



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Criminal Appeal 207 & 226 (CONSOLIDATED) of 2001

BETWEEN

ISAACK MWENDA KIMATHI 1ST APPELLANT

CLOUDYS THAIRU KALULU 2ND APPELLANT

Versus

REPUBLIC.....DEFENDANT

**(Being an appeal from original conviction and sentence in criminal case No. 423 of
2000 of the Senior Resident Magistrate (Mr. D.K. Gichuki) at Meru dated 21.6.2001)**

RULING OF THE COURT

The two appellants/applicants who were the first and second accused in the lower court were tried and convicted on one count of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on the night of 13th day of February 2000 at Pacific Bar Makutano Market in Meru Central District of the Eastern province, the appellants jointly with others not before the court, while armed with dangerous or offensive weapons, robbed Mary Wanjiru Thairu of cash Kshs. 51,000/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Mary Wanjiru Thairu.

The appellants/applicants have appealed against both conviction and sentence and have put forward five (5) grounds of appeal:

- (a) that the learned trial magistrate erred in law when he failed to consider that the prosecution case was not proved beyond any reasonable doubt,
- (b) that the trial magistrate erred in law and fact when he lost sight of the fact that there was no positive identification at the scene as it was maintained,
- (c) That the trial magistrate erred and misdirected himself on both law and fact when he convicted on contradictory evidence,
- (d) That the trial magistrate erred in both law and fact when he lost sight to the fact that the initial report of the complainant had no special marks of the assailant or how she could identify him,

(e) That the trial magistrate erred in both law and fact when he rejected the appellants'/applicants' defence without giving any cogent reasons.

Each of the two applicants have applied to this honourable court vide the Chamber Summons application dated 24.5.2005 for an order for the production of the Occurrence Book (OB) of 13th February 2000 at Meru police Station. We shall deal with the two applications as one application since the appeals are also consolidated under Criminal Appeal No. 207 of 2001 in which Isaac Mwenda Kimathi is the 1st appellant while Cloudys Thairu Kalulu is the 2nd appellant.

The application is supported by the affidavits made and sworn on 11.5.2005. Two main grounds are given by the applicants for this application:-

(a) That the conviction and sentence arose from the case of recognition by identification and thus justice cannot be reached without putting the initial report to the test.

(b) That this can only be arrived at through production of the OB where the victims made their first report.

The application is opposed. Mr. Muteti for the respondent submitted that an application of this nature can be granted only in exceptional circumstances. He contended that such an application can only be granted if it is proved to the court that the additional evidence sought to be introduced could not have been availed during the trial despite diligent efforts by the applicants to do so. He also contended that the applicants were represented by very senior counsel who never made an application for production of the O.B. during the trial.

Secondly, Mr. Muteti submitted that the issue of the OB was not even raised by the applicants in their grounds of appeal and that in the circumstances, the present application was an after-thought and that to allow the application would be tantamount to reopening the case without giving the prosecution the opportunity to cross-examine the appellants on the additional evidence sought to be adduced. Mr. Muteti relied on the case of ELGOOD V. REGINA (1968) EA 274.

In the cited authority, the Court of Appeal at Nairobi (Sir Ronald Sinclair, P., Sir Trevor Gould, Ag V-P and Newbold (JA) set out the principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of the appeal. These are that:-

(a) The evidence that is sought to be called must be evidence which was not available at the trial.

(b) It must be evidence relevant to the issue;

(c) It must be evidence which is credible in the sense that it is well capable of belief.

(d) The court will, after considering the evidence, go on to consider whether there might have been a reasonable doubt in the mind of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

It was also held in the said cited authority that an affidavit in support of an application to admit additional should have attached to it a proof of the evidence sought to be given.

It was on this basis that on the 26.5.2005, we made an order requiring a certified copy of the OB for the 12th, 13th and 14th February 2000 being proof of the additional evidence sought to be given by the appellants. A Certified copy of the said OB was availed to us on 28.6.2005, the day on which this ruling ought to have been delivered in the first place.

It is necessary at this stage to give the brief facts of the case against the appellants. The

prosecution's case was that in the early hours of 13.2.2000, robbers struck at the Pacific Bar in the Makutano area which lies on the outskirts of Meru town. The bar was closed. The complainant, Mary Wanjiru Thairu, PW2 was by then asleep in one of the rooms at the rear of the bar. Just before the robbers struck, the complainant had instinctively woken up. When the robbers hit the door to the room in which the complainant was sleeping, she screamed thrice and by that time, she had also switched on the electricity lights in the room. The light (also electric) in the veranda of the bar was also on.

When the door to the room was hit, it flew open, and the second appellant entered the room. The complainant was standing in the middle of the room. After the 2nd appellant entered the room, he drew a black object that looked like a pistol from the left belt strap and pointed it at the forehead of the complainant. In the right hand, the 2nd appellant had a panga. As the pistol-like object was being pointed at the complainant, the 2nd appellant demanded money from the complainant. Right behind the 2nd appellant was the 1st appellant who also entered the room, wielding a panga which had no handle. The 1st appellant also demanded money from the complainant. The complainant had to give out money to the two appellants. The money had been kept in the inner pocket of the cardigan which the complainant was wearing.

The complainant testified that she knew both appellants before the day of the robbery, both of whom according to the complainant used to take beer everyday in her bar. The complainant said she had known the 1st appellant for over a month while she had known the 2nd appellant for over three months, and that both these appellants used to drink at the bar on a daily basis during the period that she knew them. The complainant also testified that on the previous night, the two appellants who had been sitting in the verandah of the rear room which was broken into left the bar at 11.00pm.

It was the further testimony of the complainant that after she gave out the money to the two appellants, they went out of the room. The complainant then followed them and met with both of them again at the end of the corridor leading outside the front part of the bar. On that second encounter, the appellants are said to have got hold of the complainant and demanded that she opens the bar. The two appellants followed the complainant to her sleeping room from which she went to collect the keys to the bar

Before leaving for the bar, the 2nd appellant asked the complainant for more money. The complainant gave out a tin to the 2nd appellant in which there were some coins as the complainant told the appellants that that was the only money she had left. The 2nd appellant is said to have emptied the coins into the outer pockets of his coat and thrown the empty tin back at the complainant.

In her further testimony, the complainant stated that when the appellants left, she called out loud to her watchman and also the watchman of an adjacent building who testified as PW4. It was then that she realized that John Riba (PW4) was answering from the toilet and needed someone to open the door for him. The complainant opened the toilet door for PW4. Together with PW4, and the complainant's own watchman, Geoffrey M'Aburi (PWI) the matter was reported to the police. The police later visited the scene.

The two appellants were later arrested after the complainant had pointed out each of the them to the police.

PWI, Geoffrey M'Aburi testified that on the material night, he was on duty at Pacific Bar at about 5.00am. He was together with another watchman, John Riba (PW4) who used to guard a chemist shop on the adjacent building. PWI testified that at first he saw five people, four of whom entered Pacific Bar, after first going to the verandah of the bar and then onto the corridor between Pacific Bar and the adjacent building. PWI said that he followed the four men into the corridor which was lit by an electric light. Initially, PWI thought that the four men were customers. When the four people were on the verandah, PWI recognized the 2nd appellant whom he said he knew by the name Mwenda.

PWI also saw the 1st appellant in the corridor with the help of an electric light that was on. PWI also saw a third person who turned round and pointed what PWI thought was a gun at PWI. PWI was

ordered to go back or lose his life.

When PW1 enquired what the matter was, he heard gunfire and immediately fell down. He rose up almost immediately and ran across the road through the shops and into a banana plantation where he hid himself. When the man who was following him gave up on him, PW1 came out of hiding and secretly followed the two men. PW1 was able to see the two men join others on the road and he could clearly see them with the help of electricity light from an adjoining building. PW1 was able to once again recognize the 2nd appellant with the help of the electricity light outside Pacific Bar and the adjacent chemist. He also once again saw the 1st appellant. According to PW1, both 1st and 2nd appellants were about four paces away from the electric light at the adjacent chemist shop. It was PW1's evidence that he knew the 1st appellant well because the 1st appellant was a regular customer at Pacific Bar and that on that one night he recognized the 1st appellant three times, first at the verandah before entering the corridor, then at the corridor and finally on the side of the road outside the verandah of the Pacific Bar as the robbers were leaving the bar.

PW4, John Riba testified that he saw the 1st appellant whom he knew before as a friend to the driver of the complainant. The driver, Charles Gituma testified as PW3, but he turned hostile. PW4 said that there was enough light from an electric bulb that enabled him to recognize the 1st appellant. It was also the evidence of PW4 that the 1st appellant was a regular customer at Pacific Bar and that it was the 1st appellant who led him to the toilet at the rear of the bar and locked him therein. PW4 also stated that when the complainant opened the toilet for him, the complainant, PW2, told PW4 that she had identified the 1st appellant as one of the robbers. That he in turn mentioned to the complainant that he had also identified the 1st appellant as one of the robbers.

Other witnesses were PW5, P.C. Francis Kateya who arrested the 1st appellant on 13.2.2000 on a tip-off. PW5 recovered some Kshs. 4,325/= from the 1st appellant. The money was produced in court as P exhibit 5.

PW6 PC Ali Abdi, while accompanied by PW7, PC John Wachira arrested the 2nd appellant at Makutano area of Meru town. PW8, Inspector Charles Wangombe conducted an identification parade in respect of the 2nd appellant who was identified by the complainant.

The 1st appellant who was unrepresented gave unsworn evidence when he was put on his defence. He told the court that he was a miraa trader and that on 13.2.2000, he went to Maua to sell miraa. He came back on 14.2.2000 and that as he stood at the corridor of Universal Bar at Makutano area of Meru town, he was arrested and taken to Meru Police Station. He was informed a week later about the allegations against him. That he informed the police that he had fought with a son of the complainant and that the allegations against him were a revenge by the complainant. The 1st appellant thus denied the offence which he said he knew nothing about. He called no witnesses.

The 2nd appellant who was represented by counsel gave sworn evidence. He told the court that he was arrested on 30.3.2000 at Makutano area of Meru Town. He testified that he was arrested between 10-11am when passengers were alighting from the matatu in which he worked as conductor. When asked by police whether he knew one person by the name Mwenda, he had denied knowledge of such a person. The 2nd appellant denied any participation in the robbery, but admitted that he knew the complainant before the date of the alleged offence. He also admitted that he was a regular drinker at Pacific Bar where the robbery took place. The 2nd appellant also denied any collusion with another to commit the robbery against the appellant.

On being cross-examined by the prosecutor, the 2nd appellant testified that he had known the complainant for over three months before the alleged robbery but denied that he was at Pacific Bar on 12.2.2000. He also testified that a month before the alleged incident, he had indeed been the last customer in the bar. He also testified that whenever he was in the bar, the complainant used to personally sell beer to him although a few times the complainant's employees would sell the beer to him.

That was the evidence upon which the learned trial magistrate found each of the two appellants

guilty of the offence as charged and convicted them. Although the appellants did not raise the issue of the OB either during the hearing of their case or as a ground of appeal in their petition of appeal, they now seek to adduce additional evidence in the form of that OB for 13.2.2000 which they allege is relevant to their case by proving whether or not their names were given to the police as suspects of the robbery. Have the appellants/applicants fulfilled the requirements for adducing additional evidence at this stage of their case?

We have carefully considered the appellant's application and the reasons advanced in support of the application. We have also perused a certified copy of the relevant OB report for 13.2.2000. We have also considered submissions by learned state counsel in opposition to the application. We have also considered the applicable principles as set out by the Court of Appeal in the ELGOOD case (above). We have also considered in detail the evidence on record both for the prosecution and the defence. Our view is that this application is not merited. There is no proof before us that the additional evidence which the appellants now seek to introduce was not available during the trial. The OB record was made on 13.2.2000 at 5.35am. Since that date, the evidence was always available and all that the appellants needed to do was to make an application to the court to have the same produced. Even the appellants' defences made no reference whatsoever to that evidence which they now seek to introduce. We have also perused the entire record of the proceedings in the lower court and find no evidence that any of the two appellants made an application for production of the OB and that perhaps they could not have it then because the trial magistrate did not allow their application. Our view therefore is that the evidence of the OB having been available since 13.2.2000, there was no reason why the appellants did not seek to have it produced earlier. We think that what the appellants now seek to do is an afterthought.

It is not in doubt that the OB report about the robbery at Pacific Bar on the morning of 13.2.2000 is relevant to the issues in hand. It is also not in dispute that such evidence is capable of belief. It is our view however that taking all the evidence before the court into account we are satisfied that even if the evidence of the OB had been given together with the other evidence at the trial, there would have been no doubt whatsoever in the mind of the court as to the guilt of the two appellants.

In the result, the appellants' application is dismissed as the same lacks merit.

Orders accordingly.

Dated and delivered at Meru this 27th day of September 2005.

D.A. ONYANCHA

JUDGE

RUTH N. SITATI

JUDGE