



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NYERI**  
**(CORAM: GICHERU, C.J, KWACH & OWUOR, JJ.A)**  
**CRIMINAL APPEAL NO. 130 OF 2002**

**BETWEEN**

**PAUL KAMAU MACHARIA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at**

**Nyeri (Juma & Mitey, JJ.) dated 31st July, 2002 in**

**H.C. Cr. Appeal No. 146 of 2001)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

Paul Kamau Macharia (the appellant) was convicted by the Chief Magistrate's Court at Nyeri on a charge of robbery with violence contrary to section 296 (2) of the Penal Code. The charge against him was that on 5th day of March, 2000 at Mweiga Airstrip in Nyeri District, with others not before the court, while armed with dangerous weapons, robbed John Maina Munyeki of a motor vehicle registration No. KAG 794G Toyota Hiace and used violence on him. The appellant was sentenced to death. He appealed to the superior court against both conviction and sentence but his appeal was dismissed on 31st July, 2000. He has now brought this second appeal.

The prosecution's case was that on 5th March, 2000 John Maina Munyeki (deceased) was driving the matatu KAG 794G along Mweiga - Nyeri road. At Mweiga airstrip the vehicle stopped for Gerald Macharia (P.W.2), a passenger, to get off. As Macharia attempted to disembark, he was pushed back by a person who had been posing as a passenger but turned out to be a robber. Macharia and James Maina, the conductor (P.W.1) sensed that there was something wrong. They got out of the vehicle and ran away. As they were doing so Maina noticed that the robbers had pushed the deceased out of the driving seat and one of them had taken over as driver. He reported the incident to the police at Kiganjo Police Station.

The robbers then drove to the Kenol Petrol Station at Kiganjo and ordered the petrol station attendant, John Mwai (P.W.4) to put in petrol for Shs. 200/=. Before they could drive off the police arrived. When they were challenged by the police, one of the robbers produced what appeared to be a pistol and aimed it at them. The police returned fire and killed the pistol-wielding robber and also accidentally fatally injured Munyeki (the deceased). The appellant who was sitting on the driver's seat surrendered and was arrested. He pleaded with the police not to shoot him claiming that he was unarmed

and that he was the lawful driver of the vehicle which had been hijacked by the robbers.

At his trial the appellant told the Magistrate that he had gone to the petrol station to buy paraffin and he got arrested there by the police. In the course of the investigations the police had recorded a charge and caution statement from the appellant in which he confessed his participation in the robbery. It was a long and detailed statement. Although the statement was retracted, it was admitted in evidence by the trial Magistrate after a trial within a trial. In the statement the appellant explained in great detail how they had planned and executed the robbery.

The pistol they used in the robbery had been manufactured and supplied by a man who owned a workshop at Kayole in Nairobi and he took the police to the man's workshop. There is no doubt therefore that the confession was true and was voluntarily made. That was the concurrent finding of both the trial court and first appellate court. We have no reason to disturb that finding at this stage.

The main point which Mr. Oira, for the appellant, raised before us was that the appellant had not been properly identified as one of the people who committed the robbery. He submitted that the evidence of Mwai, the petrol attendant, could not be relied on because the police witnesses had said that a person other than the appellant was driving the matatu.

He said in chief-

"1st accused got out of the vehicle and lay down on the floor and said "mimi sina pistol" (I have no pistol). Police arrested him. The one with the pistol and another passenger were shot dead."

When cross-examined by the appellant, Mwai said-

"I saw you well. You were the one driving. You just stopped at the kerosene pump. I came to you and told you to reverse it to the right pump."

Mwai's account of the situation at the petrol station was supported by P.C. James Thome (P.W.11) who told the court-

"Mwenda saw the vehicle reported stolen. He showed me the vehicle. We approached the vehicle. The vehicle was fuelling. There were 3 occupants in the vehicle. We ordered them to surrender and come out with their hands raised. When we ordered them to surrender the man on the driver's seat was the first accused. He told us he was the driver of the vehicle and was hijacked. He told us not to shoot him. We told him to come out."

Mwai's evidence was the strongest indictment against the appellant. He was an independent witness whose interest was only to relate the events as he saw them unfold. His account was corroborated by James Thome and together corroborated the appellant's confession to the police. From this evidence there can be no doubt that the appellant was positively identified as one of the robbers and his protestations to the contrary cannot be true. He was identified in circumstances perfectly free from any possibility of error.

For these reasons we agree with Mr. Oluoch, for the Republic, that this appeal has no merit. It is accordingly dismissed.

Dated and delivered at Nyeri this 9th day of May, 2003.

**J.E GICHERU**

.....

**CHIEF JUSTICE**

**R.O KWACH**

.....

**JUDGE OF APPEAL**

**E. OWUOR**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR