REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL 65 OF 2004

(From Original Conviction and sentence in Criminal Case No. 961 of 2003 of the Senior Resident Magistrate’s Court at Kangundo: N. N. Njagi Esq. on 29.3.04)

PIUS MUTUKU KAWINZI ……………………………………… APPELLANT

VERSUS

REPUBLIC ……………………………….…………………… RESPONDENT

<u>J U D G E M E N T</u>

The appellant PIUS MUTUKU KAWINZI was convicted of two counts. In Count 1 ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) of the Penal Code. In Count II ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 of the Penal Code. He was sentenced to death as mandatorily prescribed in the law in respect of Count I and 3½ years imprisonment in respect of Count 2. Being aggrieved by the conviction and sentence, the appellant lodged this appeal. The chief facts of the prosecution case were that the complainant P.W.1, his wife P.W.2 and their son P.W.3 were asleep on the night of 25th October 2003 when at 11.30 p.m. robbers struck. The complainant was ordered to sleep and cover himself. Various items were stolen. In the course of the robbery P.W.2 and 3 were injured.

The appellant raised nine grounds of appeal in his petition of appeal. However in his submission he argued only grounds. The key ground argued challenged the reliability of his identification by P.W.2 and 3. Those were the only two witnesses who identified him both in identification parades conducted three weeks after the robbery and in the dock during the trial. It was the appellant’s submission that the two witnesses contradicted each others evidence as to the description of the clothes the appellant was wearing. He also submitted that the nature of light under which the two saw him was not disclosed.

Mr. O'Mirera Learned Counsel for the state opposed the appeal. On the issue of identification O’Mirera submitted that the two P.W.2 and 3, saw the appellant clearly by torchlight. That they saw him for sometime which was long enough to identify him.

We have on our part, as is required of us, re-evaluated the evidence adduced before the trial court. On the issue of identification, both P.W.2 and 3 were emphatic that they were attacked by 3 or 4 people. Those who entered the complainant’s bedroom were two, a tall man and another. Both witnesses from their account, saw the tall man very clearly, P.W.2 for a period of 40 minutes and P.W.3 for a minute or two and later for 10 minutes P.W.2 described him as tall and clothed with a T-shirt of white and yellow colours with flowers. P.W.3 described him as well built, clean shaven and wearing a dark sweater. Both identified the appellant as that man in the identification parade and also in court.

We find that the evidence of identification of the appellant by these two witnesses could not be reconciled. Both witnesses were emphatic they saw the tall man. Both claim he was the one who caused bodily injuries to them for which P.3 forms were produced in evidence. They were clear of his note. The assault on P.W.3 was done in presence of P.W.2. Yet their description of the way he dressed was different. In our view that identify was irreconcilable and therefore unreliable. It is clear to us that each of these witnesses, P.W.2 and 3, were talking of a different person and yet both identified the appellant as that person. In addition to the irreconcilable evidence of these witnesses in respect of the identification of appellant, it did not escape our attention that P.W.3 identified a second man in an identification parade but in court, he identified one DAVID MUTINDA WAMBUA as that person.

The appellant was charged with another, one DAVID KIKWAU MUTUKU whom the learned trial magistrate acquitted for lack of evidence. He was definitely not the person that P.W.3 identified in the dock as the one he identified in the first identification parade on 13th November 2003. From the evidence adduced before the court by P.W.7, Inspector Wambua, the P.W.2 and 3 were able to identify the appellant.

Inspector Wambua, P.W.7, did not talk of having conducted a second parade and neither did the trial magistrate refer to it in his judgement. However, Police constable Ogaula P.W.5, and the investigating officer told court that he asked P.W.7 and that P.W.7 did conduct two identification parades. on both appellant and his co-accused on 13th November 2003. That he, P.W.5 was present during both parades and that P.W.3 did not identify the appellant’s co-accused. P.W.5 also said, which is very important, and which the arresting officer P.W.4 confirmed, that both appellant and his co-accused were arrested following information from an informer. The informer was not a witness.

Having considered the fact that P.W.3 purported to identify two of those who robbed and assaulted them, and in the process identified a stranger to the case, taking that log with the inconsistency of the descriptions of their attackers as per the evidence of P.W.2 and 3, we find that the appellants identification by both witnesses was not safe. There was no other basis of the conviction entered against the appellant except the identification by P.W.2 and 3. That identification was shaky and unreliable and therefore dangerous to base a conviction upon. Even without going with the details of other issues raised by the appellant in his appeal, we are satisfied that on this issue alone, that the conviction is unsafe and should not be allowed to stand. Consequently we quash the conviction and set aside the sentence.

The upshot of this appeal is that it is allowed. The appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Machakos this 2nd day of November 2004.

J. W. LESIIT

JUDGE

R. V. WENDOH

JUDGE