



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

**Criminal Appeal 54 of 2006**

**MILLAH WANJALA MUCHACHA :::::::::::::::::::: APPLICANT**

**=VERSUS=**

**REPUBLIC :::::::::::::::::::: RESPONDENT**

**JUDGMENT**

This is an appeal against Conviction and Sentence from the Judgment of the Principal Magistrate Eldoret in Criminal Case No. 8934 of 2003 delivered on 30th June, 2006.

In the said Case, the accused was charged with 4 counts of robbery with violence contrary to section 292 of the Penal Code.

The accused pleaded not guilty. Upon the trial of the case, the Honourable Principal Magistrate found the Accused guilty as charged in counts 1, 2, 3 and 4. The Accused then filed this Appeal on 6<sup>th</sup> July, 2006. His Counsel subsequently filed a Supplementary Petition of Appeal on 8<sup>th</sup> February, 2007.

We have considered the Petitions of Appeal, the Proceedings and the Judgment. As required of this Court as the first appellate Court and guided by the Court of Appeal case of **OKENO =VRS= REPUBLIC (1972) E.A. 32**, we have reconsidered the evidence/evaluated them ourselves and drawn our own conclusions in deciding the appeal.

We will deal with count 1 and deal with counts 2, 3 and 4 which was dealt with together by the trial Court.

P.W.5 testified that at about 7.30 p.m. he was stopped by robbers near the gate of his house. They had knives, pangas and clubs. They took him inside his house and ransacked the same. They stole from him shs 1,500/= and a mobile telephone. He said that they stayed in the house for one hour. One of the robbers even sat on his bed. They demanded shs 500,000/=. They then took him outside so that he could take them to his business premises.

P.W.1 then started screaming for help. He was cut three times on the head with pangas. He fell down unconscious. He came to his senses at Lugulu Hospital. He was in Hospital for three days.

He said that there was a lantern lamp which was on. He said the accused was the one in charge. He removed his hat at some point. The robbers took long.

We are of the opinion that P.w.5 saw the accused. The robbers stayed in the house for a long time, one hour. There was sufficient light to enable the P.w.5 to have seen the accused. He even stated that he was clean shaven when he removed his hat.

The identification parade was carried out at Lumakanda and P.W.5 picked out the accused person. The parade was carried properly.

With regard to the Second Count, on the same night at 9.00 p.m. at Matete market, P.W.1 who was in his Furaha Bar when a group of men entered. They were dressed in public clothes. They were more than then. When he asked them for their order, he was hit on the head with an iron bar. He fell down and became unconscious. He was bleeding. He was taken to Lugulu Mission Hospital.

P.W.1 did not recognize the robbers who attacked him. He said that later he was shown the accused as one of those who had been arrested. He identified the accused in the dock. He did not give any evidence of any identification parade.

It is our view that P.W.5's evidence did not connect the Accused with the robbery at Furaha Bar. He did not recognize any of the robbers and became unconscious after he was hit on the head. He did not attend any parade in which he identified the Accused.

We therefore find that the Trial Court should not have relied on the evidence of the P.W.1 in convicting the accused.

P.W.2, a bar attendant was at the Furaha bar when at 10.30 p.m. She went to the rear of the bar. While there, she saw men dressed in jungle jackets enter the bar. She thought they were police officers. She went to the bar. She met 5 men. She said one of the robbers hit P.W.1 on the head. She lay down on the floor. The robbers started stealing mobile phones and money. She says they took 30 minutes. She was led to the bar counter which she operated. The gang took some money. There was light in the bar. She saw the accused who led her to the counter.

Later at a parade in Lumakanda Police Station, she picked out the accused as one of the men who had robbed them at the bar. She testified that he had a hat on just like P.W.5 stated.

P.W.2 in cross –examination, she was clear and consistent. She saw the accused. He was wearing a hat. He is the one who led her to the counter and took the money. She saw that he was wearing boots.

P.W. 9 the DCIO Lugari Division conducted the identification parade at Lumakanda Police Station on 7/12/2004. P.W.2 identified the accused. There were 8 persons in the parade. The identification parade was done in accordance with the law and procedure. The Accused duly signed the form.

P.W.3 was the Manager at the Furaha bar. He was in the bar at 10 p.m. on 27/11/2007 when the group of men came in. He said that the men were there for 30 minutes. They beat the customers and asked for wallets, money and mobile phones.

He could not recognize any of the robbers. They had hats and boots on.

We are of the view that the Honourable Court should have disregarded the evidence of P.W.3 with regard to identification. He never claimed that he could recognize the robbers. He did not attend the identification parade.

P.W. 4, was an employee at the bar Furaha Bar. She was serving in the main hall. She went to the counter to get a beer for P.W.1. She found men in jungle jackets in the bar. She was pushed to the rear. She saw one man point a pistol at the boss's chest. Her boss P.W.1 was hit on the head with an iron bar and fell down. The gang then robbed the customers of money and handsets. P.W. 4 was not robbed. She had nothing.

She went to an identification parade at Lumakanda Police station where she identified the accused. He was one of the robbers. She said she saw him in the bar. That there was electricity which enabled her to see him. She said she saw his face and he was armed with a whip.

We find that P.W.4 was able to see the accused. There was electric light which was on in the bar. The accused and his men took at least 30 minutes at the bar premises. This was sufficient time for P.W.4 to have seen the accused and recognize him at the parade. She also testified that the accused was wearing boots similar to those which were produced in Court. The boots were found in the accused's house.

We have read the testimonies of the accused and his two witnesses D.W.2 and D.W.3. We have considered his defence of alibi. They are not water-light. The alleged incident took place on 27<sup>th</sup> November, 2004. None of the witnesses testified that they were with the accused throughout between 25-11-2004 and 29-11-2004 day and night. They did not say that they were with accused on the night of 27/11/2004 and in particular at about 10 p.m. and if so, where.

Having reconsidered the facts and evidence and made our own evaluation, we find and hold that the trial magistrate reached a properly finding in convicting the accused on the basis of the evidence of P.W.2, P.W.4 and P.W.5 besides the other circumstantial evidence. We think that the evidence of P.W.3 ought to have been disregarded and excluded by the trial Court. However, this does not diminish or affect the weight of evidence and the proof of identification – by P.W.2 and 4 & 5 in respect of counts 2, 3 and 4 and P.W.5 in respect of count 1. The possibility of a mistake by any of the said witnesses is removed due to the conducive conditions of the identification and recognition both at P.W.5's house and the Furaha Bar.

We see no reason in interfering with the conviction and sentence passed by the trial Court. We do hereby dismiss the Petition of Appeal by the Appellant.

**DATED AND DELIVERED ON THIS 21<sup>ST</sup> DAY OF FEBRUARY 2008 AT ELDORET.**

**M.K. IBRAHIM,**

**JUDGE.**

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21/2/08

CORAM – M.K. IBRAHIM,

C/C - CHELANGA

MR. MIYIENDA – PRESENT FOR THE ACCUSED

MR. KAIGGAI FOR THE STATE

Judgment delivered duly signed.

M.K. IBRAHIM

JUDGE.

MR. MIYIENDA: We wish to appeal. We appeal for certified copies of judgment and the proceedings.

COURT: The Appellant shall be supplied with Certified Copies of Judgment and proceedings to enable him appeal.

M.K.IBRAHIM,

JUDGE.