code were proved, an accused person commits the offence of robbery with violence, if with an intention to steal, he commits one or more of the following acts:-

“(a) is armed with any dangerous or offensive weapon or instrument; or

(b) is in company with one or more persons; or

(c) immediately before or immediately after the time of the assault he beats, strikes or uses any personal violence to the person”

See *Michael Nyongesa v Republic* Criminal Appeal No 29 of 1993. The evidence which was accepted by the two courts below was that there was a gang of people on rampage at Matanya trading centre. The appellant was a member of that gang who systematically broke into shops and injured some of the occupants of the shops as they stole their goods. The watchman was beaten and left unconscious. Amongst the shops the gang got into was that of Nderitu who testified that the gang comprised of about five people and they were armed with axes and torches. PC Mwangi and Murimi also testified that there was an axe lying on the ground where the appellant had been ordered to lie down by the police. Karugu, who was injured in the robbery was cut with a weapon of sharp edge and his wounds had to be stitched. Upon arrest the appellant was found with rhino batteries and an assortment of cigarettes similar to the ones stolen from the other shops and not Murimi's shop where he was seen emerging from. He was arrested at the scene while the rest of the gang ran away and disappeared in the dark. The evidence against the appellant was overwhelming. In that he was one of the gang of people that was armed with an axe that injured Kuria and stole substantial property from various shops at Matanya trading centre. We are satisfied that the appellant's conviction was proper, with the result that the appeal has no merit and the same is dismissed.

Dated and delivered at Nairobi this 9<sup>th</sup> day of May, 2003

**J.E. GICHERU**

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**CHIEF JUSTICE**

**R.O. KWACH**

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**JUDGE OF APPEAL**

**E. OWUOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**