REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Criminal Appeal 37 of 2004

MARTIN MUGAMBI KARINDI…….APPELLANT

V E R S U S

REPUBLIC…….....…….RESPONDENT

(Being an appeal against both conviction and sentence in

Cr. Case No. 263 of 2003 in Senior Resident Magistrate's Court

Before Hon J. OMBURAH, Senior Resident Magistrate, Dated 29th March November 2003)

J U D G M E N T

1. The Appellant Martin Mugambi Karindi was the accused in Meru CM's Court Criminal Case No. 263/2003. The particulars of offence were that he had committed robbery with violence contrary to s.296(2) of the Penal Code and that "**on the 19th day of May 2002 at Kathama Kaindi Village in Kianjai Location, Meru North District within Eastern Province jointly with others not before the court while armed with offensive weapons to wit axes and knives robbed James Kinoti Ithula of cash Ksh.20,000/-, one crate of soda, four bundles of cigarettes, seven pairs of dry cells and seven loaves of bread all valued at Ksh.22,440/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said James Kinoti Ithula."**

2. The prosecution called five (5) witnesses and at the end of the trial, the learned trial magistrate found that the evidence against the accused was credible and sentenced the Appellant to suffer death as by law established. The Appellant was dissatisfied and preferred this Appeal and the grounds as set out in the Petition of Appeal are;

1. "That the learned trial magistrate erred in both law and fact by failing to consider that the prosecution case was totally contradicted hence unsafe to sustain conviction.(*sic)*

2. That the learned trial magistrate erred in both law and fact on basing his conviction on identification recognition by the witness without looking far that the evidence adduced was after thought. *(sic)*

3. That the learned trial magistrate further erred in law and fact for failing to note that the attributed identification by recognition was not rooted the way to be considered. On looking circumstances surrounding the scene in evidence on record. *(sic)*

4. That the learned trial magistrate erred in both law and fact. For failing to ascertain that the

attack was during the night. The attackers had covered their faces and the light of a torch. The error of a mistaken identity could arise. *(sic)*

5. That the learned trial magistrate erred on both law and fact. By being on one side of the party when he failed to have a look on my alibi and also to give weight on it. Which was surrounded by two defence witness who could have planted a great benefit of doubt on prosecution case. *(sic)*

6. The learned trial magistrate erred on both law and fact, for failing to ascertain and to look on record that I was not arrested in any position of the said exhibit. The investigation also was done very poorly according to the evidence adduced. Statements of all witness were recorded after five to six months after the report and after my arrest. *(sic)*

3. Before we turn to the issues raised in the Appeal, we are aware that as the first Appellate court we are obligated to evaluate the evidence tendered before the trial court and reach our decision irrespective of the findings of that court (see Okeno vs R [1972] E.A. 32. To do so, we must first set out the evidence itself and then proceed to evaluate it; P.W.1, James Kinoti Ithiga said that on 19.5.2002, he was at his shop within Kathama Kaiti at 2.am. when robbers struck and demanded that he should open up or get killed. Before P.W.1 could react, the robbers proceeded to cut the window grills, entered the shop and as one of them did so, his face mask fell off and as the witness pointed his torch at him, he recognized him as the Appellant. The robbers then demanded money from P.W.1 who gave them Ksh.20,000/- as they beat him and his wife using "**pangas and whips and axes**". P.W.1 added that the Appellant was wearing "**a black jacket and stripped trouser**". Other items stolen that night, according to P.W.1, were cigarettes, loaves of bread and one crate of soda.

4. Regarding the lighting on the material night, P.W.1 said that because the robbers had disconnected electricity, he used a "**spotlight**" and with it he recognized the Appellant whom he had known before as Martin Mugambi. In any event, after the robbers, left P.W.1 woke up his brother-in-law, one Bernard Miriti and informed him that he had been robbed and together, they made a report at Ngudune Police Station and named the Appellant as one of the robbers. That the Appellant apparently disappeared from the area and was arrested only 5 months after the incident. It was in fact P.W.1's evidence that he took the police to the Appellant's home the day after the robbery but he could not be found as he had already gone underground.

5. It is important to also state here that P.W. 1 said that he had known the appellant since childhood and that the latter used to buy cigarettes at his shop. We should add that P.W. 1 further stated that on the material night the Appellant and another robber had torches which they pointed at P.W.1 who also pointed his torch at them before he was ordered by the Appellant to switch off his torch which was then taken away.

6. P.W.2, Charity Kangai, wife of P.W.1 recalled that when they were attacked on the material night, the Appellant came in through the window and when his mask fell off, she recognized him because he was a regular customer at their shop. That the Appellant threatened to rape her even as he and his confederates took items from the shop. She added that P.W.1 gave the robbers Ksh.20,000/- as he was being threatened. We should note here that P.W.2 said that the robbers had "**pangas, axes and rungus and torches**" and unlike P.W.1 who said that the robbers beat them with pangas, P.W.2 said; "**they did not beat us"**

7. P.W.2 added in evidence in any event that her husband reported the incident the next day at Ngudune Police Station.

8. P.W.3, Bernard Mwiti recalled that on 19.5.2002 he was woken up at night by P.W.1 and informed that they had been attacked by robbers and that he (P.W.1) had identified as Mugambi, the Appellant and the next day, P.W.3 went to the scene and accompanied P.W.1 to Ngudune Police Station where the incident was reported and that the Police told them to wait until the Appellant was arrested.

9. P.W.4, P.C. Joseph Mwaura recalled that on 8.9.2002, while at CID office, Meru, he received a report

from one Lala, Chief Kianjai Location and an Administrative Police Officer called Nchebere that they had information about the Appellant who had been suspected of committing a number of offences at Kianjai area. The witness and other police officers then organized the Appellant's arrest at Leta village. When he was confronted, the Appellant claimed that he was called Mwenda and not Mugambi but neighbours said that he was indeed Mugambi and a search in the house netted a number of suspected stolen properties which are of no relevance to this case. P.W.4 then added that the Appellant who had been suspected of having a firearm, led them to the home of one Gitonga where the firearm, a sterling patchet, was recovered. He was separately charged with the firearm offence and the charge of robbery with violence was preferred in the present case.

10. P.W.5, P.C. Justus Wambua received the report of robbery from P.W.1 on 20.5.2002 at Tigania Police Station and after proceeding to the scene, he commenced investigations including the whereabouts of the Appellant who had been named as the prime suspect. Later, one PC Mwaura arrested the Appellant and the charge of robbery with violence was preferred against him. It is important to state that the Appellant sought the occurrence Book for Tigania Police Station from P.W.5 for the relevant period and when P.W.5 produced it, it was recorded inter-alia that the "**reportee identified one namely Martin Mugambi since he hails from the same village." The reportee, we note was P.W.1.**

11. When the Appellant was asked to defend himself, he gave a sworn statement and he said nothing of the events of the 19.5.2002 and the allegations against him but said that he was arrested on 4.9.2002 and that at Maua Police Station he was asked why he had refused to pay P.W.1 Ksh.4000/= and also why he had "**abused**" N. wife. He was locked up for a month and later charged with the rape of N.wife and robbery with violence. He added that all the charges were false and that the complainants were all his neighbours.

12. In further evidence, the Appellant called J. Gi who said that he knew the Appellant and that it was one N who engineered the charge against him because the Appellant had refused to pay his debt of ksh.4000/-

13. From submissions made and the grounds on appeal as well as the evidence on record and now before us, the following issues require our determination;

(a) Identification of the Appellant at the scene.

(b) Contradictions in evidence by the prosecution.

(c) The value of the Appellant's evidence in defence and his alibi defence

(d) Circumstances of the appellant's arrest.

14. On the question of identification, it was the case for the prosecution that the robbers had torches but P.W.1 also used his torch or spotlight which he focused on them and at that moment and before it was taken away, he was able to identify and recognize the Appellant. The Appellant has taken issue with that purported recognition but we do not agree with him. It was the evidence of P.W.1 that the robbers had disconnected electricity to his shop and that being 2.00 a.m. or thereabouts he had to use a torch. Although only the Appellant had a mask, the same fell off his face and it was exposed. Recognition is always better than identification and in this case, the Appellant was well known to P.W.1 and more importantly as soon as the robbers left the scene, P.W.1 proceeded to the home of P.W.3 and told him of the suspect he saw and it was the Appellant. P.W.3 confirmed this evidence as did P.W.4 who produced the Occurrence Book for Tigania Police Station and that initial report was not challenged. P.W.2 corroborated the evidence of P.W.1 in all respects and any doubts one may have about the intensity of the light from the torch held by P.W.1 and the distance at which he saw the Appellant or even the period he took to do so, must dissipate in light of this otherwise very clear case of recognition. It is important to note that P.W.2 had regularly served the Appellant at the same shop and had known him since her school days.

15. We cannot see how we can fault this aspect of the case and we hold that the Appellant was truly and well recognized at the scene by PW1 and PW2 and their report to PW3 and PW4 immediately after the robbery only adds to the veracity of that evidence.

In Anjononi v. R [1980] KLR. 59 at p.60, the court of appeal held as follows:

"**The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailant; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."** We agree wholly with that finding and will apply it squarely to this case.

16. Regarding contradictions in the case by the prosecution, we can only find two; the first is that P.W.1 said that he and PW2 were beaten by the robbers while PW2 said otherwise. The second is that it was unclear what weapon the Appellant and his confederate had at the time of the incident P.W.2 spoke of "**axes and pangas**." While P.W.1 spoke of "a **panga and whip**". Whereas in other situations this would have been an important aspect of the case," and while the contradictions are apparent, we do not think that in the instant, they should sway our minds from the fact that the Appellant was at the scene, with others, and had offensive weapons that were used to threaten the complainants and the charge was properly laid and proved. The contradictions in such a case cannot be material and we so hold.

17. The Appellant has said that his defence was ignored but the same was not a defence that can challenge our finding on facts regarding his participation in the robbery. He concentrated on the events of his arrest, a matter we shall shortly dispose of, and called a witness whose evidence was unhelpful. Granted, the onus of proving a criminal charge never shifts to the accused but it would be expected that when put to his defence, an accused is reasonably expected to explain certain aspects of his situation. In this case, the Appellant's defence was irrelevant to the charge he was facing and this court would not accept that it would in any way have changed his present circumstances. It was an afterthought and interestingly, the allegation that it was P.W.1 who fabricated the charges because he was owed Ksh.4,000/- by the Appellant was not corroborated by D.W. 2 who said that it was one N who was owed Ksh.4000 by the Appellant hence the alleged frame-up. His own witness so materially contradicted him that the defence was no more than a weak attempt to ward off the charges that the Appellant was facing. Either way the defence as presented was of no assistance to the Appellant.

18. The Appellant was arrested five (5) or so months after the robbery and he has argued that the witnesses who were present during his arrest were not called to testify. We think that this issue is pedestrian because the Appellant, as the evidence would show, was present when the crime was committed, disappeared the next day and was arrested in an ambush situation five (5) months later. He tried to dupe his way out but was identified by neighbours as Mugambi, the suspect and not Mwenda, his preferred name at the time. The evidence of P.W. 4 and P.W.5 is sufficient to show the reasons for his arrest and we see no prejudice that N and Chief Lala were not called to testify. We are aware that all evidence must be put before a trial court but in this case, failure to call the two witnesses would have not have aided the prosecution case to the detriment of the Appellant. The evidence on the circumstances of his arrest was sufficient.

19. On the whole therefore, we have looked at the evidence of each of the five (5) witnesses, evaluated it and it is our findings as we have articulated above, that the charge of robbery with violence against the Appellant was proved beyond reasonable doubt. We see no reason at all for interfering with the judgment of the trial court which was based on sound and credible evidence and we uphold the conviction and sentence.

20. This Appeal for the above reasons has no merit and is hereby dismissed.

21. Orders accordingly.

Dated signed and delivered this 13th day of July 2007

ISAAC LENAOLA

JUDGE

WILLIAM OUKO

JUDGE