



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

**AT MACHAKOS**

**Criminal Appeal 71 of 2006**

**REUBEN MUTUKU KOKA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from original conviction and sentence of the learned Kitui District*

*Magistrate II (Prof.) E.N. Gichangi, Esq in Kitui Criminal Case Number 1511 of 2004 dated 30/05/2006).*

**JUDGMENT OF THE COURT**

1. The appellant herein, REUBEN MUTUKU KOKA was arraigned before the Kitui Principal Magistrate's Court on two counts of burglary contrary to section 304 (2) of the Penal code and stealing contrary to section 279 (2) of the Penal code. He is alleged to have broken into the homes of Morris Mwata Omolo and Joel Kimanzi Kinyali respectively situate within Kitui Municipality on the 5/08/2004 at about 3.00 a.m and stolen therefrom an assortment of goods. The appellant denied the charges and went through a full trial during which the prosecution called six (6) witnesses. The appellant also testified and called one witness.
2. PW1 was MORRIS MWATA, a resident of Kitui town. He stated that on the 4/8/2004, he was asleep in his house when thieves broke into his compound. He said that he looked out of the window and saw about 4 people who told him they were policemen. He said that at the time, both the security light outside his house and the lights inside the house were on and that when the 4 people told him they were policemen, he opened the door for them and they entered. He said he saw the appellant who wore a "kofia" and carried a rungu (club) with which he (appellant) hit PW1 (Morris) as he pushed him around. That as Morris now sat on his bed, the appellant picked up 2 mobile phones make Sagem and Siemens respectively and then left.
3. Morris testified further that as the appellant harassed him, the other thieves were holding Morris' wife (PW2) and demanding money. That those other thieves tried to snatch the T.V. and when Morris tried to stop them from doing so, the appellant hit him (Morris) with the rungu, and again hit him for the third time on the knee. Morris said that he was then ordered to go back to bed and from his bed, he saw one of the thieves pick the trouser (Morris') which he had worn during the day, and in which there was Kshs.3,000/= and also picked up a jacket. Morris said that when the other thieves left, the appellant remained in the house with him. Morris said that he lay in bed on his back so that he was able to see the appellant clearly. He also said that when he (Morris) sought to know who the appellant and his companions were, the appellant, who was standing by the door hit him again with the rungu on the

stomach and warned him not to speak. Morris also said that soon thereafter the appellant ran away when screams came from the neighbours home; and that together with his neighbour Kimanzi (PW3) they went and reported the matter to Kitui Police Station where they recorded their statements.

4. Morris also said that he was injured during the attack and that as a result he was issued with a P3 Form. He also said that he lost his two mobile phones, two trousers and Kshs.3,000/= in cash, plus a jacket. He also stated that he was the one who pointed out the appellant to the police during the arrest though he said he had never seen him before the day of the attack. Describing the attire which the appellant was wearing on the night of the attack, Morris said that the appellant's "kofia" was red and yellow and that he (Morris) was able to clearly identify the appellant because the lights in the house were on. Morris also said that both the "kofia" and the rungu which the appellant allegedly had on the night of the attack were recovered from the appellant's house after the arrest. Morris also said that the appellant wore a yellow shirt and a long jacket which were also recovered from the appellant's during the arrest.

5. PW2 was Coreen Kamene K (Kamene) the wife to Morris. She said that on 4/08/2004 at around 3.00 a.m, she was asleep in her house together with Morris when thieves broke into their home though they had identified themselves as policemen when she asked them to identify themselves. She said that at the time of the attack, the lights inside the house were off, though the security light was on. She said that after the thieves entered the house, they demanded money and mobile phones and the radio that was usually in the house. She said they also carried away the TV and the trouser that Morris had worn in the evening. She said that as the thieves shone their torches around, the light fell on the appellant's face whom she said she had seen before that day. Kamene said that when she tried to look at the other thieves, the appellant hit her on the back of her head and ordered her to go back to sleep with the baby. She also said that the thieves took with them the TV, leather jackets and Kshs.3,000/= that was in Morris' trouser.

6. Kamene also testified that when their neighbours screamed after being attacked, the thieves ran away. Kamene also said that the appellant and his companions were armed with a knife, a panga and another weapon that looked like a gun. Kamene also said that she was able to identify the appellant with the help of the security light that was just next to the bedroom window and which brought in all the light into the house. She also said she was able to identify the appellant with the help of the torch light from the appellants' torches and that she knew the appellant because one of her former house helps was the appellant's sister. In her further testimony, Kamene stated that she was not quite sure whether the house lights were on but said there was much confusion and that she was afraid.

7. PW3 was JOEL KIMANZI K (Kimanzi), a resident of Mosquito Estate in Kitui town. He stated that at about 3.00 a.m on the night of 3<sup>rd</sup> – 4<sup>th</sup> August 2004, he was asleep in his house when he heard a knock at the door and people who identified themselves as policemen asked him to open the door. He said that before he opened the door, he then switched on the house lights and confirmed the time to be 3.30 a.m and that soon thereafter the thieves broke into the house and that the appellant was the first person to enter the house, demanded money and threatened him with death if he did not give the money.

8. Kimanzi said that the thieves carried away electronic goods, among them a T.V. (JVC) Radio Cassette (Panasonic) both valued at Kshs.20,000/=, a JVC Video deck valued at Kshs.6,200/= and wrist watches valued at about Kshs.1,500/=. Kimanzi also said that the whole time, the appellant was standing next to him and warned both Kimanzi and his wife (PW4) that if they screamed, he would kill them and that later he learnt from Morris that they too (Morris and family) had been attacked by the thieves. That Morris was able to identify his TV which was found abandoned, at Kimanzi's gate. That at about 4.00 a.m., Kimanzi accompanied Morris to the police station and made a report. Kimanzi identified the rungu – MFI – 1 which he said the appellant used to hit him and also identified a metal bar – MFI – 2 – which he said was used by the thieves to break the door.

9. In further testimony, Kimanzi stated that no recoveries were made from the appellant's house. He also said that according to him the appellant did not have a mask on the night of the attack and that he gave the description of the appellant with his first report to the police before the appellant was arrested.

10. PW4 was PATRICIA MUTHAKYI, (Patricia) a resident of Mosquito Estate in Kitui town and wife to

Kimanzi. She said that on the night of 4/08/2004 at about 3.00 a.m, they were attacked by thieves who had claimed to be policemen. She said that on hearing a knock at the door, she switched on the house lights before she opened the door for them. She said that when the thieves entered the bedroom, the thieves ordered Kimanzi to get under the bed as they demanded money and mobile phones from her. Patricia said both herself and Kimanzi were beaten by the thieves who later stole some electronic goods from the house. Patricia also said that she identified the appellant with the help of the security lights when she peeped through the window. Patricia also said that she was able to identify the appellant at an identification parade.

11. PW5 was CAROLINE WAMBUA (Caroline) another resident of Mosquito Estate in Kitui town. She stated that at about 3.00 a.m on 4/08/2004, she was in her house breastfeeding her baby when she heard some people talking outside the plot where she lived. She said she peeped through the window and saw four people who were talking in Kiswahili and that soon the four people went to her window, held onto it and ordered her to open the door failing which they would enter by force.

12. Caroline said she carried her baby as she went to open the door and saw the appellant who was armed with a piece of wood which he (appellant) held like a gun. That on entering Carolyne's house, the appellant demanded money and mobile phones. Carolyne also said that she normally left her lights on even as she went to sleep because of the baby. She said that after ordering her to sit down, the appellant left her without stealing anything from her house and without hurting her but that soon thereafter, she heard her neighbours screaming.

13. In her further testimony, Carolyne testified that she had known the appellant for about 3 years before the night in question. She also said that she was personally present when the appellant, who used to work as a hair cutter (Kinyozi) in town was arrested, and that the only items recovered from the appellant's house were MFI – 1 and MFI -2.

14. PW6 was Number 5249 Police Constable Japhet Mulumba of Kitui Police Station. He testified that on 5/08/2004 at about 4.00 p.m, he was on duty at the crime office when he received a report from Morris and others regarding the housebreakings and thefts at Mosquito Estate. He said that after booking the report, he and P.C. Omari accompanied Morris back to the scene where he found Morris' house in disarray. He also said that Morris led him to the appellant's place of work (Kinyozi) from where the appellant was arrested and his house searched. PW6 said he recovered MFI – 1 and MFI – 2 from the appellant's house. These weapons were produced as P Exhibits 1 and 2 respectively.

15. The appellant gave sworn evidence in which he denied committing the alleged offences. He stated that he operated a hair shaving business in Kitui town and that on the night of 4/08/2004, he slept in his house throughout the night after he had gone to bed at 9.30 p.m. He also said that on the following morning, he woke up at about 6.30 a.m and went straight to work. That it was while he was at work at about 7.30 a.m that one person went to the appellant's place of work and told him that they (that person and others) had been disturbed by thieves in the night but that the appellant never bothered to pursue the subject. The appellant also stated that between 8.40 – 9.00 a.m, Morris went to the "Kinyozi" looked around and then went away without saying anything about the alleged theft. According to the appellant, Morris was well known to him because he had been his customer in the past.

16. The appellant stated further that on the 7/08/2004 at around 3.00 p.m, he was arrested from his place of work, taken to his (appellant's) house where they found Solomon Koka (DW2), searched the house but recovered nothing except that the police took away a broken leg of his stool. The appellant denied that P Exhibits 1 and 2 were recovered from his house. He also said that when Kimanzi went to his 'Kinyozi' on 5/08/2004, the appellant did not notice any injuries on him. He also denied that he knew the complainants' houses. The appellant stated that the case against him was a fabrication. At the end of his testimony, no questions were put to the appellant.

17. DW2 was SOLOMON KOKA (Koka) who said that he was an unemployed youth and a resident of Mosquito Estate where he said he stayed with his father. Koka stated that on the night of 4<sup>th</sup> – 5<sup>th</sup>/08/2004, he slept at the appellant's house and during that whole night, Koka never saw his brother rise

till morning and that two days later, the appellant was arrested in the presence of PW3, Kimanzi.

18. In his judgment, the learned trial magistrate set out the evidence of all the six (6) prosecution witnesses and also the evidence adduced by the appellant and his witness. Taking all that evidence into account, the learned trial magistrate was satisfied that the prosecution had established its case on both counts against the accused person beyond any reasonable doubt. The learned trial magistrate was satisfied that the appellant had been positively identified by all the key witnesses who all said they saw the appellant who was armed with P Exhibits 1 and 2 and that there was enough electric and torch light for the proper identification of the appellant. The appellant was eventually found guilty, convicted and sentenced to 2 years' imprisonment on each count, the two sentences to run concurrently.

19. The appellant, being dissatisfied with the whole judgment appealed to this court and set out five (5) grounds of appeal as follows:-

i. The Learned trial magistrate erred in law and misdirected himself when he found that the Appellant was positively identified by the complainants when infact conditions were not favourable for identification.

ii. The Learned trial Magistrate erred in law when he held that the Appellant was subsequently recognized by the complainants at the time of the arrest when infact such recognition was based on mere suspicion.

iii. The Learned trial Magistrate erred in law and in fact in weighing the prosecution case in isolation and disregarded the Appellant's defence which was not controverted and/or challenged by way of cross-examination at all.

iv. The Learned trial Magistrate erred in law in finding that the prosecution had proved its case beyond reasonable doubt when the prosecution case was full of contradictions and doubts that ought to have gone to the benefit of the Appellant.

v. The Learned Magistrate's sentence of two (2) years in each count without an option of fine was too harsh, oppressive and unreasonable in the circumstances.

20. At the hearing of the appeal, Mr Muinde who appeared for the appellant contended that the appellant was not positively identified during the material night since according to him, the conditions for such identification were difficult. Mr Muinde also argued that the witnesses gave different dates as to when the offences were committed and that it was not clear whether the offences were committed on the night of 3<sup>rd</sup> and 4<sup>th</sup>/08/2004 or whether it was on the night of 5/08/2004.

21. Mr Muinde, pointed out that as much as PW2 (Kamene) alleged that she was able to identify the appellant, she also said that she was gripped with fear and that such fear would not have allowed Kamene to identify the appellant to the extent that she said she did. Mr Muinde also submitted that the fact that the appellant was not arrested immediately after the alleged offences also went a long way in demonstrating that the appellant was not positively identified by any of the witnesses.

22. It was further contended on behalf of the appellant that the learned trial magistrate gravely erred in failing to consider the evidence given by the appellant and his witness and further that the contradictory evidence given by the prosecution, most of which evidence Mr Muinde submitted was mere suspicion, did not displace the evidence given by the appellant. It was also contended on behalf of the appellant that the sentence meted out to the appellant was excessive in the circumstances. Mr Muinde cited the following circumstances for the guidance of the court:-

a. Blackstone's Criminal Practice 1997 – Section F 18 as quoted with approval in the case of PATRICK NABISWA vs REPUBLIC Criminal Appeal No. 80 of 1997 – court of Appeal at Mombasa.

b. Criminal Appeal No. 184 of 2002 between JAMES OTENGO NYAROMBE, ALLOYS

23. The appeal was opposed on the grounds that any variance in the dates given by the various witnesses was curable under the provisions of section 214 (2) of the Criminal Procedure Code (CPC) which provides that:-

**“214 (2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof..”**

24. On the question of identification of the appellant, Mr Wang’ondy, submitted that each of the five victims clearly identified the appellant as one of the thieves who terrorized them on the material night and that during the time of the attack, the electric lights in the respective houses were on. Mr Wang’ondy singled out the evidence by PW4 and PW5 who both said that they knew the appellant before and further that PW4 identified the appellant on the identification parade. It is to be noted that apart from what PW4 says about the identification parade, the other witnesses, and in particular PW6 did not tell the court that he conducted any identification parade. Mr Wang’ondy also contended that the two days between the time of the commission of the offence and the arrest of the appellant was not such a long time as to cause any alarm, particularly because, according to Mr Wang’ondy, the matter was still under investigation.

25. It is my duty as the appellate court of first instance to reconsider the evidence and to evaluate it afresh with a view to reaching my own conclusions in the matter – See OKENO vs R (1972) EA 32 at page 36 where the Court of Appeal for East Africa stated as follows:-

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R (1957) EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwal v R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter’s vs Sunday Post (1958) EA 434.”**

26. I have weighed all the evidence on record and have made the following findings. It is not in doubt that on the night of 4<sup>th</sup> & 5<sup>th</sup>/08/2004 between 3.00 a.m and 3.30 a.m, residents of Mosquito Estate in Kitui town were terrorized by a group of gangsters who demanded money and mobile phones and also beat up some of the residents. Among those residents were PW1, PW2, PW3, PW4 and PW5. The gangsters stole some items from the homes of PW1 and 2 and also PW3 and 4, and that apart from a TV that was identified to belong to PW1 and 2, none of the other stolen items were recovered. I have also made a finding that those gangsters were armed with some crude weapons, and according to all the witnesses from PW1 – PW5, the appellant was armed with a rungu which the prosecution produced as P Exhibit 1.

27. I have also made a finding that there is some slight discrepancy as to whether when the gangsters struck, there was light in the house in which both PW1 and PW2 were sleeping. According to PW2, it was only the security light outside their house that was on and remained on throughout the time that the gangsters terrorized them. Neither PW1 nor PW2 said how long the gangsters remained in the house, but PW2 said the only light that enabled her to identify the appellant was the external security light which was close to the window and which brought in sufficient light. She also said that light from the torches which the gangsters flashed around as they demanded mobile phones and cash also provided additional light that enabled both PW1 and PW2 to identify the appellant.

28. Regarding the lighting in their house, PW1 said the lights inside the house were on and also that the security light was on and that those were the lights that enabled him to identify the appellant whom he did

not know before.

29. I have also made a finding that according to PW1, when the other gangsters had taken what they wanted from them (PW1 and PW2) they ran out of the house leaving the appellant inside the house with him (PW1) and that the appellant only ran out after screams came from the neighbours' houses. According to PW3 and 4 however, they said the appellant was in also in their house before they screamed. The question that has arisen is whether the appellant was in the two houses at one and the same time or whether there were screams at two different times during the incident. I have also found that whereas PW1 said the appellant wore a "kofia", PW3 said that the appellant did not have a mask on but it is important to remember that PW1 and PW2 were in different house from the houses where PW3 was.

30. I have carefully reconsidered the evidence on record and given it a fresh examination, bearing in mind that I have not had the opportunity that the trial court had of hearing and seeing the witnesses. It is obvious to me that the appellant was clearly identified by all the witnesses who came into contact with him on the material night; there was PW1 and PW2 who both said there was adequate electric lighting in their house for them to clearly see the appellant. PW1 in particular stated that he had ample time, even after the other robbers went out to other houses, the appellant remained in the house and from his position on the bed, with electric lights on, PW1 was able to see the appellant properly, and so did PW2.

31. I have weighed this evidence against the appellant's defence of alibi, but in my view, the appellant's story of having slept through the night and of how he was eventually arrested was a mere story which is not believable. Although it is strange that the prosecutor did not cross-examine the appellant on his defence, I am not persuaded that that alibi is true.

32. There is also the evidence of both PW3 and PW4 each of whom said that they saw the appellant in their house against bright electric light. PW3 in particular said that after the gangsters knocked and asked to be let into the house, he switched on the lights in his house and confirmed the time to be 3.30 a.m. He said the appellant was the first one to enter and that he stood next to him as he (appellant) warned PW3 and PW4 not to scream lest he should kill them. I have no doubt that there was enough light for visual identification of the appellant by both PW3 and PW4.

33. PW5 said that the lights in her house were on when the gangsters struck. She said she personally opened the door when the gangsters asked her to do so and that on opening the door, she saw the appellant as he demanded money and mobile phones. PW5 also said that she had known the appellant for some three years before the day of the attack, and therefore that it was not difficult for her to identify him.

34. This court is aware of the onerous task placed on witnesses when it comes to identification of persons whom they see for only fleeting moments and even then under difficult and sometimes fearful circumstances. What is at stake in such cases is the accuracy of any alleged identification as opposed to the truthfulness of the witness. (See PATRICK NABISWA Case (above)). I am however persuaded that five witnesses in a row could not all be wrong regarding the presence of the appellant in their respective houses at Mosquito Estate in Kitui town.

35. In the result, I find and hold that the appellant's appeal lacks merit on both conviction and sentence. The same is accordingly dismissed in its entirety.

36. It is so ordered.

Dated and delivered at Machakos this 8<sup>th</sup> day of February, 2008.

**R.N. SITATI**

**JUDGE**