



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Appeal 252 of 2003**

**[From original conviction and sentence in Criminal Case No. 1249 of 2002 in the Chief Magistrate's Court at Nakuru before Hon. S. Muketi (SRM)]**

**SAMMY NGAWASA LONGORI ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, *Sammy Ngawasa Longori* was charged with an offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars stated that on the 13<sup>th</sup> day of June 2002 at corner Mbaya Area along Rumuruti, Maralal road in Rumuruti in Laikipia District of the Rift Valley Province, jointly with others not before court while armed with a dangerous weapons namely AK. 47 assault rifle robbed ***Stephen Maina Waweru*** cash Kshs.1,500/- and at or immediately after or immediately before the time of such robbery used personal violence to the said ***Stephen Maina Waweru***.

He also faced an alternative charge of attempted robbery contrary to Section 297 (2) of the Penal Code.

The particulars of the alternative charged stated that on the 13<sup>th</sup> day of June 2002 at Corner Mbaya area in Rumuruti – Laikipia District of the Rift Valley Province jointly with others not before court while armed with dangerous weapons namely AK. 47 assault rifle attempted to rob ***David Gathundu Kingori*** of a motor vehicle registration number KAE 293V Mitsubishi Canter valued at Kshs.1.2 Million and at or immediately before the time of such attempted robbery, fatally wounded the said ***David Gathundu Kingori***.

The appellant pleaded not guilty to all the charges and after a full trial he was found guilty of both accounts of robbery with violence and accordingly convicted and sentenced to suffer the mandatory death sentence.

Being aggrieved by the conviction and sentence, the appellant has appealed against the conviction and sentence. In his petition of appeal, the appellant challenged the conviction which he contended was based on the evidence of identification by a single witness. The appellant also challenged the conviction which he argued was based on insufficient and contradictory evidence by the prosecution witnesses. The appellant also faulted the judgment which he contended did not comply with the provisions of the law in that the learned trial magistrate failed to frame the issues for determination. The appellant also, was

dissatisfied with the sentence which he termed as harsh and excessive in the circumstances and faulted the trial magistrate for rejecting his defence which could have earned him an acquittal.

On the part of the State, the learned State Counsel **Ms. Obati** opposed the appeal and supported the conviction and sentence by the trial court.

This being a first appeal, this court is mandated by law to reconsider and re-evaluate the entire evidence and the judgment of the trial court and arrive at its own independent determination on whether to uphold the conviction of the appellant. In arriving at this determination, this court should bear in mind that it neither saw nor heard the witnesses and give due regard to that aspect.

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

We therefore briefly set out the summary of the evidence before the trial court that led to the conviction and sentence of the appellant.

On 13<sup>th</sup> June 2002 at about 2.30 p.m., **Stephen Maina Waweru, PW 1** was traveling as a turn boy in vehicle registration KAE 293V. The vehicle was driven by **David Gathundu Kingori** and they were transporting sheep. When they reached Corner Mbaya along Rumuruti Maralal road, they were accosted by four robbers who fired gunshots at them. The driver was shot at and he died on the spot. **PW 1** was shot on the hand. He was removed from the vehicle and told to lie down on his stomach and to surrender all his money. He was robbed his jacket and Kshs.1,500/-. Thereafter he managed to run through the bush and appeared on the road where he was rescued by a tourist ran that took him to the Rumuruti Dispensary where he was given first aid and transferred to Nyahururu Hospital where the bullet was extracted from his body. The driver of the vehicle was killed during the robbery and evidence regarding his death was adduced by **Patrick Kingori, PW 4** who also attended the postmortem examination.

On the 18<sup>th</sup> June 2002, **PW 1** was called at the police station and he was able to identify the appellant as one of the robbers who had stepped on him during the robbery incident. He said he was able to identify the appellant from his physical features namely; the mouth, eyes, the gap and the big face. The identification parade was carried out by Inspector of police, **Grammons Awour, PW 5**.

Police Constable **Nyando Kokorukoru, PW 2** was attached to Maralal police station and on 22<sup>nd</sup> June 2002 he told the court how he and Inspector of police **Joseph Tukusho, PW 8** arrested the appellant from a bar. The appellant took the police to his house which they searched and recovered 16,500 Ugandan money and Kshs.24,050/-, 10 rupees, sunglasses, a watch, a travelers cheque, a certificate of appointment of an Administration Police and a leather wallet which were all produced as exhibits.

The evidence that links the appellant with the robbery was the fact that on the same day along the same route some tourists were robbed and according to **PW 8** the items that were found in possession of the appellant were the items that were robbed from the tourists. The tourists who were allegedly robbed did not give evidence before the trial court. We find that there was no evidence to connect the appellant with the robbery against the tourists and the items that were recovered from his house.

The circumstantial evidence of recovery of items that were suspected to have been stolen from the tourists has no bearing with the robbery that took place against the complainant in this case. The court can not assume that the items that were recovered from the appellant's house belonged to tourists when there was no evidence before the trial court.

When dealing with a conviction based on the evidence of possession of stolen items, the Court of Appeal recently held in the case of **Isaac Nganga Kahia Vs Republic C.A Cr. Appeal No. 272 of 2005 (Nyeri) unreported** that;

***“It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is***

***positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession, there must be acceptable evidence of search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.***

The other issue is the evidence of identification of the appellant by **PW 1** who was also a victim of the robbery. According to **PW 1** the robbery took place in broad daylight at 2.30 p.m. and took about ten minutes. He was ordered to lie down on his stomach and he was shot. He however managed to run in the bushes and he was rescued and taken to hospital. Five days later he was called by the police where an identification parade was conducted and he identified the appellant. From the description of the appellant it was more of dock identification because it was during cross examination when he described the physical features of the appellant. According to **PW 1** he attended the parade on 18<sup>th</sup> June 2002 while **PW 5** the parade officer testified that he conducted the parade on 26<sup>th</sup> June 2002.

Whereas this may be a minor discrepancy, it has to be tested against the rest of the evidence. The conviction of the appellant turns on the identification by **PW 1**.

The principles governing the identification and the standards of care when a court is dealing with evidence of identification especially from a single identifying witness or when the circumstances of identification can be said to be difficult were set out in the case of **Maitany Vs Republic KLR [1986] page 198**. The Court of Appeal reiterated the well known authority in the case of **Abdullah Bin Wendo and Another Vs Republic [1953] 20 E.A.C.A page 166** and reiterated the over repeated words as follows: -

***“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”***

Having considered the totality of the evidence before the trial court, we are not satisfied that the conviction of the appellant based on this evidence of identification is safe to sustain a conviction. The identification can be said to have been difficult since **PW 1** was told to lie down on his stomach, he was shot at and the whole incident took only ten minutes. The above coupled with the fact that the evidence of recovery was not positively proved and the contradictions between the evidence of **PW 1** and **PW 5**, this appeal must succeed.

In the circumstances we allow the appeal, quash the conviction and sentence imposed on the appellant. The appellant is set at liberty unless otherwise lawfully held.

**Judgment read and signed at Nakuru on this 15<sup>th</sup> day of March 2007.**

**M. KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**