

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 478 of 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 5425of 2001of the Senior Principal Magistrate's Court at Kibera(Ms. Mwangi -P M)

LAWRENCE MUTUKU MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

LAWRENCE MUTUKU MUSYOKA was found guilty and convicted of **ROBBERY WITH VIOLENCE** contrary to Section 296 (2) of the Penal Code. The Complainants in the case were four. On 11th August 2001, the first Complainant, **VICTOR PRATT** had guests at home including the Complainants in count 2, **LUCY WANJIRU**, Count 3, **LILIAN WANJIRU** and count 4 **WANGUI KARANJA**. As **VICTOR** drove home that day, another vehicle, in which the robbers were traveling drove into his compound with him. All the Complainants were then robbed and left locked up inside **VICTOR's** bedroom. The incident took place at 3.00 p.m. and therefore in broad daylight. On 27th, 11 days later the Complainants **WANGUI KARANJA**, **LILIAN MBURU** and **VICTOR's** wife **CHRISTINE PRATT** identified the Appellant in an identification parade. **VICTOR** was however unable to identify him then but did so in court during the trial.

The first issue raised by the Appellant in his appeal is that of identification. It was the Appellant's contention that the learned trial magistrate misdirected herself on this issue. That the trial magistrate found that there were seven identification witnesses when in fact there were only six and only three identified the Appellant. The learned counsel for the Appellant, **MR. CHEBII** further contended that the identification parade was not properly conducted and that the prosecution did not properly canvass the issue of identification. He pointed out the evidence of **VICTOR**, who was PW1 as being contradictory since he did not come out clearly on whether he identified the Appellant or not.

MRS. GAKOBO, learned counsel for the Respondent opposed the appeal. On the issue of identification, learned counsel submitted that the Appellant had been properly identified both at the scene and in the identification parade. She further submitted that the robbery was committed during the day and that it took 30 to 40 minutes which was long enough for positive identification.

We have re-evaluated the entire evidence adduced before the lower court. On this issue of identification, we agree with learned counsel for the Appellant, **MR. CHEBII** that **VICTOR**, PW1, appears to have given inconsistent evidence, in regard to his ability to identify the Appellant during the robbery. It is however very clear from the evidence of **IP KIBIEGO** PW6, the parade officer, that **VICTOR** was unable to identify the Appellant during the parade. **VICTOR's** wife **CHRISTINE**, PW3, together with two other guests, **WANGARI KARANJA**, PW2 and **LILIAN MBURU**, PW7 were able to identify the Appellant during the identification parade and also in court. **WANGUI** was the Complainant in count 4 and **LILIAN** in count 3. We did consider the evidence of these three identifying witnesses. This evidence was consistent and corroborative of each other. The three were together at the Veranda of **VICTOR's** house when the robbers struck. The evidence was that none of the robbers bothered to cover or hide their faces or identity. They conversed freely with them and robbed them confidently and unhurriedly before leaving half an hour or more later. We considered that the atmosphere in which the offence was committed was relaxed. The Complainants, except **VICTOR**, were very bold. They tried to converse with

the robbers. **WANGUI** even offered to co-operate with the robbers if they were police officers and if they could identify themselves. She said so because they had guns and police communication radios which kept communicating. **CHRISTINE** and **WANGUI** identified the Appellant as the one who ordered them and the other guests to lie down after conversing with them. On being ordered to lie down, all guests were robbed of their valuables. **LILIAN** identified the Appellant as the one who led the robbers onto the veranda where they were seated. Both **WANGUI** and **LILIAN** identified the Appellant as the one who spoke saying first that they were not police officers and that it was a robbery. He also ordered them to lie down. **CHRISTINE** also stated that the Appellant went upstairs with her and one other robber where they stole her jewellery and other valuables. The Complainants saw the Appellant and his accomplices again when they were all ordered into the master bedroom before being locked up. We are satisfied that the identification of the Appellant by **CHRISTINE**, **WANGUI** and **LILIAN** was not as **MR. CHEBII** alleged, made under difficult circumstances. The offence took place in broad daylight and for over half an hour. The Appellant was identified by three witnesses whose evidence was not only consistent but also descriptive of the role he played, how he dressed and the way he spoke to them. The identification is confirmed by the ability of all three witnesses to identify the Appellant in the identification parade. The parade was conducted 16 days after the robbery. That was a short period of time after the robbery. We also examined the record and were satisfied that the identification parade was properly conducted. We find that the identification of the Appellant was safe and free from any possibility of mistake or error. We agree with the case of **OKEYO vs. REPUBLIC CA No. 52 of 2000** relied on by **MR. CHEBII**.

MR. CHEBII had submitted that the identification parade was not conducted in accordance to the Judges Rules. He did not substantiate his claim. However, we find his submission without any substance or merit. The Appellant had questioned where the witnesses were going after identifying him but was satisfied with the manner the parade was conducted. We are also satisfied with the manner in which the parade was conducted. It was fair and within the applicable rules.

MR. CHEBII raised issue with **CHRISTINE** being a Complainant according to her evidence. There was no charge in respect of the things stolen from her. We agree that **CHRISTINE** should have been one of the Complainants in the case. She said that she lost her jewellery, rings and other valuables. The prosecution should have added a count of robbery with violence in the charge in respect to the loss she suffered in this robbery. We do not however find that the Appellant suffered any prejudice due to this omission. Failure to charge an offender with all the offences he is alleged to have committed is not fatal to the prosecution case. Nothing turns on this issue.

MR. CHEBII raised issue with conclusions arrived at by the learned trial magistrate. One of them had to do with her finding that 7 people identified the Appellant. As already stated, the trial magistrate misdirected herself on that point. However, the misdirection does not affect the evidence adduced against the Appellant or the final conclusion of guilt that the learned trial magistrate reached. We find no merit on this issue. After re-evaluating the evidence adduced in this case, the evidence against the Appellant was that of identification. We have carefully scrutinized this evidence and are satisfied that identification was strong and safe to sustain the convictions entered. We are satisfied that the Appellant, with three accomplices who were not arrested, robbed all the four Complainants on the material day. We confirm the convictions entered and the sentence of death passed.

Dated at Nairobi this 26th day of May 2005.

LESIIT,

J. MUTUNGI, O.K.

JUDGE

JUDGE

Read, signed and delivered in the presence of;

LESIIT,

J. MUTUNGI, O.K.

JUDGE

JUDGE