



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.189 OF 2002
**(From Conviction and Sentence of the Snr. Resident Magistrate, J. Oseko in
Criminal Case No.1389 of 2001 of the Chief Magistrate's Court at
delivered on 31-10-2001)**

EMMANUEL WAINAINA NDIRANGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

ELVIS MBUGUA NDUATI (PW.1) is an Executive with Victory Tea Brokers who had employed EMMANUEL WAINAINA NDIRANGU (appellant) at their offices at Furaha Building along Nkrumah Road, Mombasa. This building was under the care of AMIR JUMA KARATA (PW.2) who was living on the upper floors.

It is the evidence of PW.2 that on the 14/4/2001 at about 1.30 while in his quarters within the said building, he heard the sound of something falling. He woke up and went to alert a watchman, but before he reached him he heard another thudding sound. He went towards the direction of the sound outside and looked outside the gate. He saw three bags around and saw the appellant three metres away wasting something into them. He said he was able to see the appellant, whom he had known before as an employee of Victory Tea Brokers, through the bright Security lights which were lit outside the gate. When the appellant saw him, he (the appellant) ran away. PW.2 said he shouted at the appellant that even if he ran away, he had been seen.

PW.2 said he and the watchman decided to guard the said sacks. At 3.15 a.m. the appellant returned and thereupon when he saw them he retreated, but the watchman blew his whistle. Appellant ran away towards Ambalal House which was again brightly lit and did not return. The decided to make a report to Central Police Station.

The evidence of PW.2 was confirmed by that of HENRY MUTUA MUNUVE (PW.3) a watchman guarding GAPCO Company next door, who stated that he too identified the appellant as he ran away from the Victory Tea Brokers Offices. He said he had known the appellant for one and half years.

A report of the breaking into these offices and theft of the Tea leaves therefrom was made to P.C. David Morogo (PW.4) of Central Police Station Mombasa and investigations were commenced, leading to the appellant's arrest.

In his unsworn statement in defence, the appellant denied to have committed the offence and raised the defence of alibi. He said he indeed worked on 12th April 2001 upto 5 p.m. but he traveled up country for Easter holidays. He said he left Mombasa on that same 12th April 2001 at 9 p.m. and returned on 17th

April 2001. He made reference to bus tickets which he said had been issued to him during his journey but did not present them to court. His explanation was that the police took them away during investigations.

It is trite law that if an accused puts forward an alibi as an answer to a criminal charge, he does not thereby assume a burden of proving that defence. The burden of proving his guilt still remains throughout on the prosecution. This is the holding in **R. v. JOHNSON (1961)3 All E.R. 969** and followed in **SEKITOLEKO V. UGANDA 1967 E.A. 531**. There are numerous other Court of Appeal decisions, both reported and unreported, on this same point of law.

In this case the burden to displace the alibi defence raised by the appellant lay on the prosecution. This the prosecution went about doing by calling PW.2 and PW.3 who testified that they saw the appellant at the scene during the night of 14th April 2001 through bright security lights and that they had previously known him for long, at any rate for about 1 ½ years in the case of PW.2. The issue really is whether the evidence of PW.2 and PW.3 is credible and worth of belief.

The appellant, in his unsworn statement, said that PW.1 had a grudge with him; that PW.1 wanted his brother to do the job the appellant was doing but the company refused. That is why PW.1 gave false evidence against him. I have read the recorded evidence of PW.1 in cross-examination by the appellant. This was not put to him. In any case the appellant did not complain at all in this appeal about PW.2 and PW.3 the identifying witnesses.

Appellant also claimed that PW.4 had a grudge against him. He did not give details of that grudge but claimed that PW.4 is the one who took away the bus tickets from him and refused to return them to him. This again, was not put to PW.4.

From the above analysis, I find no reason for holding that the evidence of identification of the appellant by PW.2 and Pw.3 was in any way false. Having accepted it, I find that it sufficiently displaced the appellant's defence of alibi.

In **PETER M. MWAURA V. REPUBLIC (1987)1 KAR 1129** there the appellant had raised a defence of alibi but this was held to have been displaced by the evidence of the prosecution witnesses who had testified that the appellant was in fact at the scene, was chased and caught. The alibi defence was rejected.

The appellant was thus proved to have been the one who broke into the offices of Victory Tea Brokers and to have removed tea leaves from there and was rebagging them outside the gate when he was seen by PW.1 and he ran away. His conviction was safe.

He was sentenced to 18 months imprisonment on 14th November 2001 which he has either substantially served or served. It was a lenient sentence. I reject his plea for mercy.

Appeal is hereby dismissed.

It is so ordered.

Dated and Delivered at Mombasa this 9th of May 2003

A.G.A. ETYANG

JUDGE