



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang & Dulu, JJ.)

CRIMINAL APPEAL NO. 69 OF 2005

BETWEEN

REUBEN MURIITHI M'KIRERA.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

*(An appeal from the judgement of Senior Resident Magistrate Ms. Muchira dated 26th January, 2005
in Criminal Case No. 1628 of 2004 at Kibera Law Courts)*

JUDGEMENT OF THE COURT

The charge brought against the appellant herein was robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, while in the company of others not before the Court, on 21st February, 2004 at Ongata Rongai Township in Kajiado District, in the Rift Valley Province, and while armed with dangerous weapons, namely crowbars, robbed **Japheth Karani** of cash in the sum of Kshs.10,000/=, two packets of maize-meal, and 1kg. of sugar, all valued at Kshs.10,290/=, and at, or immediately before, or immediately after the time of such robbery, wounded the said **Japheth Karani**.

PW1, **Japheth Karani Isimia**, a mason living at Ongata Rongai, testified that he was asleep in the company of his wife, **Rebecca Wangechi** on 21st February, 2004 when, at 11.30 pm, he was awakened by knocks on the door. When he opened the door, he recognized the voice of a neighbour, **Reuben Muriithi** who, however, did not say what he wanted. There were other people as well, on the outside; PW1 saw five of them in the moonlight. Among the several intruders, it was PW1's evidence that he recognized **Reuben Muriithi** and **Mugo Muriithi**, who were carrying clubs. These two, PW1 testified, forced him outside and battered him; the appellant herein hit him on the left of his head, including his left ear, with a club. They also hit PW1 on the mouth, while the other members of the intruder-gang hit him all over, and kicked him in the ribs. The intruders, before breaking into the house, were demanding money; and PW1 told them he had kept his money under the bed. The intruders entered the house, and forced PW1's wife to give them Kshs.10,000/=; and they took foodstuffs, as well as 1kg. sugar. After raising alarm but getting no help, PW1 went to Ongata Rongai Police Station to make a report, and to seek medical attention. On the same night, the appellant herein was arrested when he went to the Police station to make his own report against PW1.

On cross-examination, PW1 said the gang of five intruders which made the robbery attack had included the appellant's brother, who had run away following the attack. PW1 said he had reached the Police station ahead of the appellant herein, and this was in the night. PW1 said the appellant had appeared drunk at the material time, but still could recognize PW1, as he referred to PW1 by name.

PW2, **Rebecca Wangeci** was asleep with her husband (PW1) on 21st February, 2004 when, at 11.30 p.m., she heard someone calling from the outside, demanding that the door be opened. She sensed immediately that it was the voice of **Muriithi** (appellant) who lived across the road, opposite PW1's and PW2's house. As PW1 did not allow the appellant to enter, the appellant forced the door open, and entered, alone. The appellant then dragged PW1 outside; and immediately, PW2 heard the voices of several persons outside. When PW2 tried to get outside, one of the intruders cautioned her to be quiet; and in the meantime, the intruders were battering PW1 on the outside. PW2 said she had known the appellant for about a year, and "knew him by voice."

It was PW2's testimony that the appellant entered her house and lit the hurricane lamp, as he demanded money which was said to be kept under the bed. This source of light, PW2 testified, enabled her to see "the accused properly"; it also enabled PW2 to see a second intruder who, however, was not in Court. While the two intruders searched the bedroom, their accomplices who had remained outside, took off. In the meantime, PW1 had been detained outside and battered by the intruders. PW2 did not see the appellant herein bearing any weapon, other than a piece of wood. PW2 later found out that PW1 had been injured, and was bleeding on the head. It was PW2's testimony that there had been no disagreement at any time between PW1 and the appellant herein.

On cross-examination, PW2 said that she had been able to verbally address the appellant, by name, at the material time. She had urged the appellant: "...**Muriithi**, go sleep; what's wrong?" PW2 said the appellant, at the material time, had even identified himself by name, when he asked for PW1 to open for him. The appellant had entered the house, and then dragged PW1 outside; and PW2 had screamed when the appellant was beating up PW1, and one of the intruders had then admonished PW2 to keep quiet.

PW3, Police Force No. 61095 **P.C. Josphe Munguti** of Ongata Rongai Police Station, while on duty on 22nd February, 2004 checked the Occurrence Book, and found the record relating to the attack upon PW1. PW3 then called PW1 and initiated investigations into the incident. PW3 received the report that the attack on PW1 and PW2 had taken place on 21st February, 2004 at about 1.00 a.m., and their money and items of food had been stolen. PW3 visited the *locus in quo*, and found that PW1's door had been broken. The attackers had escaped, and were not found. PW1 had been injured on the face. PW3 was able to arrest only the appellant herein.

To the appellant's cross-examination, PW3 answered that he had found the appellant already arrested, which arrest took place when the appellant himself came to the Police station. The appellant had his own matters when he came to the Police station, and found PW1 already there, for the purpose of reporting the night incident.

PW4, **Dr. Z. Kamau** of the Nairobi Area Police Surgery, had examined PW1 on 1st March, 2004 when PW1 presented with a history of assault. He found that PW1 had healed bruises on the left face and left forehead. This was nine days after the alleged assault, and PW1 told PW4 that he had difficulty hearing with his left ear. PW4 found that the said injuries had been caused by a blunt object, and treatment had already been administered at Rongai clinic. PW4 classified the injury as harm, and he duly filled in the medical-reporting, P3 Form.

When put to his defence, the appellant made an unsworn statement in which he said he had done his regular work as a stone-mason, throughout the material date. When he left his place of work, he was paid his wages for the week; he then passed through his home and left there the sum of Kshs.1000/=, and went out with a similar amount. He was going to scout for a masonry job for the ensuing week, and he waited for the potential employer up to 8.30 pm. He then passed through a certain Unity Club, where he remained drinking, until 12.00 midnight. The appellant said he then took a taxi, and had an argument with the taxi-man over change- money; the taxi-man defrauded him of his money and then landed a

punch on him and dismissed him as a drunkard. It is that incident, the appellant said, that brought him to the Police station where he found PW1 reporting on the robbery of the material hour – and the appellant was promptly arrested.

After reviewing the evidence, the learned Magistrate thus stated:

“On the material night, both these prosecution witnesses [PW1 and PW2] said when their house door was knocked [the] accused spoke up, and both recognized his voice. The accused entered [the house], dragged PW1 outside, and, with others, beat him up. PW1 said he saw them armed with a *rungu* [club]. PW2 said [the weapon was] a piece of wood. The charge sheet reads, a crowbar. I find this erroneous, as these two witnesses did not refer to [the weapon borne by] the robbers as a crowbar. I shall however deem such error typographical, and not fatal to the charge. PW1’s evidence is corroborated by PW2, regarding the identity of the accused person. Not only did they recognize his voice at 11.30 p.m., but as PW2 said, the accused himself later entered the house [and] lit the hurricane lamp to look for money under the bed as [advised] by PW1. With the accomplices, the accused stole the foodstuffs and money from PW1. It is no coincidence that later, PW1 found the accused at the Police station trying to circumvent justice, by feigning his own being a victim...”

“PW2 said clearly she saw [the] accused beating up PW1. The Police doctor PW3 confirmed that parts of PW1’s body were injured, just as was specified in the charge. I have therefore no doubt that the prosecution has proved PW1 was wounded by the accused person during the robbery.”

The learned Magistrate found the defence proffered to carry little weight, and concluded that the prosecution case had been proved beyond reasonable doubt. She convicted the appellant herein, and sentenced him to death as prescribed by law.

In his grounds of appeal the appellant contended that he had not been positively identified as a suspect, given the fact that the incident took place at night; that the charge was not proved to the required standard; that the trial Court erred in fact and in law in rejecting the defence case.

The appellant developed these points in written submissions which constituted the main part of his appeal statement.

Learned State Counsel **Mrs. Kagiri** opposed this appeal, submitting that the offence had taken place on a moon-lit night, and in that state of lighting, PW1 had noted that two of the intruders entered his house and forced him out and beat him up, during which time the voice of the appellant herein betrayed itself. It was urged that PW1’s evidence was corroborated by that of PW2 who was in the house while PW1 was being forced out. Like PW1, PW2 gave evidence that she had recognized the appellant’s voice at the time of committing the crime.

Counsel urged that PW2 had perceived the appellant the better still, when the appellant re-entered the house for the purpose of stealing the complainants’ money, and that to facilitate the theft-enterprise, he, the appellant, lit the hurricane lamp to light up the place where the money lay – and this act illuminated his own face, which PW2 then visually perceived.

The evidence of PW2 during cross-examination, counsel noted, had shown that there had been a conversation between her and the appellant herein, and that the same touched on the identity of the appellant.

Mrs. Kagiri urged that the circumstances were favourable to the identification of the appellant as suspect, by way of the visual faculty. Counsel recalled the testimony of the Investigation Officer, who had visited the *locus in quo* and had confirmed the door to PW1’s house to have been broken.

Learned counsel submitted that the appellant and his fellow-intruders had used violence upon PW1 before robbing PW1 of money and food, and that this evidence was consistent and corroborated.

We believe the trial Court to have been impressed with the demeanour of both complainants as witnesses, but was not able to believe the *alibi* defence put forward by the appellant. We do not doubt PW2's evidence that the appellant after getting word on the location of the complainants' money, lit a lamp to illuminate the same; and this enabled PW2 to identify the appellant. This evidence of visual identification, for the reason that it could, especially at night, be unreliable, is confirmed through corroboration. Both PW1 and PW2 heard the appellant's voice which was familiar, and besides, he had identified himself at the time he was asking the complainants to open the door. We hold, in these circumstances, that there is firm and corroborated evidence of identification; and that the appellant herein was one of the robbers at the *locus in quo*. It is not in doubt that a robbery took place, executed by the appellant and his associates. It is immaterial, in our view, that the weapon of robbery was not accurately described in the charge sheet; without doubt, an offensive weapon of a blunt design, was used to inflict harm to PW1 at the time of robbery. Besides, the mere fact of plurality of the robbers, as was here the case, was sufficient in law to constitute the attack as robbery with violence. We are in agreement with the trial Court that the appellant had raised no defence such as would raise doubts in the burden of the prosecution case.

Consequently, we dismiss the appellant's appeal; uphold the conviction; and affirm the sentence imposed by the trial Court.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 14th day of April, 2008.

J.B. OJWANG

G.A. DULU

JUDGE

JUDGE

Coram: Ojwang, & Dulu, JJ.

Court Clerks: Huka & Erick

For the Respondent: Mrs. Kagiri

Applicant in Person