



REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 21 of 2009

JULIUS MUIRURI

MUTUNGI.....APPELLANT

Versus

REPUBLIC.....RE  
SPONDENT

*(arising from the judgment of Hon. T.W Murigi Senior Resident Magistrate Murang'a in Criminal Case No. 1041 of 2007)*

JUDGMENT

The appellant was charged with 2 counts of robbery with violence contrary to section 296(2) of the Penal Code.

He was tried of the said offence convicted and sentenced to suffer death on both counts.

Being aggrieved by the said conviction and sentence he filed this appeal.

The appellant who was not represented filed and placed before us an amended grounds of appeal and written submissions which he relied upon at the hearing.

The appellant's grounds of appeal can for the purposes of this judgment be stated as follows:

- a) *The charge sheet was defective since it did not contain the word "offensive weapon"*
- b) *That he was arrested on 16th April 2007 but taken to court on 3rd May 2007.*
- c) *His identification was not proper.*
- d) *The appellants defence was not considered by the trial court.*

Miss Maundu for the DPP opposed the appeal and submitted that P.W.6 explained the delay in taking the appellant to court. She further submitted that the charge sheet was not defective for want of the word offensive as the same is curable under section 382 CPC. She submitted that the appellant was recognised with the assistance of security light and that P.W.1 and P.W.2 were able to identify the appellant since he had spent 30 minutes in the house. She further submitted that the sentence was lawful and recognised in law.

The appellant in support of his submissions stated that the identification parade was not properly done as there were only three people in the parade instead of the eight required in law.

From the submissions herein we are of the considered view that the following issues are for your consideration in this appeal:

- a) was the identification of the appellant proper and was the identification parade as conducted valid?**
- b) Was the charge sheet defective ?**
- c) Was there unexplained delay in taking the appellant to court?**
- d) Was the conviction of the appellant safe?**
- e) Was the sentence given to the appellant lawful?**

We shall deal with the issue of the identification/recognition of the appellant and the subsequent identification parade.

The appellant has submitted that the circumstances were difficult for the complainant to have recognised and/or identified the attackers. That it was at night and that the only source of the light was a lantern lamp.

P.W. 1's evidence was that on 6th April 2007 at 1.00 a.m. She was asleep when she heard someone knocking the window. She "increased the light" of the lamp and saw that it was a man. He demanded for money and she gave him Ksh. 1000/-. She was inside the house and he was standing next to the window.

That when he entered the house the attacker told her to go with him to her neighbour and that she was behind him

She stated that she was able to identify the appellant since there was moonlight.

P.W.2 CECILIA WANJIRU IRUNGU also stated that she had put on the lantern lamp and that the appellant went to the bedroom with her husband demanding phones and money that the appellant hit her face with a panga and she started to bleed.

She stated that at the identification parade she was able to identify the appellant and that the parade was made up of five men. She stated that she was able to identify the appellant since she saw his face properly using the lantern lamp and that the appellant was in her house for half an hour.

P.W.3 JULIUS IRUNGU NJOROGE stated that he heard a knock at the door and the man identified himself as a police officer and that when he opened the door she man pushed him to the bedroom.

He further testified that he was later on able to identify the appellant in a parade made up of five people and that he was only able to identify the appellant in the second parade having been unable to do so during the first parade.

P.W.4 WILSON NDUNGU WANGANGA testified that on 12th April 2007 at about 9.30 pm. He was at Makuyu market stage when "he heard." the touts talking of a thief who operated in Makuyu and Ndikwa and that they had seen him. That he waited to see the thief since he had heard at home people complaining of burglars. That he saw the thief and decided to follow him and that the appellant decided to run towards Mjini and that he was subsequently arrested at Maragua police station. Under cross examination the witness stated that he had case with the appellant in court and that the appellant was suspected of being a mungiki member.

P.W. 5 AIP BENJAMIN KIPRONO testified that he presided over the identification parade and that the

first parade comprised of nine members.

When put on his defence the appellant gave sworn evidence and stated that on 12th April 2007 he left Nairobi after Easter Holidays for the village and found that young men had been arrested on allegation that they were Mungiki and that the sub chief had visited his home and arrested his girl friend and took away his properties. He decided to go to Muranga's Makuyu stage and since there were no vehicles because of strike he decided to wait for vehicles going to Nyeri. He boarded a vehicle which was overloaded and therefore before they reached a road block the conductor ordered passengers who were standing to alight. That he boarded another motor vehicle at Wanjii Stage which motor vehicle went straight to Maragua police station where he was arrested on suspicion of being a mungiki member.

Based upon the evidence on record was it possible for the witness to identify the appellant? To our mind the circumstances prevailing were difficult for the complainant to identify the appellant. P.W1. stated that the appellant was outside while she was inside her house. P.W.3 stated that the appellant pushed him to the bedroom. He did not testify as to how bright the lantern lamp was and P.W.2 testified that she followed the appellant from behind.

We therefore find that it was not possible for the witness to identify the appellant in the prevailing circumstances and hold that the found on identification was not safe.

We have also noted that the identification parade was not properly conducted since the same was made up of only five people and therefore find that the appellant was prejudiced.

On the issue of the appellants defence we have noted the evidence of P.W.4 which tends to throw some credit to the appellant's evidence that he was arrested of on suspicion of being a mungiki member. We found that the trial court did not analyse the appellant's defence but merely dismissed the same in the following terms.

***“I discredit his defence as a mere denial. His defence that he was in Nairobi on the material day does not hold any water. He did not collaborate his defence. It is his defence that he was arrested on allegation that he was a mungiki sect member. It is the evidence of p.c Hassan Mohamed that initially he had charged him with burglary and stealing but after investigation found it fit to charge him with the present offence. The accused who arrested by a member of public who had received information that he was a thief.”***

We found the evidence of P.W.4 who allegedly arrested the appellant not trustworthy. It was full of hearsay and therefore find that the conviction of the appellant herein was not safe.

On the issue of the charge sheet we agree with the submission of Miss Maundu for the state that the same was not defective and that the appellant was not prejudiced in any manner through the omission of the word “Offensive”

in the final analysis we found that the conviction of the appellant herein was not safe and therefore allow the appeal quash the conviction and set aside the sentence herein.

The appellant should be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 18th day of October 2012.

**J. K. SERGON  
JUDGE**

**J. WAKIAGA  
JUDGE**

Miss Maundu for the State

Julius Mutungi - in person.

**J. K. SERGON**  
**JUDGE**

**J. WAKIAGA**  
**JUDGE**