REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 250 of 2005

SAMUEL KARORI MUTHEE.....……..…….....……APPELLANT

-AND-

REPUBLIC…….RESPONDENT

(An Appeal from the Judgement of Senior Resident Magistrate Mrs. Murage dated 11th May, 2005 in Criminal Case No. 17 of 2004 at the Kikuyu Law Courts)

JUDGEMENT OF THE COURT

The appellant was charged with two counts of robbery contrary to s.296(2) of the Penal Code (Cap.63), and a third count of having suspected stolen property contrary to s.323 of the Penal Code.

The prosecution case was that on 25th June, 2004 at 3.00 a.m. PW1 and PW2 were sleeping at their home, when their house was broken into. Two people entered the bedroom, armed with *panga*s, and robbed PW1 and PW2 of cash in the sum of Kshs.5000/=, a mobile phone and radio cassette, all valued at Kshs.20,000/=. The complaints had earlier known the appellant whom, at the material time, they saw in their bedroom where there was good electrical lighting. The appellant, during the night robbery, threw a *panga* at PW1 though it missed target.

Evidence was tendered that during the same night of robbery committed against PW1 and PW2, the appellant and his accomplices also broke into the home of PW3, and robbed him of several household items. As the gang departed in the early morning, PW3 met the appellant herein at 6.30 a.m. as he carried a Police radio; the appellant threw this away as he fled. Members of the public responded to PW3's screams by coming out and arresting the appellant herein. They later handed him over to the Police who re-arrested him and brought charges against him.

After hearing the testimonies and submissions, the trial Court made its findings as follows:

"***Considering…the evidence in its entirety I find that [the] accused was identified as having been among the robbers who robbed PW1 and PW3. PW1 saw a Police radio with one of the men who accompanied [the] accused. Later PW3 saw the accused in possession of the same Police radio. The accused has not challenged this evidence. His defence is not convincing. All the witnesses knew him before [the material] day. They had no reason to lie against him; their evidence is [mutually] corroborative…The prosecution has proved the case against the accused person. I dismiss [the] defence offered as a lie. I find the accused guilty as charged in the three counts."***

The learned Magistrate convicted the appellant herein and sentenced him to death as provided by law, in respect of counts 1 and 2; and for count 3 a sentence of three years' imprisonment was imposed. It was, however, not specified how the *three* different sentences should be executed – and this, we would say, leaves a *gap* in the pronouncement of sentence.

In the petition of appeal filed on 20th May, 2005 the appellant contends as follows:

(i) that the trial Court convicted on the basis of inadequate Police investigations;

(ii) that the evidence tendered by the prosecution was contradictory;

(iii) that there was no nexus between appellant and the commission of the offence;

(iv) that conviction was entered even though the stolen items were not found in appellant's custody.

On the occasion of hearing this appeal, on 5th June, 2007 the appellant who represented himself, elected to speak after the State Counsel had made her submissions; and he also placed written submissions before the Court.

Learned State Counsel ***Ms. Gakobo*** contested the appeal, and supported conviction on all the counts and on sentence. She urged that proof of the case against the appellant had been discharged beyond all reasonable doubt. With regard to count 1, PW1 had had the advantage of full lighting in his bedroom at 3.00 a.m. when the robbery took place, and he had seen as the attacker, the appellant herein who used to be his neighbour and was well known to him (the complainant). PW1 saw that it was the appellant who had thrown a *panga* at him during the robbery; and he had clearly noted the appellant's mode of dress: brown jacket, striped shirt; and when arrested, the appellant was found wearing exactly those clothes.

PW1's testimony was corroborated by PW2's. PW2 could recognize the appellant, as somebody she had known before the material time.

During the robbery in PW3's house, again, the lights were switched on, and the appellant was the first person to enter the house. The appellant used to visit PW3, and PW3 had known him since childhood. PW3 recognized the appellant as one of those who robbed him on the material night.

It was an uninterrupted arrest process, when PW3 raised the alarm; members of the public came and nabbed the suspect; they beat him up until the Police rescued him from their hands, and re-arrested him.

A pocket radio seen in the appellant's hands that night by PW1, and thrown at PW3 during attempted flight, was recovered and handed over to PW6; and this pocket radio which is shown to have been in the possession of the appellant, was the basis of count 3 in the charge.

It was learned counsel's testimony that the degree of identification of the culprit achieved in this case, "was very safe". The pocket radio cast away by the appellant, PW6 testified, was a Police pocket radio; and counsel now submitted that since the appellant was not a Police officer, it has to be inferred that the said radio "was stolen, or unlawfully obtained."

Learned counsel submitted that the trial Court had properly analyzed the appellant's unsworn statement as well as that of his witness, and arrived at the conclusion that it was all lies. She urged that the appeal had no merit; the conviction should be upheld; the sentences be confirmed.

We have considered all the evidence tendered before the trial Court, all the written submissions of the appellant and the oral ones of the State Counsel, and we have followed the reasoning of the learned Magistrate which led to her findings, to the conviction of the appellant and to the sentences imposed.

We have seen no reason at all to doubt the testimonies of PW1, PW2 and PW3 who clearly saw the appellant as he committed the acts of robbery charged. Recognition is the basis upon which key

witnesses knew the appellant to be one of the robbers; and so we do not doubt that the appellant was accurately identified as the law-breaker, during the material night.

We hold that the appellant was rightly convicted on all the charges brought against him; and we will make specific orders as follows:

1. the appellant's appeal, on all the counts of the charge brought against him, is dismissed.

2. We uphold the conviction of the appellant on counts 1, 2 and 3 of the charge.

3. We affirm the sentences of death imposed by the trial Court in respect of counts 1 and 2 of the charge save that they are to run concurrently.

4. In the light of the 3rd order herein, the sentence of imprisonment imposed in respect of count 3 of the charge shall remain in abeyance.

DATED and **DELIVERED** at Nairobi this 25th day of September, 2007

J. B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerk: Tabitha Wanjiku & Eric

For the Respondent: Ms. Gakobo

Appellant in person