**Kimemia and another v Republic**

**Division:** Court of Appeal of Kenya at Nyeri

**Date of judgment:** 14 May 2004

**Case Number:** 110/03

**Before:** Tunoi, Githinji JJA and Ringera AG JA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Crime – Robbery with violence – Elements of the offence – Whether knife and toy gun constituted*

*dangerous or offensive weapons – Section 296(2) – Penal Code.*

*[2] Criminal procedure – Charge – Overloaded with all the alternative particulars of robbery with*

*violence – Counsel for accused did not raise any objection to the charges – Whether failure of justice has*

*been occasioned.*

*[3] Words and Phrases – “Dangerous or offensive weapons” – Articles made or adapted for causing*

*injury to the person – Whether toy gun would be an offensive weapon – Section 89(4) – Penal Code*

*(Chapter 63) – Section 2 – Firearms Act (Chapter 114).*

**Editor’s Summary**

The two Appellants were convicted of robbery with violence and the conviction affirmed on first appeal. It was common ground that they were passengers in a public service vehicle which was car-jacked by robbers. The prosecution’s case was that the two Appellants with a third man who died subsequently stopped the driver and commandeered the vehicle into a bush where they robbed the other passengers of cash and mobile phones. The suspects were armed with knives and a toy gun. They were alleged to have used violence at the time of the offence. The Appellants subsequently drove the vehicle back to the main road where they were accosted by villagers and beaten up on suspicion of being robbers. Their fellow passengers later came and identified them. One suspect died on the way to hospital while the two Appellants recovered to stand trial. The Appellants recorded inquiry statements in which they admitted to having participated in the robbery. These statements were later retracted. On second appeal, the Appellants argued that the particulars of robbery with violence had not been established.

**Held** – An offensive weapon is any article made or adapted for use for causing injury to the person. *Mwaura and others v Republic* [1973] EA 373 followed. Knives would therefore amount to offensive weapons. A toy gun may however not be considered an offensive weapon unless defined as a firearm by the Minister under section 2 of the Firearms Act. No objection was taken to the overloading of particulars on the charge of robbery with violence. The defect in the charge was a mere irregularity, and no injustice was occasioned since the accused were represented by counsel. The Appellants were clearly identified by the prosecution witnesses. Their defences were implausible, also considering their detailed statements under inquiry, which were produced without any objection. Since the first appellate court had discharged its duty to reconsider the evidence, and had arrived at concurrent findings of fact with the trial court, the second appellate court could only deal with issues of law. *Kiringo v Republic* [1982] KLR 213 followed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Kiringo v Republic* [1982] KLR 213 – **F**

*Muthiori v Republic* [1981] KLR 46

*Mwaura and others v Republic* [1973] EA 37