



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU

Criminal Appeal 77 of 2005

JOHN KARANJA KIMANI ..... 1<sup>ST</sup> APPELLANT

METHUSELLA MURIUKI THUO ..... 2<sup>ND</sup> APPELLANT

GEORGE MURIITHI WABETI ..... 3<sup>RD</sup> APPELLANT

**VERSUS**

REPUBLIC ..... RESPONDENT

*[From the original conviction and sentence in Criminal Case No.540 of 2003 Principal Magistrate's Court, Nyahururu D.K. NGOMO (P.M)]*

JUDGMENT

The appellants were charged with three counts of the offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**.

The particulars of the charge stated that on the 29<sup>th</sup> day of January 2004 at Nyandarua District within Central Province, jointly with others not before court while armed with dangerous weapons to wit four pistols and rungun robbed **J M K** of cash Kshs.2,000/-, 2 crates of beer and clothings all valued at Kshs.20,000/- and at or immediately after the time of such robbery wounded the said **J M K** by hitting him with a club.

They were charged with a second count of **robbery with violence** contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the charge stated that on 29<sup>th</sup> day of January 2003 at around 10.00 p.m. p.m. at Kianjata Village in Nyandarua District within Central Province, jointly with others not before court while armed with dangerous weapons to wit four pistols and rungun robbed **W KN** of Kshs.650/-, 72 inch T.V set make Samsun, radio cassette make National Panasonic, 2 chain links wires, a bicycle make Hero, assorted compacts, assorted masonry tools and wall clock all to total value of Kshs.80,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **William Kiboi Nduhiu**.

The 3<sup>rd</sup> appellant, **George Muriithi Wambeti** was charged with an alternative charge of **handling stolen goods** contrary to **Section 322 (2)** of the **Penal Code**.

The particulars of the charge stated that on 31<sup>st</sup> day of January 2003 at Kibathi village in Nyandarua District within Central Province, otherwise than in the course of stealing dishonestly retained (1) one radio make Sanyo Serial No.631940, (2) National Panasonic radio serial No.89952, (3) Wall clock make Ajanta, (4) one black bag knowing or having reasons to believe them to be stolen goods.

The appellants pleaded not guilty to all the charges and after a full trial before the Principal Magistrate's Court at Nyahururu, the appellants were found guilty and convicted of a lesser charge of simple robbery. The appellants were sentenced to five years imprisonment for the offences in first and second counts, the 3<sup>rd</sup> appellant was sentenced to three years imprisonment in regard to the offence in third count and the sentences were to run concurrently.

Being dissatisfied with the conviction and sentence by the trial court, the appellants have appealed to this court and during the hearing of the appeals the three appeals were consolidated and heard together. The appellants' appeals are based on similar grounds. The appellants contend that the conviction was based on the evidence of identification which identification parade was irregularly conducted. The conviction was also faulted by the appellants on the grounds that it was based on contradictory, and insufficient evidence which failed to prove the case of robbery to the required standard. The judgment of the trial court was also challenged for shifting the burden of prove to the appellants and for failing to take into account the defence of alibi which was put forward by the 2<sup>nd</sup> appellant.

During the hearing of this appeal, the appellants who were unrepresented sought the leave of the court and they were permitted to put in written submission in addition to their oral submissions.

This appeal was opposed by the State, the learned Senior State Counsel **Mr. Koech** supported the conviction and sentence which he submitted was based on cogent evidence of identification and recovery of stolen items which were identified by special marks. **Mr. Koech** further submitted that the appellants were found guilty of robbery with violence as there was evidence that they were armed with guns when they attacked the victims and he therefore urged this court to find that the conviction under **Section 296 (1) of the CPC** was unlawful and this court to exercise its powers under the appeal and enhance the sentence imposed on the appellants to the mandatory death sentence.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own determination on whether to uphold the conviction and in so doing to bear in mind that it is the trial court that saw and heard the witnesses and give due considerations for that.

(See the case of **Njoroge Vs Republic [1987] KLR page 19**)

I now wish to set out the summary of the evidence that was considered by the trial court. On 29<sup>th</sup> January 2003, **JM K, PW 1** was selling at a bar at K Shopping centre at about 8.00 p.m., he was in the company of **W KN, PW 2**. They were accosted by a gang of robbers who were armed with guns and rungs. **PW 1** was hit with a rungu on the head, he temporarily lost consciousness but he later came to his senses. The robbers ransacked the bar, they took away Kshs.2,000/-, they also took some beers and some ladies clothes all valued at about Kshs.20,000/-. The robbers also ransacked **PW 2** from whom they found no money but they forced him to take them to his house in the company of **PW 1**. While at **PW 2's** house, the robbers ordered **PW 2** to request the house to be opened. **PW 2's** wife, **M W K, PW 3** opened the house, **PW 1** and **PW 2** were ordered to lie down while **PW 3** was ordered to take the robbers round the house from where they stole several items which are stated in the charge sheet. **PW3** said that she was carrying a lantern during the ordeal as he was ordered to show the robbers round the

house. The robbers packed the items in two bags and ordered **PW 1**, **PW 2** and **PW 3** to carry them, for which they obliged, when they reached near Lake Olbolosat, the robbers told the witnesses to go back as they had forgiven them for being very cooperative. In the course of the ordeal, some of the robbers got into the bedroom of the **PW 2**'s daughter and the daughter was raped by two of the robbers. **S W K**, **PW 4** gave evidence of how she was raped. The complainants reported the matter to the police.

Following a tip-off, **Corporal Francis Mwangi**, **PW 6** told the court that on 30<sup>th</sup> January 2003, he in the company of other police officers, went to the house of the 3<sup>rd</sup> appellant where they recovered two radios, a wall clock, and speakers as well as other items that were produced as exhibits in court. Those items were taken to Oljororok Police station and they were identified by **PW 2** and **PW 3**. This evidence was corroborated by that of **A.P.C Mwaura**, **PW 7**. **Sergeant Elisa Singoe**, **PW 5** is the one who recorded the complaint at the Oljororok police station and produced the exhibits in court.

An identification parade was carried out by **Inspector of Police Nathan Wekesa**, **PW 8** where the 1<sup>st</sup> appellant was identified by both **PW 2** and **PW 3**. **PW 8** also told the court, he conducted another parade where the 2<sup>nd</sup> appellant was similarly identified by **PW 2** and **PW 3**. **Inspector of Police Richard Omar**, **PW 10**, conducted the identification parade in respect of the 3<sup>rd</sup> appellant who was identified by **PW 2** and **PW 3** and **PW 4**.

In their evidence, **PW 2** told the court that he was able to identify the appellants because he was with them during the robbery ordeal which started in the bar where there was light by a lantern that illuminated the place. He said he was with the robbers for about eight hours within which time he was able to identify them by their special physical features.

As regards the 1<sup>st</sup> appellant, **PW 2** said that he identified him by his facial features and a missing tooth. As regards the 2<sup>nd</sup> appellant, **PW 2** told the court that he was able to identify him as the one who took his jacket and shoes and searched him.

Put on their defence, the appellants in their un sworn statement of defence, denied having had anything to do with the robbery. They also relied on the evidence of **E N T** (DW 1) the father of the 2<sup>nd</sup> appellant but his evidence was in respect to the circumstances surrounding the arrest of the 2<sup>nd</sup> appellant on 1<sup>st</sup> March 2003 and had nothing to do with the robbery which took place on the 29<sup>th</sup> January 2003.

It is no the basis of the above evidence that the appellants were convicted. The trial court considered the defence evidence which was dismissed as farfetched, it was the trial court's view that the defence offered did not dent the otherwise strong prosecution's case.

This appeal turns on the twin issues of whether the conviction which was based on the evidence of identification of the appellants by **PW 2** and **PW 3** was safe from error and the evidence of recovery of stolen items from the 3<sup>rd</sup> appellant was also safe from error. This appeal also raises the issue of credibility of the evidence especially the evidence of **PW1**, **PW 2**, **PW 3** and **PW4**. The trial court which saw and heard the witnesses believed the evidence of complainants which was duly corroborated indeed the trial court remark as follows: -

*"I have gone through the evidence and I must say that it is corroborative of the evidence of the rest of the witnesses who were present. They have no doubt in their minds exactly what happened. The rest of the evidence by the other witnesses is supportive of the evidence of the eye witness. The accused in their evidence just touched on the day they were arrested and none talked about the day this incident took place."*

In evaluating the evidence before the trial court it is significant to note that the trial court had a greater advantage in assessing the credibility of the witnesses than the appellate court. It was held in the case of **Republic Vs Oyier [1985] KLR page 353**;

***“The first appellate court could not interfere with those findings by the lower court which were based on the credibility of witnesses unless to reasonable tribunal could make such findings or it was shown that there existed errors of law.”***

I find that the trial court properly analyzed the evidence and arrived at the correct decision that the evidence was corroborated and the prosecution witnesses had proved the charge before the court.

In the case of **Mutonyi Vs Republic [1982] KLR 203** the Court of Appeal reiterated the definition of the term ‘corroboration’ stating

***“An important element in the definition of corroboration ... is that it affects the accused person by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime as been committed but also that the accused committed it.”***

The evidence before the trial court regarding the identification of the appellants and recovery of the stolen items which were found in possession of the 3<sup>rd</sup> appellant was cogent and I find no justification in interfering with the trial court’s judgment. The trial court reduced the charge to a lesser charge of robbery. It is the trial court that heard and saw the witnesses although **PW 1** and **PW 2** said the appellants were armed with guns and rungu, the trial court reduced the charge and sentenced the appellants to five years which is a lenient sentence considering the offence that was committed.

I decline to enhance the sentence as sought by the State but I confirm the sentence as imposed by the lower court. I dismiss the appeal as lacking in merit.

**Dated and delivered on this 10<sup>th</sup> day of May 2007.**

**MARTHA KOOME**

**JUDGE**



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