REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 1096 OF 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 5478 of 2002 of the Senior Principal Magistrate's Court at Kibera (Ms. Siganga -SRM)

STANLEY MUTHEE KARANJA..……...APPELLANT

VERSUS

REPUBLIC…… …….…....RESPONDENT

J U D G M E N T

The Appellant, **STANLEY MUTHEE KARANJA**, was convicted for **ATTEMPTED ROBBERY WITH VIOLENCE**, contrary to Section 297(2) of the Penal Code. He was then sentenced to death, in accordance with the statutory provisions.

In his Appeal, the Appellant has raised three substantive issues, which can be summarized as follows:

1. The identification by PW1 and PW2 was not free from error.

2. The Prosecution evidence was contradictory, insufficient and not credible.

3. The defence was wrongly rejected by the learned trial magistrate.

In tackling this Appeal, we shall re-evaluate the evidence on record. The said reevaluation will be conducted whilst bearing in mind the submissions by both the Appellant and the Respondent.

There were four Prosecution witnesses at the trial. PW1, Carolyne Mutahi, is the wife to the Complainant. She testified that robbers "paid them a visit" on 17th July 2002, at about 1.30 a.m. She said that she had just gone to bed, when she saw a torch light from the sitting room window to the bedroom. In her testimony she said that the torch light "appeared to be from my corridor and I was shocked."

PW1 woke up her husband, and told him that she suspected the torchlight to be within the house. The husband, PW2, is said to have run to switch on the security lights. The three robbers then ran to the rear of the house. It is then that PW1 who was now in the kitchen, came face to face with the Appellant, at the Kitchen window. She said that the Appellant even called her "mama Cheptoo". PW2 testified that he recognized the Appellant, as he used to be an employee of their neighbours, Wilson and Elizabeth.

When one of the other robbers tried to enter the house through the Kitchen window, PW2 cut him on the legs, using a panga. The robbers then retreated and fled. As they were running off, the robbers were forced to fire four gunshots into the air, to scare away the neighbours who were coming to the aid of the Complainant's family.

On his part, PW2 Ken Kimng'eno Mutahi, said that when PW1 woke him up, he went to the sitting room. He found the window ajar, and the curtain was open. He saw a torch light outside, and three people were conversing. PW2 threw a Somali sword at the three people, hoping to frighten them. The 3 people ran to the rear of the house, where they broke the security light.

He corroborated PW1's evidence, that when one robber started entering the house through the Kitchen window, he cut him on the legs with a panga. According to PW2, he recognized the Appellant by his voice. PW2 had known the Appellant for over a year.

Those two witnesses are the ones who identified the Appellant. The question we now have to grapple with is whether or not the identification was free from error.

Learned state counsel, Ms. Mwenje submitted that PW2 had switched on the security lights, which included the lights at the back of the house. She submitted that the security lights at the rear were only smashed by the robbers when they realized that PW1 was seeing them.

In her judgment, the learned trial magistrate said;

> ***"Both PW1 and 2 told the court that they clearly saw the robbers on that night as the house interior was in darkness while the security lights outside were on, and the robbers were outside the house."***

Later on, the learned trial magistrate said;

> ***"Similarly, PW2 said that the accused was one of the robbers though he did not physically see the accused during the incident, he was able to hear accused's voice as accused spoke to PW1 through the kitchen window, and PW2 was unable (sic) to recognize accused's voice, as that of a person he had known for 1 year prior to this incident."***

First, those two statements are contradictory. If PW1 and PW2 both clearly saw the robbers, and if the Appellant was one of the said robbers, there is no way that at the same time PW2 would also say that he did not "physically see" the Appellant. He should either have clearly seen the robbers, including the Appellant, and then been able to identify him, or otherwise, he did not see the Appellant at all. So, what does the record show?

PW2 testified, when being cross-examined by the Appellant, that he did not see the Appellant on the material night. He was only able to recognize his voice. That raises further questions, for if the security lights were on outside the house, and the three robbers were out there, how is it possible that PW2 did not recognize the Appellant, if he was one of the three robbers? PW4, PC Peter Nzeni, was a Police Officer, then attached to Ngong Police Station. He testified that on the night of 17th July 2002, he received a phone-call from the Complainant. According to the witness, the call was made "a few minutes to midnight."

Obviously, that is very curious indeed, for PW2 said that he went to bed at 12.30 a.m. By that time, the robbers had not yet come calling. Both PW1 and PW2 testified that the incident occurred at about 1.30 a.m. It was therefore, not possible that PW2 had telephoned the police station about one-and-a-half hours before the incident complained of. However, if the issue as to time was the only one, it may possibly have been excusable. But in this case, PW4 also said that PW2 told him that he (PW2) had "seen one of the five robbers and recognized the robber."

By his own evidence, PW2 testified that he had not seen the Appellant that night. How is it possible that he then told PW4 that he had seen the Appellant?

The Appellant gave an unsworn statement in his defence. He said that at the time of the alleged attempted robbery, he was at his house, asleep. In other words, he denied being anywhere at the scene of crime. His was thus an alibi defence. When commenting on the Appellant's defence, the learned trial magistrate

expressed herself as follows: -

"However, I find that accused's identification by way of recognition at the scene by PW1 and 2, to be a total contravention to the accused's claim that he was in his house, sleeping at the material time. No defence witness was called to confirm to the court that indeed accused was in his house when the incident occurred. I therefore dismiss the accused's claim that the Complainant "guessed" that he (accused) was one of the robbers. There is no guesswork involved here."

From our understanding of the foregoing finding, the learned trial magistrate dismissed the defence only because the Appellant did not call any witness to confirm to the court that he was in his house at the material time. Two points emerge from that finding. First, the learned trial magistrate did not make an express finding as to whether or not the alibi was untrue. Of course, by implication, the trial court was saying that the alibi was untrue. But it was necessary for the court to say so expressly, and to then state the reasons for arriving at that conclusion.

Secondly, the learned trial magistrate misdirected herself by indicating that the Appellant had an obligation to call witnesses to prove his defence. We agree with the Appellant that by adopting that stance, the learned trial magistrate seems to have convicted him on the basis of a weakness in the defence case, as opposed to the affirmative proof of the prosecution case. It must always be borne in mind that an accused person has no obligation at all to prove his innocence. He may well choose to say absolutely nothing, by way of his defence. That notwithstanding, the trial court could not convict him unless the Prosecution proved its case beyond reasonable doubt.

In James Muthee Karanja & Another vs. Republic, Criminal Appeal Nos. 193 and 195 of 2002, (At Nakuru), the Court of Appeal quoted with approval, the following words from SEKITOLEKO vs. UGANDA (1967) E.A. 531;

> ***"(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else.***
>
> ***(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected herself."***

In line with the afore-cited authority, we hold that the learned trial magistrate erred by dismissing the Appellant's defence on the grounds that he did not call witnesses to corroborate it.

We also hold the considered view that the circumstances prevailing at the material time were difficult, and therefore, the identification by PW1 was not free from error. We say so because although the learned state counsel submitted that the robbers only smashed the security lights outside the kitchen after they realized that PW1 was seeing them, that is not borne out by the evidence on record. PW1 said;

> ***"I ran to the sitting room. Our neighbours switched on their alarm. The people outside, 3 of them, ran away in different directions. They ran to the rear part of the house which was plunged in darkness. They smashed a rear window and I ran to the kitchen to switch on the rear security lights and I saw the kitchen window was smashed. I saw a face directly through the kitchen window. That face was for a person I know very well."***

According to PW1, the place was plunged into darkness. That meant that when PW2 switched on the security lights at the front of the house, the rear was still in darkness. That is when PW1 ran to the kitchen, to switch on those other security lights. We therefore, find that the circumstances prevailing were not conducive for positive identification, as PW1 did not at any time testify that she did actually put on the security lights. What she confirmed doing is continuing to scream, while the robbers continued cutting the window grill.

PW4, PC Peter Nzeni, said that he arrested the Appellant at 2.30 a.m., which was shortly after the incident. The Appellant was arrested at his house. And although the robbers had fired gunshots, there was

no evidence that the Appellant's house was searched for any firearm. At any rate, no firearm was adduced in evidence. Also, even though PW2 had slashed one of the robbers with a panga, there was nothing at all to suggest that the Appellant was the person who had been slashed.

In a nutshell, the only evidence relied upon by the Prosecution was the identification of the Appellant by PW1 and PW2. In **James Muthee Karanja & Another vs. Republic** (Supra), at pages 9 to 10, the Court of Appeal reiterated the need to examine with greatest care, the evidence adduced in proof of identification, before a court of law can convict a person on the basis of identification. The court expressed itself thus;

> ***"The appeal of second Appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be reduced if whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made.Finally, it should remind itself of any specific weakness which appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."***

It is for the foregoing reasons that we have deemed it essential to examine the evidence of the Appellant's identification, in such minute detail, lest it lead to an injustice. At the end of the said detailed re-evaluation of the evidence on record, we have come to the conclusion that it would be unsafe to uphold the Appellant's conviction. Accordingly, the conviction is quashed, the sentence set aside, and we direct that the Appellant be set at liberty, unless he is otherwise lawfully held.

Dated at Nairobi this 27th day of January 2005.

LESIIT F. **A. OCHIENG'**
JUDGE **JUDGE**

Read, signed and delivered in the presence of;
Miss Nyamosi for Ms. Mwenje for Respondent

Appellant present
Muia/Odero CC

LESIIT F. **A. OCHIENG'**
JUDGE **JUDGE**