REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 295 of 2006

DIAL LEKITEI……...……...APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence of the Senior Resident Magistrate's Court at Maralal in Criminal Case No. 295 of 2006 – S. Mbungi [S.R.M.])

JUDGMENT

The appellant, Dial Lekitei was charged with the offence of **burglary and stealing contrary to section 304(1)** as read with **section 279 of the Penal Code**. The particulars of the offence were that on the night of 31st December 2004, at Nairimirimo village in Samburu District, the appellant broke into the house of James Leleshipan and stole therefrom a Kenya Police Reserve Firearm make Mark IV Serial No.16032 valued at Ksh.5000/=, the property of Kenya Government. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged and sentenced to serve seven years imprisonment on each limb of the charge. The said sentences were ordered to run concurrently. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted based on the evidence of identification by a single witness made in difficult circumstances. He was aggrieved that the trial magistrate had relied on contradictory and uncorroborated evidence of prosecution witnesses to secure his conviction. He faulted the trial magistrate for finding him guilty yet the firearm which was stolen from the complainant was not recovered in his possession. He was aggrieved that the trial magistrate had not considered the totality of the evidence adduced and thereby arrived at the erroneous decision finding him guilty. He was finally aggrieved that the trial magistrate had sentenced him to serve a custodial sentence that was harsh and excessive in the circumstances.

At the hearing of the appeal, the appellant presented to the court written submission in support of his appeal. He further made oral submissions urging this court to allow the appeal, quash his conviction and set aside his sentence. On his part, Mr. Mugambi for the State submitted that the prosecution had established its case against the appellant to the required standard. He urged the court not to interfere with the conviction and sentence of the trial magistrate.

The facts of this case as can be gleaned from the evidence adduced before the trial magistrate's court are as follows; PW1 James Leleshipan was at the material time an assistant chief of Lalaiti sub-location in Samburu District. He was also a member of the Kenya Police Reserve. He was issued with a Mark IV rifle. On the 31st December 2004, he left the rifle in his house under the custody of PW2 Lelenti Leleshipan. PW1 attended a party which was being held in his village to usher in the New Year. At about 9.00 p.m., while at the party, he heard a shot being fired. PW1 thought that that PW2 had accidentally fired the gun. He went to investigate with other residents of his village who included PW3 Leidudam Lekupe. When they reached the house of the complainant, they found PW2. PW2 told them that the appellant had entered the house of PW1 and stolen the gun. When PW2 tried to stop him from

taking the gun, the appellant fired in the air and succeeded in scaring away PW2. The appellant was known to PW2 at the time of the incident. PW2 testified that he was able to identify the appellant by the moonlight. When PW2 was asked by PW1 and PW3 who had stolen the gun, PW2 did not hesitate to state that it was the appellant who had stolen the gun. PW2 described in detail the clothes that the appellant was wearing at the time of the incident.

On the following day, *i.e*. on the 1st January 2005, PW1 accompanied by PW3 and other villagers tracked the foot prints of the person who stole the gun. They were able to trace the foot prints to a house where they found the appellant. The appellant was arrested and taken to the administration police camp at Barsaloi. The appellant however escaped from the custody of the administration police. He was arrested some months later and charged with the offences for which he was convicted. The firearm which was robbed from the complainant was never recovered.

The appellant submitted that the evidence of identification which was adduced by the prosecution was not sufficient to sustain his conviction. He submitted that the trial court erred when it relied on the sole evidence of identification made in difficult circumstances to convict him. This court is aware that a court cannot convict an accused person based on the sole evidence of identification, especially that identification which is made in difficult circumstances, unless such evidence of identification is watertight (*See* **Maitanyi vs Republic [1986] KLR 198** *at page 200*). In the present case, the appellant was known to PW2 prior to the robbery incident. Although the identification was made in difficult circumstances, PW2 was in no doubt that he had identified the appellant as the person who stole the rifle from the house of the complainant. PW2 testified that he was able to identify the appellant by the bright moonlight. He was cross-examined by the appellant and by the court. His evidence was however not shaken. When PW1 and PW3 arrived at the scene, PW2 did not hesitate to categorically state that it was the appellant who had stolen the firearm. It was the view of this court that the evidence of PW2 was that of recognition which is stronger evidence than that of mere identification by a stranger.

The evidence of identification by PW2 was corroborated by the testimony of PW1 and PW3. They testified that they were able to track down the foot prints of the person who stole the gun to the house where they found the appellant. The appellant was apprehended and taken to the nearby administration police camp. The appellant however escaped from the said administration police camp and went into hiding. He was arrested several months after the incident and later charged in court. The conduct of the appellant after the incident was not consistent with the conduct of an innocent person. It was clear that the appellant escaped from the custody of the administration police officers so that he could retrieve the firearm from where he had hidden it and take it to a more secure location. PW1, PW2 and PW3 were able to trace the exact place where the appellant had hidden the firearm. They saw that the firearm was hidden at a place where the ground had been dug up. The defence of the appellant was properly considered and dismissed by the trial magistrate as being of no consequence in view of the overwhelming evidence that was adduced by the prosecution witnesses. In the premises therefore, I find no merit with the appeal filed by the appellant against his conviction. I uphold his conviction by the trial magistrate.

On sentence, the appellant was sentenced to serve seven years imprisonment on the 29th March 2006. According to the prosecution, the appellant was a first offender. This court takes note that the item which was stolen is a dangerous weapon which is lethal if it lands in the hands of criminals. This court is not oblivious of the fact that the firearm in question could be used to cause mayhem and insecurity in the region where the appellant hails from. However, this court is of the view that the trial magistrate did not consider the entire circumstances of this case including the mitigation of the appellant. The sentence of seven years imprisonment, which is the maximum sentence provided under **Section 304(1)** of the **Penal Code**, was uncalled for in the circumstances of this case.

The upshot of the above reasons is that the appeal against conviction is hereby dismissed. The appeal on sentence is allowed. The sentence of the trial magistrate is set aside and substituted by an appropriate sentence of this court. I sentence the appellant to serve four years imprisonment on each of the two counts that he was convicted. The said sentences shall run concurrently and shall take effect from the 29th March 2006 when the appellant was convicted by the trial magistrate.

It is so ordered.

DATED at NAKURU this 17th day of December 2007

L. KIMARU

JUDGE