



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: OMOLO, SHAH & O'KUBASU, J.J.A

CRIMINAL APPEAL NO. 14 OF 2000

BETWEEN

1. SIMON NJOROGGE WAIRIMU

2. PETER HIUHU GACHAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a conviction and sentence of the High Court
of Kenya at Nyeri (Juma and Mulwa, JJ) dated 19th
October, 1999**

in

H.C.CR.APPEAL NOS. 305 & 306 OF 1998 (Consolidated)

JUDGMENT OF THE COURT

The appellants, Simon Njoroge Wairimu and Peter Hiuhu Gachau were both convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to death as by law provided, by the Principal Magistrate J.S. Mushelle Esq., at Nyeri, on 8th July, 1998. They appealed against conviction and sentence, to the High Court sitting at Nyeri. Their appeals, numbered 305 and 306 were heard together and dismissed on 19th October, 1999. They are here in this Court by way of a second appeal.

The facts as brought out by the prosecution evidence are that the body of one Charles Mwariri Wachira (the deceased) was found floating in River Honi by P.W1, Evans Sachita, a police corporal attached to Kiganjo Police Station, on 20th January, 1998. Corporal Sachita went to the river to retrieve the body as a result of a report received by him. Two days thereafter the deceased's wife went to Kiganjo Police Station to report her husband's disappearance. She was taken to Nyeri Provincial General Hospital Mortuary where she identified the body as that of her late husband.

Kiganjo Police Station received information from Nyeri Criminal Investigation Department to the effect that they had arrested some suspects who may have been involved in the killing of the deceased. Nyeri CID had recovered a pair of gum boots and a jacket which items were identified by the deceased's wife Patricia Nyambura (P.W3) as belonging to the deceased. The gum boots were found in the home of

Peter Hiuhu Gachau and the jacket was found in the home of Simon Njoroge Wairi Tm hue. alleged offence had taken place on 13th January, 1998 at Nyaribo village in Nyeri District of Central Province. On 13th January, 1998 at about 8.30 p.m. Peter Hiuhu Gachau went to the home of one Magdalene Njoki Nderitu (P.W5). He had with him a pair of black gum boots and a jacket. At about 9.00 p.m. Simon Njoroge Wairimu arrived at the home of Magdalene Nderitu, and Magdalene's evidence was to the effect that Simon took the gum boots and Peter took the jacket. She stated, however, in cross-examination that the jacket produced in court was not the one which Peter took with him.

It was not disputed that the deceased died as a result of multiple skull fractures and haemorrhage caused by deep cut wound on the right side of his forehead. It cannot be disputed that the deceased met his death as a result of being attacked by person or persons armed with some blunt object. There is no direct evidence connecting Simon and Peter with the assault on the deceased. The evidence which connected the two appellants with the offence in question was firstly the fact of the two being found in possession of the said gum boots and jacket identified by Patricia Nyambura as belonging to the deceased and secondly a confession statement by Peter which statement was repudiated but admitted after a trial within a trial.

Mr. G.K. Wambugu who appeared for both the appellants took issue with the identification of the gum boots and the jacket by Patricia Nyambura. His complaint was that the two items were not sufficiently identified by her as to show that the same belonged to the deceased. Patricia was quite positive about the two items. She stated that the black gum boots belonged to her husband, were size 7, had a cut mark on one of them and that she herself was using them at times. There can be no doubt that Patricia positively identified the gum boots as those of the deceased and it must be borne in mind that Simon did not claim he owned them. It must also be remembered that Simon was in possession of the gum boots on the very day of the robbery. This fact raised an irresistible inference that Simon was one of the robbers. The magistrate and the superior court found that to be so. On the evidence the two courts were entitled to do so.

Patricia identified the jacket found in possession of Peter as belonging to the deceased. The two courts below had no doubt that she properly identified the jacket. We have no basis upon which we can interfere with that finding of fact. It was fully justified by the recorded evidence.

Mr Wambugu argued that there was no evidence to lend corroboration to the retracted statement and that although the learned Magistrate had warned himself of the need for corroboration, the High Court did not so warn itself. There is no basis for this contention. It having been found as a fact that the gum boots and the jacket belonged to the deceased, there being found with the appellants corroborated the retracted statement. The trial court is only required to warn itself where it is relying solely on an uncorroborated evidence; where, however, there is corroboration, the warning is not necessary.

The evidence of Magdalene as regards the jacket in court not being the one which Peter brought to her home does not, stand scrutiny in reality. Peter, when he went to Magdalene, had the jacket in his hand, not on him. The jacket was positively identified by Patricia as belonging to the deceased.

The recent possession of the two items by the two appellants left the two courts below in no doubt that they were involved in the robbery. This being second appeal we see no point of law to make us overturn the factual findings of the two courts below. In view of the foregoing we order that this appeal be and is hereby dismissed.

Dated and delivered at Nyeri this 17th day of May, 2001.

R.S.C. OMOLO

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

E. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.