



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NYERI

Criminal Appeal 47 of 2007

CYRUS GACHOHO KAMAU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Being an appeal from the judgment of P. Ngare Gesora, Ag. Senior Resident Magistrate in Senior Resident Magistrate's Criminal Case No. 51 of 2007 at Kangema)*

JUDGMENT

The appellant was charged with the offence of attempted burglary contrary to section 304(2) as read with section 389 of the penal code. The appellant pleaded not guilty to the charge and his trial ensued. It was the state's case that on the night of the 23<sup>rd</sup> day of December, 2006 at Kahuti village in Murang'a district within central province the appellant jointly with others not before court attempted to break into the dwelling house of Stanley Mwangi Karobia with intent to steal therein. The complainant told the court that on the material day he was woken from his sleep by shouts of a person saying, "Mzee mzee fungua." When he went near the window he saw 2 men. One tall and brown and the other one short. He flashed his torch. He saw the tall man wearing a black coat and trouser tucked in his socks. His wife started screaming. When his sons heard them bang the window they also started screaming. The two men then ran away. Later on that day while at Kahuti shopping centre the appellant confronted the complainant telling him that he had heard people saying that he was the one who invaded his home the previous night. The complainant at this juncture recognized the appellant's voice as the voice which called him out and demanded money at the time of the attack. He then made a report at the Kahuti police post. The appellant was thereafter arrested and charged. PW 2, the son of the complainant testified that he was woken up by screams from his parents' house. When he peeped through the window, he saw the appellant who was armed with an object. The appellant ran away when they heard their screams. He said he used to know the appellant before. PW 3 a neighbour testified that he was attracted to PW 1's home by screams. As he was going to the scene, he saw two men running away. He saw one wearing black coat and trouser tucked in socks. PW 4 testified as to how the appellant was arrested, investigations conducted and thereafter the appellant was charged.

When placed on his defence the appellant denied having committed the offence. He gave a defence of alibi. He said he was at the wedding of DW 2 at the alleged time of the crime. DW 2 testified in his favour, saying that the appellant was one of ushers at his wedding.

The trial court having carefully evaluated and considered the evidence tendered found for the prosecution, convicted the appellant and thereafter sentenced him to 5 years imprisonment. It is against that conviction and sentence that the appellant has lodged the instant appeal. When the appeal came up for hearing, **Mr. Orinda** learned Senior Principal state counsel conceded to the appeal on the grounds that the evidence of identification of the appellant was not water tight as to find a conviction. Mr. Gori learned counsel for the appellant agreed, with the position taken by counsel for the state. He however went on to submit that PW 1 and PW 2 had stated that they saw the appellant through the window yet it was at night.

Having carefully read and considered the record of the proceedings before the trial court, I have no doubt at all that the learned Senior Principal State Counsel was right in conceding the appeal on the ground of identification. For a conviction to result on the basis of identification in difficult circumstances, such

evidence must be water tight. *See Maitanyi v Republic [1986] KLR 198.* In the circumstances of this case, I do not think that the evidence of identification of the appellant led by the prosecution met the threshold set out in the aforesaid authority. The circumstances of this case are that the incident took place in the thick of night. Indeed PW 1 stated that it was at midnight when the two raiders came to his home. The two raiders were allegedly seen through the window. One was said to be tall and brown whereas his accomplice was short. The source of light, its intensity and its source in relation to the raiders was not inquired into. It would even appear that the identifying witnesses were peeping through the window in darkness. Much as PW 1 and PW 2 claimed to have recognized the appellant during the incident, they never mentioned that fact to the neighbour who came to their rescue following their screams. Neither did they provide that information to the police in their first report. It should be noted that the police were summoned and came to the scene an hour or so after the incident. One would have expected that if indeed the two witnesses had recognized the appellant whom they knew very well, they would have immediately told the police who came to the scene of their discovery.

This was not to be until, the appellant confronted the complainant at Kahuti market complaining that he had heard rumours doing rounds in the neighbourhood that he was suspected to have been part of the gang that had raided the complainant's home. It is at this stage that the complainant allegedly confirmed from the voice of the appellant that he was among the raiders. It is then that he caused the appellant's arrest. Now was the evidence of PW 1 and PW 2 to the effect that they visually identified the appellant at the scene of crime or was it through voice recognition. Even if it was voice recognition, there is no evidence that the appellant used to talk to these witnesses frequently so as to enable them tell his voice from the others. Thus whichever way one looks at it, the evidence of identification was insufficient to support the conviction. There are doubts in that evidence which the trial magistrate ought to have resolved in favour of the appellant.

In the result, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held

*Dated and delivered at Nyeri this 29<sup>th</sup> day of January 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**