



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU

(Coram: Nyarangi, Cockar J.J.A & Omolo Ag. J.A.)
CRIMINAL APPEAL NO. 120 OF 1990

BETWEEN

JOSEPH KIMANTHI M'MNIRIDUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Nakuru (Tanui, J.) dated 29th March, 1990

in Criminal appeal No. 305 of 1989)

JUDGMENT OF THE COURT

The appellant was convicted of attempted robbery contrary to section 297(1) of the Penal Code and of personating contrary to section 382(1) of the Penal Code and was sentenced to 5 years' imprisonment and to receive 5 strokes on count 1 and to 4 months' imprisonment on count 2.

His appeal to the High Court was dismissed. The only point of law for consideration in this second appeal is that of identification. The complainant who had fought off the robbers, who were about 5 in number, said that he was able to see and identify the appellant as one of the robbers by the corridor light which was on at the time. The struggle had lasted for about 5 minutes and in our view the complainant had ample time to see the appellant. There were favourable factors of light, time and opportunity for the complainant to be able to see the appellant clearly. About 2 hours later at about 3.30 a.m. at night the appellant was seen walking at a lonely spot. On seeing the policemen he ran away but was caught soon after hiding behind a thicket. When arrested he gave his name as John Mwangi Wambugi which later was found not to be his true name.

Both the trial Court and the High Court had rejected the defence raised by the appellant that he was arrested at 8.00 p.m. We are in full agreement with the concurrent rejection of the defence raised by the appellant.

The learned State Counsel does not support the conviction. We observe that there was no identification parade held in this case. Instead the complainant was allowed an opportunity to see the appellant at the police station. This we strongly deplore and hope that a greater care will be exercised to ensure that witnesses do not see the suspects at the Police Stations. Besides the footprints at the scene were not the ones picked up by the police, dog. For these reasons we take the view that the conviction on count one is

not safe. We allow the appeal on count one, quash the conviction, set aside the sentence on count 1 and order that so far as the charge relating to count one is concerned the appellant shall be set free forthwith unless otherwise lawfully held.

As far as conviction on count 2 is concerned we are satisfied that the same is sound and we dismiss the appeal against conviction on count 2.

Dated and delivered at Nakuru this 25th day of February, 1991.

J.O. NYARANGI

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JUDGE OF APPEAL

A.M. COCKAR

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JUDGE OF APPEAL

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR