



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.616 OF 1998

(From Original Conviction and in Criminal Case No.69 of 1996 of the
Principal Magistrate's Court at Kiambu)

SHADRACK MWENDWA KALIU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The appellant was convicted and sentenced to death by F.N. Muchemi Esquire a Senior Principal Magistrate in Kiambu on the 22nd day of May 1998. It is against this conviction and sentence that the appellant challenges in this appeal. The appellant appeared in person while the state was represented by Mr. Kivihya.

Among the grounds of appeal put up by the appellant were that the prevailing circumstances did not favour positive identification. The appellant has also taken issue with the numerous contradictions arising in the prosecutions case and that he ought to have given the benefit of doubt owing to such contradictions. The appellant has also argued that the trial magistrate shifted the burden of proof to him and that his defence should have been accepted as it was a good defence.

We have considered the proceedings of the learned trial magistrate carefully. Evidence touching on the identification of the appellant was adduced by several witnesses who were at the scene of crime. These were P.W.1, P.W.2, P.W.3, P.W.5 and P.W.8. P.W.1 was the complainant while the other witnesses are guards from Group 4 Security. All of them are in agreement that the area was well lit by security light outside the complainant's house. They described the appellant's manner of clothing and how he was armed with a pistol. They have explained how the appellant kidnapped P.W.1 and attempted to shoot him with a pistol. They have described how he shot P.W.5. Besides electricity lights all the witnesses are in agreement that the car where P.W.5 was had its headlights on and that they saw the appellant approaching as he came to shoot at the car bonnet.

P.W.1 travelled in the same car with the appellant and when it had an accident she noticed he appellant who was still wearing the same clothes as before having been injured. As the others fled the appellant was unable to ran away due to his injuries. He was therefore apprehended by P.W.2, P.W.4, P.W.7 and P.W.8 who all gave similar testimony. We have noted that the trial magistrate carefully analysed the evidence of the above witnesses carefully. We are satisfied that she considered the appellants defence carefully and found no merits in the said defence. We are not in agreement with the appellant that the trial magistrate shifted the burden of proof to the appellant when she indicated in her judgement that the appellant should have called Kiarie as a witness to prove that he was a pedestrian and that he was coming from the said Kiarie's house to repair Kiarie's television.

We have noted that the appellants defence to the effect that he was a pedestrian walking along the road when the complainant's vehicle hit him was considered by the trial magistrate but found to be incredible. We agree with the finding of the trial magistrate that the appellant could not have been an innocent as pedestrian in the light of the evidence given by the various eye witnesses who saw and identified him at the scene of robbery.

We do not agree with the appellants arguments in his written submissions that he was not possibly identified and that the prosecution's case contains various contradictions. We are satisfied that the appellant was properly convicted and sentenced to death on cogent evidence.

We therefore dismiss the appellant's appeal against both conviction and sentence.

Order accordingly.

Delivered, dated and signed in open court this 13th day of August, 2003.

.....

MBOGHOLI MSAGHA

JUDGE

.....

R.M. MUTITU

JUDGE