

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 1082 OF 1995

**(From Original Conviction and Sentence in Criminal Case 2869 of 1994 of
the Principal Magistrate Court at Makadara)**

JAMES ONYANGO MUNDANYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with the offence of Robbery with violence c/s 296(2) of the Penal Code. after a full trial he was convicted of the lesser charge of Robbery c/s 296(1) of the Penal Code and sentenced to 5 years imprisonment with 8 strokes of the cane. He was also ordered to be under Police supervision for 5 years.

This is an appeal against both conviction and sentence. The thrust of the appellant's appeal is that he was not properly identified as one of those who committed the offence.

In dealing with that crucial issue, the learned trial magistrate had the following to say in his judgment.

“ I find from the evidence before me that though the incident took place in the dead of the night the accused and others already convicted were clearly seen by the complainant, his wife and maid through light from a lantern which was partially lit. The accused was also identified in an identification parade. The complainant and his wife told the court that the accused was not a stranger to them as he used to frequent the neighbourhood. Further when one Thiongo was arrested he mentioned the name of the accused and the others who were involved in the attack. Upon that information they proceeded to the house of one Peter where complainant's stolen items were recovered.”

As the first appellate court it is my duty to evaluate the whole evidence afresh and arrive at independent conclusions. This I have done.

The incident took place in a one roomed house. There was some partial light. The complainant saw the appellant carry the gas cooker and cylinder. He (the complainant) had known the appellant before. He used to see him in the estate. He was emphatic that he saw the appellant clearly when he was disconnecting the gas cylinder from the cooker.

Pw3 is the maid who was in the same room. She also talked of some light from a hurricane lamp. The police officer who arrested the appellant after a chase. He was found in possession of a keyboot and a car key.

An identification parade was conducted by I.P Lawrence Gharama. the complainant identified the appellant by touching. The officer stood firm under cross-examination in respect of the said parade.

In his defence the appellant said there was a dispute about a battery and with the wife of the complainant and this may have led to the arrest and subsequent charges against him.

It is worth noting that if there was such a dispute the complainant would have known about it. After all

it involved his wife. Yet nowhere did the appellant ask the complainant under cross examination.

Be that as it may, the prosecution had a duty to prove the case against the appellant beyond any reasonable doubt. My assessment of the evidence is that the prosecution did prove the charge against the appellant to the required standard. With respect therefore I agree with the learned trial magistrate and uphold the conviction.

The appellant had five previous convictions, four of them were relevant to the present case. I find that the sentence was well merited. Accordingly this appeal is hereby dismissed. Order accordingly.

Dated and delivered at Nairobi this 17th day of December, 1998.

A. MBOGHOLI MSAGHA

JUDGE