REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 564 OF 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 20786 of 2003 of the Chief Magistrate's Court at Makadara (J. M. Gandani (Mrs.) – SRM)

JULIUS MUINDI KIMUYU…...……..……..……..APPELLANT

VERSUS

REPUBLIC…… ……....……....RESPONDENT

CONSOLIDATED WITH

565 OF 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 20786 of 2003 of the Chief Magistrate's Court at Makadara (J. M. Gandani (Mrs.) – SRM)

JAMES MUITA WANJA Alias JULIUS NJOROGE…....…..APPELLANT

VERSUS

REPUBLIC…… ……..……....RESPONDENT

J U D G M E N T

The two Appellants **JULIUS MUINDI KIMUYU** and **JAMES WANJA alias JULIUS NJOROGE** were charged with **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code**. They were found guilty and convicted with both counts and sentenced to death. Being aggrieved by the convictions and sentences they filed these appeals which we have consolidated since they arise out give same trial.

The Appellants have raised similar grounds of appeal in which they challenge the convictions on the basis of identification on which they said was not safe having been made in difficult in conditions and for the undue consideration of their defences.

The facts of the case were that the Complainants were walking home together at 8.00 p.m. when they were confronted by six people. Each of them was surrounded by three of them and robbed. The 1st Complainant was robbed of a siemens phone which was never recovered. The 2nd Complainant was robbed of a hand bag with cash Ksh. 230/= which were recovered at the scene. The arresting officers

included PW3. The others were not called as witnesses. PW3's evidence was that he and his colleagues were on patrol duties when they heard screams and then chased people who were running and arrested two of them. He identified the two as the Appellants. He said that nothing was recovered from both but the 2nd Complainant's handbag was picked from the ground nearby.

The Appellants acted in person while Miss Gateru, Learned State Counsel represented the Respondents.

We have carefully considered these appeals and have analyzed, evaluated afresh all the evidence adduced before the lower court giving due allowance for not having seen or heard any of the witnesses. See **OKENO vs. REPUBLIC 1972 EA 32**.

Miss Gateru opposed the appeal and submitted that the evidence adduced by the prosecution proved the case against both Appellants as required. Learned Counsel submitted that the Appellants were positively identified by the witnesses and that the circumstances of lighting at the scene were good for positive identification.

We have examined the evidence to see the conditions under which the Appellants were purportedly identified. All three prosecution witnesses admit that the scene of the incident was dark. It was 8.00 p.m. and the sun had long set. The three witnesses do not talk of any natural light. They each spoke of street lights which they said were at least 300 metres away. In the case of **MAITANYI vs. REPUBLIC [1986] KLR 198** the Court of Appeal stated: -

"***It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not careful test if one of these matters are unknown because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards it now becomes the great burden of senior magistrate trying cases of capital robbery to make these inquires themselves."***

In the learned trial magistrate's finding the Court found at page 3 of judgment thus: -

"***From the above, it appears that PW1 was able to identify the 1st accused when he was taken tot hem after he was arrested, he also said that the 2nd accused was arrested together with 1st accused. He said during the robbery the 1st accused had been armed with a knife. PW2 did not know who robbed her but saw the accused persons here being caught 8 metres away.***

I therefore find that the 1st accused was positively identified by the 1st prosecution witness and PW2 saw him being arrested."

No observation was made anywhere in the learned trial magistrate's judgment as to the nature, extensity of the light or its distance from the robbers at the time the offence was being committed. The clear evidence of PW1 was that he could identify the 1st Appellant because he came face to face with him during the robbery. That face to face, if it occurred at all was at a dark spot and therefore it is not clear how PW1 was able to see the man who faced him. On the other hand PW3's evidence was he and his colleagues chased people who were running away from the directions of screams they heard. Neither PW1 nor PW2 said they screamed. In any event, the 1st Appellant's defence was he started running because of hearing screams and since he knew the scene was not safe. The 1st Appellant's defence was not shaken at all by the prosecution since PW1 who was the single identifying witness who testified against him saw the 1st Appellant under difficult circumstances. In the circumstances the possibility of error of mistake in identification cannot be ruled out.

As for the 2nd Appellant no one identified him as one of the robbers. He was not found with anything

that could connect him to the robbery. He was convicted by the trial court merely because "PW2 saw the accused persons being caught 8 metres away." That was a dangerously erroneous conclusion to make. The 2nd Appellant gave an alibi defence that he was never at the scene of incident. He was caught at a bar for an unrelated incident. At the Police Station there was confusion of names and that was how he was charged with this offence. That alibi defence was watertight. The legal principle applicable is that once an accused has advanced an alibi defence all that is required is for it to raise reasonable doubt as to the strength of the prosecution case against him. See **PETER NJUGUNA MURIU vs. REPUBLIC [1982-88] 1 KAR 376**

In this case the prosecution against the 2nd Appellant was totally weak. In the circumstances the Appellant's alibi defence was unshaken and dislodged completely the weak prosecution case against him. The 2nd Appellant was entitled to an acquittal in the circumstances. Having considered these appeals we are of the unanimous view that the circumstances of identification were wholly unsafe and it ought not to be allowed to stand. We therefore allow the appeals, quash the convictions and set aside the sentence.

The Appellants should be set at liberty unless they were otherwise lawfully held.

Dated at Nairobi this 19th day of April 2007.

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LESIIT, J.

JUDGE

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DULU

JUDGE

Read, signed and delivered in the presence of;

Appellants present

Miss Gateru for the Respondent - absent

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

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DULU

JUDGE