



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

Criminal Appeal 75 of 2006 & 174 of 2007 (Consolidated)

ELIAS MURIITHI MURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO.174 OF 2007

DEDAN KIMATHI MUTUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Criminal Appeal No. 75/06 and 174/2007 are consolidated.

In this appeal Dedan Kimathi Mutugi and Elias Muthii Mutinda were arrested with others and charged with the offence of Burglary contrary to Section 304 (2) and stealing contrary to Section 278 (b) of Penal Code. They were tried and sentenced to serve each five (5) years imprisonment in each limb. Sentences to run concurrently. The first Appellant Dedan Kimathi grounds of appeal are that sentence of 5 years imprisonment was excessive where offence was not proved and that the evidence of identification was not truthful being as it was surrounded by doubts and that the Trial Magistrate failed to consider the grudge between the appellant and complaint and that the Trial Magistrate shifted the burden of proof on the appellant and that the sentence was harsh. Elias Muriithi 2nd Appellant complained that the complainant did not produce any receipts for the stolen goods and that the complainant told lies to court.

The prosecution evidence was led by PW1 James Njenga Mbogo. On 3.9.2005 at 4 a.m. he was inside his house asleep. Suddenly he heard some moments outside. He saw light through the bedroom widow. He woke up his wife he heard voice call out “Mwalimu fungua” “mwalimu una Kimwa.” One we break into they would do to her all the evils in this world” After sometime PW1 heard a voice shouting thieves! thieves! people were running towards the gate . Another voice said “Turudi” Then screams for the neighbour. They were informed that thieves had left. They opened their home. So they never saw the robbers. But they were told by their son that he saw thieves and they were Dedan Kimathi and Elias Muriithi. They were his classmates at Kathaka School ant they were neighbours. In the

morning the PW1 went to report to the police station. They did not go with police to identify the suspects. A radio Sonitec was taken, they took Anti-Jan Key. The police collected times broken glass outside the house. PW1 said he did not see the robbers but the night was very dark. Torchlight could pass light through the curtain. He could not identify voice of 3rd Accused. PW2 saw torch light 4 men. He was able to identify 1st and second accused they went to school together in 1991. He then started raising alarm. This scene must have been outside the PW1's house. Then the robbers left. Further opened his house and they were outside there looking for damages. PW2 identified PW1 and PW3 gave evidence Millicent Wabira Mbogo she heard people outside who demanded money but she did not see them it was about 4 men. She insisted she identified Dedan Kimathi because they had torches and also she was informed by her son that Dedan Kimathi was among the robbers. There was no external security lights. She said she had known attackers before.

PW4 was the other son of the complainant. He left his home and went to a maize shamba and kept still until he saw the face of 2nd Accused there were other men. They passed him and later he heard neighbour Mary shouting for help. His mother told him that she saw 1st Accused and that they had gone with a small radio. He added that the 1st accused 2nd accused and 3rd accused were men well known to him. Patrick said he did not see 1st Accused that night although he was known to him.

On cross-examination he said the radio handle belonged to his family he had seen it before. He did not see 3rd Accused that night.

PW5 Mary Wangari Mwangi was a neighbour who came for help. She testified that she heard commotion and that the son of PW1 had come to her house to seek help and that they went to the scene but she did not find the robbers. She observed that the windows of the house were shattered. On cross-examination she said she knew the accused but did not see them that night.

PW1 police officer to whom the report was made said that the complainant told him that one of his sons had identified some suspects. In fact he testified that he had identified only one. He visited the scene some window panes were smashed. The complainant's son led the police to the home of 2 suspects who were arrested. The son also identified 1st and 2nd accused. The officer said he knew all the suspects as they resided in the area of Mutomo Police Post after close of prosecution evidence only the two appellants had a case to answer the other two were acquitted. Both Appellants gave unsworn statements and denied the charge.

On the issue of identification, it was dark night, there was no outside security lights. The light available was torch light with the robbers torches. The complainant never got out of the house. Until they were informed the robbers had left. They were told his son Muriithi that the first Accused was seen because they used to school together. The voices heard by the witnesses were not identified as being of any of the robbers. The only witness who could have seen the robbers was PW2 (son) but he said light was torch light reflected by wall. I would say that the circumstances surrounding identification were difficult.

The offence of housebreaking and burglary is provided for under Section 304 (2) this having entered any building etc used as a human dwelling with intent to commit a felony therein or having committed a felony. In any such building etc etc breaks out thereof is guilty of the felony termed house breaking and is liable to imprisonment for 7 years. And if the offence is committed at night it is burglary and the punishment is 10 years imprisonment. In this case there is no evidence of breaking in or out. The robbers did not enter the dwelling house. The evidence of stealing is that a handle of a Sony Radio was found by the window and some broken glass were found on the ground. The stolen Radio was not found with the accused although their houses were searched within a period of about 2 hours after the event and the complainant had nothing to identify the same stolen goods.

In the circumstances it is my finding that the identification evidence was not satisfactory and the evidence does not support the conviction of the charge as charged. I find the prosecution did not prove its case beyond reasonable doubt. I allow the appeal, quash conviction and set aside sentence. The Accused

persons shall be set at liberty forthwith unless otherwise lawfully held.

Dated this 28th April, 2008.

J. N. KHAMINWA

JUDGE

28/4/2008

Khaminwa- Judge

Njue- Clerk

Mr. Omwega for state

Two Appellants present in person

Read in open court.

J. N. KHAMINWA

JUDGE