



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
CRIMINAL APPEAL 245 OF 2006
ROBERT EKAI MARTIN.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

ROBERT EKAI MARTIN, the Appellant was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge against him were that on 16th July 2005 at Kimakia estate Njoro within Nakuru District of Rift Valley Province jointly with others not before court, while armed with offensive weapons namely iron bars, arrows, pangas and runigus, they robbed Michael Macharia Karanja of cash of Kshs.4,500/- and an assortment of shop goods valued at Kshs.7,088/- and at or immediately before or immediately after the time of that robbery they used actual violence to the said Michael Macharia Karanja. The appellant pleaded not guilty, but after trial before the Senior Resident Magistrate at Nakuru he was convicted and sentenced to death. He has now appealed to this court against that conviction and sentence and listed 8 grounds of appeal which raise three main points. The first one is that the Appellant was not properly identified as one of those who robbed the complainant the second point is that the learned trial magistrate erred in convicting him on contradicted evidence and the third one that the learned trial magistrate did not give his defence the serious consideration it deserved.

Arguing the appeal before us, Mrs Mbeche for the Appellant submitted that for the evidence of visual identification to sustain a conviction, it must be watertight. In her view the evidence of identification in this case was far from meeting that standard. She submitted that there was no light in the complainant's shop and the light shone from the spot lights which the robbers had, was not directed to the appellant to have enabled PW1 and PW2 identify him. Moreover, she further argued, no identification parade was conducted for the witnesses to identify the appellant as one of the robbers. She also argued that the prosecution evidence was contradictory. While PW1 at one stage said that the Appellant had a bow and arrows, she said that he later on said those weapons were found in his house. Regarding the Appellant's defence, she submitted that he had raised an alibi which was not dislodged and urged us to allow the appeal.

On his part Mr. Mugambi, learned state counsel, urged us not to disturb the Appellant's conviction as it was based on overwhelming evidence. He further argued that there was no need of an identification parade as this was a case of recognition. PW1 and PW2 knew the Appellant previously for three years and with the aid of the light flashed from the robber's torches they were able to see him clearly. He said

that when the complainant and his neighbours went to the deceased's home they found him hiding under a bed in a house that had been locked from outside. He submitted that that conduct of the appellant points to his guilt.

We have anxiously considered these submissions. The lower court record was poorly done and parts of it are almost incomprehensible. However, having carefully read the whole of it the prosecution case is that during the morning of 17th July 2005 at about 3.00 a.m. while the complainant, Michael Macharia Karanja, PW1, and his nephew, Peter Wanjogu Kanyoni, PW2, were sleeping in the former's shop at Kimakia, Njoro they were awakened by bangs on the door and soon thereafter a gang of about 8 people armed with crude weapons stormed into the shop and ordered them to lie facing down. They robbed PW1 of cash of Kshs.4,500/- and ransacked the shop. As they did that they flashed the torches they had and the two witnesses testified that they were able to identify the appellant, a neighbour, whom they knew as Ekai alias Kijana and another by the name Fisi Munyonge. PW1 and PW2 decided to challenge them and the robbers fought them back injuring PW1 on his shoulder and PW2 on his private parts. They raised an alarm, the robbers vanished, but they gave their names to the neighbours including PW3 who responded to their distress call and went to the scene.

The neighbours together with PW2 went to the home of the appellant and found his house, which he shared with his mother and siblings, locked from outside. They called the appellant but a female voice answered and informed them that he was not in. When they threatened to call police and break into the house, Appellant's younger brother came out through the window and opened the door. On going in, they found the appellant hiding under the bed. He was armed with an iron bar, three arrows and a bow. They arrested him and took him to the police station. He was later charged with robbing PW1.

Upon being called upon to defend himself, the Appellant gave an unsworn statement and denied knowledge of the robbery. He said this was a trumped up charge orchestrated by PW1 with whom he had quarrelled over change which PW1 had refused when he had bought some things from his shop on 20th May 2005. He called three witnesses who said they did not know where he was at the time of the robbery. Their evidence was mainly on his arrest by the neighbours.

After careful consideration of the evidence on record, we are satisfied that the Appellant was among the gangsters who robbed PW1 in the early hours of 17th July 2005. Although the complainant's house was dark at the time of robbery, PW1 and PW2 stated that the robbers had bright torches which they were flashing around and that enabled them to see the Appellant and one of his confederates, Fisi Munyonge. As we have stated those witnesses gave the appellant's name and that of one Fisi Munyonge to the neighbours who answered their distress call immediately after the robbery. On going to Appellant's home they found his house locked with a padlock from outside, and it was not until they threatened to call police and break in that appellant's brother came out through the window and opened the door. When they went in they found the appellant hiding under the bed. Before that a woman who was in that house denied his presence.

That is not the conduct of an innocent neighbour. The appellant's own witness, Maurice Ekwani, DW2, responded to the complainant's distress call and went out with the other neighbours and chased the robbers who disappeared into Ngongonger farm. In the cases of **Malova Vs Republic [1980] KLR 110** citing the Ugandan case of **Terikah Vs Uganda [1975] EA 60** the Court of Appeal held that the conduct of an accused person escaping from the scene of crime was indicative of his guilt. In this case the conduct of the appellant hiding under the bed and instructing his relatives to say he was not in, corroborated PW1 and PW2's testimony that he was one of the robbers.

The appellant's allegation of a grudge between him and the complainant over a quarrel they had on change about two years previously is simply inept and cannot hold. Even if there was any such a quarrel it could not have been the basis of a criminal charge as serious as this one and the trial magistrate was right in rejecting it. Counsel for the Appellant contended that the Appellant had given an alibi but we cannot see any from the record. The appellant was found in his house soon after the robbery and he did not claim to have been anywhere else at the time of the robbery. As we have stated his conduct was suspicious and from the totality of the evidence on record we are satisfied that he was among those who

robbed the complainant. We therefore dismiss his appeal.

DATED and delivered at Nakuru this 11th day of December, 2008.

M. KOOME

JUDGE

D.K. MARAGA

JUDGE