



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang & Dulu, JJ.)

CRIMINAL APPEAL NO.184 OF 2006

BETWEEN

EVANS LIYAI KANDAMBI.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Principal Magistrate Mrs. Muketi dated 28th April, 2006 in Criminal Case No. 7559 of 2005

at Kibera Law Courts)

JUDGMENT OF THE COURT

Evans Liyai Kandambi, the appellant herein, was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). In the charge it was stated that the appellant, on 23rd July, 2005 along Ongata Rongai – Moyar Road in Kajiado District within the Rift Valley Province, jointly with another not before the Court, and while armed with an offensive weapon, namely a kitchen knife, robbed **David Samuel Syuki** of cash in the sum of Kshs.3,500/= and one cellphone Nokia 3100 valued at Kshs.12,500/=, and at, or immediately before, or immediately after the time of such robbery threatened to use actual violence upon the said **David Samuel Syuki**.

PW1, **John Kimani** a Government Analyst, was asked by **Cpl. Richard Kimeu** (PW5) to conduct examination of certain blood stains. Item 1 entrusted to PW1 was a kitchen knife in an envelope; secondly, a blood sample of the appellant herein; thirdly, three pieces of grass leaves sealed in a khaki packet. He examined these items and found that –

The DNA from the blood on the knife and on the pieces of grass leaves matched the blood sample from the appellant herein.

PW2, **David Syuki** who lives in Ongata Rongai, gave evidence that he had gone for supper at his cousin's house on 23rd July, 2005, then at 7.45 p.m. his cousin was escorting him, and they reached a road junction leading to his (PW2's) place at 8.00 p.m. Just as PW2 at this point asked his cousin to go back, he saw a person ahead of him (PW2). This person was walking in the same direction as PW2. Later on the man bent as if to tie a shoe lace, even as PW2 moved closer. But PW2 then looked back and saw a different

person following him. After PW2 passed the person ahead, he looked back and saw that that person had now been joined by the one who had been following behind – and the two were behind PW2 now. PW2 slowed down so the two may pass, and they went past PW2; but some 20ft ahead of PW2, the two men, one tall and the other short, turned backwards towards PW2. The short one went to PW2's left, the tall one to PW2's right; then one of them demanded that PW2 surrender all things in his possession. PW2 now realized the two were robbers. He hit the appellant herein with his piece of meat which he was carrying in a bag, and the appellant answered back by boxing PW2 on the shoulder, while the other attacker hit PW2 from behind. PW2 hit the taller attacker with his fist, and this attacker fell. PW2 was then hit by the shorter attacker who also drew a knife and attempted to stab at PW2. PW2 held this attacker's hand, and in the meantime, the taller attacker forced his hand into PW2's pocket and grabbed Kshs.3500/=, and then PW2's cellphone, Nokia 3100 worth Kshs.9,700/=. PW2 produced the purchase receipt for the said cellphone, which was serial No. 355396004701267 and had sim-card No. 0722-977701; the purchase receipt bore No. 03504. While PW2 was still struggling with the shorter attacker, the other one escaped with his loot. PW2 alerted passers-by, with whom he returned to the *locus in quo* and he recovered his piece of meat, and a hat. He had held on to and retained the knife which the robbers had used. PW2 had bruises, and sought medical attention at Rongai clinic, and later reported the matter to Ongata Rongai Police Station. He surrendered the knife and hat to the Police, and he took Police officers to the *locus in quo*. There was blood on the ground, and the Police officers took a sample. Police officers took PW2 to Kenyatta Hospital where a recently arrested person had been taken; and when the suspect saw PW2 he covered himself up. PW2 told the Police officers this was one of his two attackers. He had not known the suspect before the incident.

On cross-examination, PW2 said he was not the one who identified the appellant herein to the Police, at the time of arrest. He said the attack on him by two robbers had taken place at 8.00 p.m., in moonlight. The appellant herein is the one who had the knife, which PW2 overpowered him and wrenched from him. PW2 said there was good visibility, and he would be able to identify even the second attacker. PW2 said he had not been drunk, and, after getting hold of the knife, he had used it to stab the attacker who was on his left, and that he did this to protect himself. PW2 said he had reported this incident to the Police, but he did not know if the appellant also went to the Police to make a report of the evening incident. When he went to the Police station, PW2 learned that a suspect was confined at Kenyatta Hospital, and he went with the Police and identified that person as having been one of the two evening attackers.

PW3, **Police Constable Benjamin Nzamba** of Ongata Rongai testified that he received no report of the robbery incident on 23rd July, 2005, but did so on the following morning, when the complainant came to say thugs had attacked him the previous night. The attackers had grabbed the complainant's money and cellphone, and he had confronted them and snatched the knife the attackers had.

PW4, Police Force No. 36141 **Senior Sgt. Boniface** was the Duty officer at Ongata Rongai Police Station on the evening of 23rd July, 2005. While patrolling the area at about 12.00 mid-night, PW4 met three people at a bus stage. He thought these people were drunk, and he stopped them; and they then said the appellant herein (who was one of the three) had been attacked by thugs. PW4 took the appellant herein to the Police station, and then to Kenyatta National Hospital; the appellant had a stab wound on the left side of his body. On the following day, the OCS received a report from PW2 herein, who came along with a knife and a cap. PW2 reported that he had stabbed a robber the previous night; and now, PW2 took PW4 to the alleged scene of the robbery attack. PW4 found blood at the scene, and took samples. This blood sample was examined, and the conclusions led to a charge being laid against the appellant herein.

On cross-examination, PW4 said that when, on 23rd July, 2005 he had found the appellant herein being held by two people, these two people said they were taking him to hospital; but it is PW4 who insisted that a report be first made at the Police station. PW4 said he had met the appellant herein purely by chance, as the appellant had been taken by those assisting him to a place called **Gatina**, and not to the Police station. The appellant did not tell PW4 who his escorts were, and PW4 had at that stage not suspected the appellant of having been involved in robbery.

PW5, Police Force No. 38954 **Cpl. Richard Kimeu** testified that on 24th July, 2005 the complainant had led him and fellow-officers to the *locus in quo* where, at a Y road junction, one road leading to Keya and

another to **Gataka**, he found blood on fallen leaves and on the soil. He took samples of the soiled leaves and grass. He took as exhibits the knife and blood, filled in exhibit memo forms, and delivered the same to the Government Analyst.

PW6, **Dr. Zacharia Kamau**, testified that he had examined PW2 who said he had been assaulted, and found a scar on the front part of the right index and middle finger. This examination took place 5 months and 19 days following the said assault. In PW6's assessment, the injuries were caused by a sharp object. The witness classified the degree of injuries as harm, and he produced the medical-reporting P3 form which he had prepared.

The appellant herein chose to give unsworn evidence, and said that on the material day he had been shopping, but when he was returning home, there were people who demanded money from him; these people stabbed him and asked him to go away, without looking back. He then was going to the Police station, but met Police officers on patrol. He said he knew nothing about the case brought against him.

The learned Principal Magistrate thus assessed the evidence, before entering her verdict:

“[The complainant] was credible and consistent in his evidence. He did report the matter to the Police the following day. This means he was truly accosted. He even led the Police to the scene of the robbery. Was the accused person framed? Had he been accosted and then framed? The answer is no. The accused was injured in the course his attempting to rob the complainant. The complainant is a six-footer whereas the accused is of small build This explains why it was not difficult for the complainant to overcome the accused. The other assailant ran away.

“The accused's conduct cannot be said to be consistent with innocence. His friends were taking him to a clinic [but he was reluctant to report the matter at] the Police station [first]. This was many hours after he sustained [the] injuries.....His defence....., even though he was under no obligation to prove anything, did not cast any doubt on the prosecution evidence”.

In his grounds of Appeal, the appellant contended that he had not been properly identified as a suspect; and that his evidence was wrongly rejected. He elaborated these contentions in submissions both written and oral. He urged that at the material time, there had not been enough moonlight, and that the complainant had failed to state whether the moon itself was in the east or in the west; nor stated where the robbers had come from. The appellant contended that when the Police had found him being escorted on the material night, he was heading towards the Police station, yet “no thief can steal, and then go to the Police station”.

Learned State Counsel **Mrs. Gakobo** contested the appeal, and urged that conviction and sentence be upheld. Counsel urged that the appellant had been well identified, at the *locus in quo*: by PW2's testimony the offence took place at about 7.45 pm, in bright moonlight; he clearly saw that the appellant had a knife, and he overpowered the appellant, snatched the knife and delivered a stab upon the attacker with the same; the complainant reported the matter to the Police, and identified the appellant as the suspect. The Government Analyst's laboratory tests confirmed that the blood at the *locus in quo* and on the knife recovered, was the blood of the appellant – and this confirmed the veracity of the complainant's evidence.

Counsel contested the claim by the appellant that his constitutional rights were infringed, because he was not brought before the trial Court within 14 days of arrest. Counsel urged that although the appellant was arrested on 24th July, 2005, but produced in Court only on 2nd November, 2005, there was some explanation, in the form of records showing he was at Kenyatta National Hospital from 24th July, 2005 to 30th October, 2005.

We have carefully considered the evidence in this case, and we have not found the claim of delayed prosecution justified, especially in view of the fact that the appellant was in hospital for sometime following the robbery incident.

We also find the complainant's evidence to be focused and highly credible, on the circumstances in which the robbery attack had taken place. We rule out the possibility that visibility was poor, so that mistaken identity could have been the basis of the conviction of the appellant herein. We do so in particular as we take notice that there is uncontroverted evidence it was a moon-lit night; and we note that the complainant, by his credible evidence, was able to see small items such as the knife which the appellant had, to snatch it, and to aim it at a specific spot in the appellant's body, disabling the appellant and rendering him liable to easy arrest soon thereafter. That, we take judicial notice, could not have been a night of poor visibility, and we hold that the complainant fully perceived and identified the attacker.

Such a scenario of accuracy in the identification-evidence, is completed with the blood analysis done by the Government Analyst. How did the appellant's blood come to be on the knife snatched by the complainant at the *locus in quo*? And how could the appellant's blood come to be found at the *locus in quo*? There is only one answer: the appellant was one of the two robbers-with-violence who had attacked the complainant on the material night.

We find the trial to have been properly conducted, and the appellant to have been rightly convicted. We dismiss the appeal, uphold conviction, and confirm sentence.

Orders accordingly.

DATED and DELIVERED at Nairobi this 4th day of March, 2008.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Huka & Erick

For the Respondent: Ms. Gakobo

Appellant in person