



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 1326 OF 1997

From original conviction and Sentence in Criminal Case No. 944 of 1996 of
the Resident Magistrate's Court at Karatina

SAMWEL WARUI WACHIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was convicted of the offence of Robbery with violence c/s 296(2) of The Penal Code and sentenced to death. Aggrieved by the said conviction he lodged this appeal. The appellant had been charged jointly with another person who however escaped from lawful custody and though convicted was not present when the judgment was delivered.

The complainants were forced into a neighbour's house where they were robbed of personal effects as set out in the charge sheet and evidence in chief. The incident took place at night. Subsequently, the appellant and his co-accused were arrested and charged with this offence. They denied the same.

In this appeal we are only concerned with the case of the appellant. It was the prosecution case that he was among the people who robbed the complainants, pw1 and pw2. He was identified at the scene and at an identification parade held after his arrest.

The identification at the scene was allegedly based on the clothing that he wore, his voice and walking gait. As we have said, the offence took place at night. The only source of light in the house wherein he robbed took place was a lantern. From the evidence on record, there were a number of people in this house but the size of the room where they all stood was to given.

The size of the lantern was not given nor the intensity of the light that came there from. The time taken by the robbers therein was not specific and it is not easy to tell if the same was enough to afford the witnesses the opportunity to positively identify the appellant.

As to the evidence of gait as we have observed, there being several people in that house, it is not known how much distance the appellant had to walk and display his gait if any. In any case, no particular gait has been attributed to him in the entire record.

Further to the foregoing, in respect of noise identification there is no evidence that the identifying witness had known the appellant before, that he had conversed with him before that night to know his voice and that one word "soldier" was enough to connect any suspect with such a serious crime.

Above, all, although some stolen items were recovered from the appellant's co-accused, none were

recovered from him.

Having gone through the evidence we are of the considered view that the conviction was most unsafe for reasons that we have given hereinabove.

There existed reasonable doubts which ought to have been given to the appellant.

Accordingly, we allow the appeal, quash the conviction and set aside the death sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 29th day of July, 2003

MBOGHOLI MSAGHA

JUDGE

R M. MUTITU

JUDGE