REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 291 OF 1982

OWIN KIMOTHO KIARIER ……APPELLANT

Versus

REPUBLIC……..RESPONDENT

(Appeal from conviction and sentence of the Senior Resident Magistrate (J. Aluoch, Mrs) dated 18th March, 1982 in Criminal Case No 291 of the Senior Resident Magistrate's Court at Nairobi)

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to section 296(1) of Penal Code (cap 63) and was convicted and sentenced.

Before I deal with the grounds of appeal stated in the petition filed by the appellant personally and in the supplementary petition of appeal filed by his Advocates, Messrs Khaminwa & Khaminwa. I shall briefly recount the facts according to the prosecution evidence. At about 2.30 a m on the nigh of 26 – 27/9/1981 the complainant (P W 1) who with his wife (P W 2) was asleep in his bed-room, was awakened by noises outside and by a stone hitting the window. He got up and switched on the electric light. Then the bed-room door was broken and four people claiming to be policemen entered armed with pangas and iron bars. Threatening both with violence the robbers obtained shs 8,000 in cash from the husband (P W 1) and also took various items of clothing, radio, simi and spear. They also took the keys of his Volvo motor vehicle outside. Then while one of them who was holding the complainant's spear, stood guarding the complainant and his wife, the other three went out. As the engine of the car started, the one guarding them three the spear outside and entered the car which was then driven away. The car was later recovered. Less than a month later, on 15-10-1981 at about 9.30 p.m the complainant saw one of the robbers in a bar in Waithaka Village as Dagoretti road. This man was the appellant. He was with another person. The complainant contacted the police and the appellant was arrested.

In his sworn statement the appellant said that he was a self employed scrap metal seller. On 26-9-1981 at 9.00 p m he had come home to Waithaka Village where he lived with his parents, brothers and sisters. He share a room with his brother. The whole of that night, after arriving home, he had slept in his room. He did not go out at all that night. After describing that he had spent that night at home in the room which he share with his brother the appellant said that he had known the complainant by sight for the last 10 years as he used to see him driving around in his home area. The appellant then described how he was arrested.

Appellant's brother, Michael Conel Kairu, testified that he and the appellant had slept the whole of the night of 26/9/1982 in the same room. Neither of them had them left the room that night. Appellant's father, Jeremiah Kiarie Kamotho, testified that he the appellant had arrived home that night at about 3.00 pm and had not left the house at any time during the night. The evidence was similar to his son Michael's.

Of the 8 grounds of petition grounds 2 and 8 are related to the sentence. Mr akhabi dealt with all the grounds 3, 4, 5, 6 and 7 of the petition and grounds 1 and 2 of the supplementary petition together with ground 1 of the petition which was that the conviction was against the weight of evidence adduced by the prosecution witnesses.

Mr Akhaabi started his arguments by criticising the fact that no identification parade was held. I do not see that there was any need for that. The complainant had already seen and identified the appellant in a public bar. An identification parade thereafter would have been purposeless.It was strictly a matter for investigating officer's discretion whether to have held identification parade or not to see if the appellant's wife was able to identify the appellant or not.

Mr Akhaabi next argued that the complainant at the time of the robbery must have been in a shocked state that it must have affected his power of identification. Therefore, corroborative evidence was imperative. But, argued Mr Akhaabi, the evidence of the complainant's wife was worthless for corroborative purposes because she had identified the appellant in court only where he was already sitting in the dock. There is no substance in this argument. The complainant agreed in cross-examination that he was shocked when people got into his house. That would naturally appear to be the state of mind of any ordinary reasonable person in such circumstances. But the appellant had added that he was not dizzy. I cannot see in what way the presence of robbers in one's house in such circumstances would adversely affect one's normal capability to identify properly. However, the complainant had said that he had known the appellant before by sight having seen him earlier on a couple of occasions at a butchery at Waithaka. There was electric light in the room. Whereas the complainant had claimed that one needed only a minute or two only to be able to see one's face, in this case he had a clear view of the appellant and his companions for about 15 minutes under electric light of the room. To my mind these conditions were favourable to a proper identification and the chances of a mistake in identifying are completely ruled out.

That the complainant had been able to observe the appellant and his companions carefully is also borne out by the fact he was able to describe in details the part each of the robber including the appellant had played in the robbery. He was also able to describe fully the clothes that the appellant was wearing at the time of the robbery. This evidence on these details was substantially corroborated by that of his wife (P W 2) who was with him at the time of the robbery.

On the criticism that the wife had identified the appellant because he was sitting in the dock and had certain conspicuous features such as long hair it is the practice that in court an accused person's place is in the dock. The appellant was represented by an advocate at the trial. If the Advocate had had any doubts at the time that the appellant's being in docks when the complainant's wife was asked to identify him, would have caused prejudice to the appellant then he could have, before the particular witness was called into court to give evidence, requested the court to allow the appellant to change his place to his own satisfaction. No such application appears to have been made to the court. The only presumption is that the appellant's advocate at the trial had no misgivings at all at the appellant being in the dock when the complainant's wife was called upon to identify the robber. There is no merit in this criticism. Likewise there is no merit in the criticism as to why finger prints were not determined on items such as the spear.It is for the investigating officer to decide what evidence to put before the court. If no evidence relating to finger prints on the spear or the volvo car was produced then the court can only presume that the appellant's finger-prints were not found on either. No prejudice was caused to the appellant on the prosecution's failure to call evidence on finger-prints.

The 3rd and 4th grounds of the supplementary petition argued by Mr Akhaabi are in respect of the defence of alibi and the evidence was that on the night of the robbery the appellant had been in his room from 9.00 p m until morning and had not left it at any time during the night.

Mr. Akhaabi argued that the appellant had merely to raise the defence of alibi. It was for the prosecution to decide what evidence to bring to disprove the defence raised by the accused. In this case, the prosecution had decided to disprove the defence of alibi through the evidence of the complainant and his wife. The evidence of both these witnesses was that the appellant at the material time was nowhere else except in their bedroom committing robbery jointly with others. It was for the trial magistrate to decide which evidence to believe and which evidence to disbelieve. She had the opportunity to listen to the witnesses and to observe their demeanour.It is only in exceptional circumstances that an appeal court will interfere in the assessment of the reliability and credit worthiness of a witness by the trial court. In this case, I have carefully considered the whole of the evidence as well as the judgment of the learned Senior Magistrate was satisfied that she had carefully and painstakingly considered the evidence before her and has given a reasoned judgment. I am satisfied that she came to the right conclusions.

Mr akhaabi's final critism was that the appellant had been in police custody for a week before he was brought to court. That is highly deplorable. An accused must as expeditiously as possible be brought before court after his arrest. However, in this case there are no allegations of ill-treatment while in police custody nor is there any question of any confession having been extracted from him while in police custody. I am satisfied that no prejudice was caused to the appellant by the fact that he was arrested on 15.10.1981 and brought to court on 21.10.1981.

On my own independent consideration, evaluation and assessment of the recorded evidence, I am satisfied that this is a safe conviction. Mr. Akhaabi did not raise the question of sentence at all. The sentence is a little on higher side but by no means, is it excessive. Appeal against conviction is dismissed and the sentence is confirmed.

A. K. COCKAR

JUDGE

6.10.82