REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

crim app 63 of 1990

WANJIKU……APPELLANT

V

REPUBLIC…...…….RESPONDENT

Judgment.

The appellant was charged and convicted of the offence of robbery with violence contrary to section 296 (1) of the Penal Code.

The evidence adduced by the prosecution was that on the night of 31st August, 1988, the appellant with others raided several homesteads at Kirima Village in Nyandarua District of the Central Province. The raiders had torches.

In the first house they raided, there was a young person aged 15 years. His evidence was that after 10.00 pm while he and his brother were asleep, he was waken up by noise of a door being broken. The robbers asked for money in Kikuyu language. They shone torch light on the witness who then covered himself with a blanket. The robbers searched for money. The witness said that he saw the appellant breaking his school box while holding the torch with his chin and chest. The light was shining on the card-board and then reflecting on his face so that he was able to see his face. They stole a radio, one wrist watch and two disco watches. The witnesses were told by the robbers not to scream. The witness had not known the appellant before then except that night but was able to pick him out at the identification parade.

In the next house, a woman woke up to find a group of young men in her room. There was a lot of light in the room. She was threatened with death if she shouted. They asked for money but carried a radio, a wrist watch and a small box. Though the woman was standing up when the robbers ransacked the room, she could not identify any of them. In the third house, a husband and wife were asleep. At about 2.00 a.m the wife said that they heard people shouting calling Njeri Njeri open. Njeri happened to be their daughter who was not at home. The people banged the door with stones until the door fell open. Both husband and wife climbed and lay on to p of wardrobes. The door of their bedroom was also smashed and then the people got in. The wife in her evidence stated that the appellant entered their room first and stood next to the door below where she was. They asked for money from her husband and a watch. She also said that the appellant pointed his torch at her and told her to come down. The appellant assisted her and put her on the bed while holding his torch with one hand. The witness said that she saw his face clearly when he was standing at the door and when he assisted her from the top of the wardrobe. She also said that the appellants voice was familiar since she had seen him before. They carried a watch, a radio, radio cassette, and shoes, leather jacket, handbag and a Somali sword. She picked the appellant at the identification parade. Her husband who was with her in the house at the time could not identify any of the robbers.

The appellant has filed several grounds of appeal one of which is challenging the identification. The leaned State Counsel supports both he conviction and the sentence.

We have evaluated the evidence and in particular the point of law raised on identification. In all the three instances the evidence led is that the robbers had torches but there is no evidence of the number of torches they had and the amount of light there was in the room. All what the witnesses said was that the torch was pointed on a cardboard and in other instance the robber held the torch between his chin and the chest. There is no evidence that the light shone on the face of the appellant.

It was held in Abdullah Bin Wendo and Another vs. Republic 1953 Volume xx 166 and Cleophas Otieno Wamunga vs Republic (Criminal appeal No 20 of 1989) that evidence of identification should be tested with great care especially when it is know that the conditions favouring a correct identification were difficult. The witnesses who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the appellant's face in the manner described by the witnesses. We are also doubtful how the witnesses were able to identify the appellant in the identification parade. In this respect, the appellant complain that it was easy for him to be picked up because in the parade he was the only one from the cell.

The trial court also relied on the identification by voice. Although identification by voice is acceptable, the evidence given was that many people shouted the name of "Njeri Njeri". This was related to a voice heard three days before. Similarly, we are doubtful that in the absence of conversation, a voice could be identified by the pronunciation of a name by a group of people and one voice be identified.

Having considered these facts, we express our doubt on identification which doubt we express in favour of the appellant. We allow this appeal, quash conviction and set aside the sentence. We order that the appellant shall be set free forthwith.

Dated and delivered on 25th September 1990

Gachuhi,Masime & Kwach JJA