IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 344 OF 2007

JOHN KIPKEU KIPROTICH………………………..…………APPELLANT

AND

REPUBLIC……………………………………………………RESPONDENT

(*Appeal from judgment of the High Court of Kenya at Kitale (Ochieng & Bauni, JJ.) dated 25th October, 2006*

in

H.C.CR.A No. 49 of 2005)

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JUDGMENT OF THE COURT

John Kipkeu Kiprotich, the appellant herein, was the 2nd accused in the subordinate court. He was charged together with three others before the Senior Principal Magistrate's court at Kitale with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal code. The facts of the robbery offence were that on the night of 11th and 12th July 2002 at Top Suwerwa trading centre Cherengany in Trans Nzoia District of the Rift Valley Province they jointly with another not before the court armed with dangerous weapons namely AK 47 assault rifle, a knife and rungus robbed Margaret Cherotich Kimutai (PW1) of cash Kshs.21,000/=, one radio cassette, make artech, 4 boxes of Eveready batteries, 2 long trousers, one jacket, 8kgs of chipsy fat, one "T" shirt, 2 national identity cards and 2 elector's cards, 8 packets of razor blades and one small bottle of some medicines or chemicals all valued at Kshs.28,960/= the property of Margaret Cherotich Kimutai and at or immediately before or immediately after the time of such robbery used actual violence to the said Margaret Cherotich Kimutai and shot dead her son Hillary Kirui. They all denied the charge and were tried by the Senior Principal Magistrate (H. I. Ongudi) who put the appellant and accused 2 on their defence but acquitted accused 3 and 4 under ***Section 210*** of the Criminal Procedure Code.

When put to his defence the appellant stated in an unsworn statement that on 18th July 2002 he saw police officers go for him at his home. He was then taken to the District Officer's office where he slept. Thereafter he was taken to Kapsowar police station and after 2 days he was called to the occurrence book office where he saw a woman and 2 men. At Kitale he attended an identification parade where the woman he had seen at Kapsowar came to identify him. He denied the case and said he was not arrested with anything in this case. In her reserved judgment dated 1st October 2004 the learned Senior Principal Magistrate stated:

“**PW1 says when the main door was opened she was able to identify the two people who entered the house. They had torches which they flashed around checking what they would steal. PW1 was therefore able to identify the two men for whom the door was opened. One was a former neighbour and the other one she had never seen him before. The former neighbour whom she identified on the identification parade was accused 2. …….. In cross examination she said she was with these people in the house for a long time. …… Her husband (PW2) says he ran through the window. There were bright torches outside this house (*sic*) has white wash and with the light from the torches he was able to identify two people whom he recognized as his customers. These were accused 2 and another who was acquitted. Probably these were the two people who entered the house after the main door was opened. He says he knows accused 2 as a neighbour, PW1 and PW2 says (sic) there was sufficient light from the torches and this enabled them to identify attackers. ……….Both PW1 and PW2 identified accused 2 at different identification parades held. They have known him as a neighbour. Accused 2 says he was never at the scene of offence. In fact he says PW1 had seen him at the crime office Kitale. However he never put this to the witnesses in cross-examination. He has only raised it in his unsworn defence. Accused 2 was someone known to the witnesses PW1 and PW2………………………………………………….. With the amount of light there was in the house I am satisfied that it would be easy to recongize a person known to another. PW1 and PW2 were able to identify the witnesses (accused) on the identification parade (ExB 17 and 18). In the parade form the accused (accused 2) has indicated that the witnesses saw him at Kapsowar. As I mentioned hereinbefore that accused 2 never cross-examined PW1 over this issue of Kapsowar. It is not clear what the witnesses could have gone to do at Kapsowar. I still find that accused 2 has been properly identified by PW1 and PW2.”**

After the learned Senior Principal Magistrate considered in turn the evidence relating to accused 1, who was acquitted, she concluded:

“**Their defence is just an afterthought. After evaluating all the evidence on record, I am convinced beyond doubt that the accused persons committed the offences with which they are charged. For my part I find them guilty and convict them as charged.”**

Then she proceeded to sentence the appellant and accused 1 to death, the only lawful sentence provided by law.

Being aggrieved by this decision the appellant filed an appeal to the superior court which was dismissed on 25th October 2007; (Bauni & Ochieng JJ.). There is however, no record to show accused 1 also appealed to the superior court, but it is the dismissal of the appellant’s appeal which has given rise to the present appeal before us.

In the appellant’s own written memorandum of appeal which his learned counsel, Mr. Misoi, adopted, 13 grounds of appeal were listed but counsel grouped them into 2 grounds, thus, those dealing with contradictions in the prosecution evidence and those dealing with identification. According to the counsel, grounds 3 to 12 dealt with identification. Apparently, counsel only submitted these in the latter category at length and said since the offence was committed at night and there was no light in the house, PW1 could not have identified anybody since she concentrated on her child who was injured in the commotion. In any event, he stated, since PW 1’s husband **Alex Kimutai Rotich** (PW2) ran out during the robbery it was not possible for him to recognize any of the robbers. Counsel also stated that though PW 1’s neighbour **Philip Kipkorir Kimutai** (PW5) came out on hearing the commotion and flashed his torch, he recognized none of the robbers. Counsel further submitted that though the robbers were said to have had powerful torches this did not make it easier for PW1 to recongize them. Again, although the appellant was picked by PW1 on the identification parade, he clearly complained that she had seen him earlier when they were travelling together in a police vehicle to Kapsowar police station. Counsel stated further that none of the stolen items, nor even the gun were found on the appellant. He prayed that the appeal be allowed and the appellant set at liberty.

Mr. Omutelema, learned Senior Principal State counsel, in reply, submitted that the robbers had powerful torches and from where PW1 was she could see what was going on and this is why she even

saw when her child was shot and the intestines came out. He submitted that since the appellant was known to the complainant he was properly identified and urged that the appeal be dismissed.

Being a second appeal, unless circumstances warrant this court to interfere on issues of facts, only matters of law call for it's intervention, – see ***Section 361(1)*** of the Criminal Procedure Code, and also **M'Riungu v Republic [1983] KLR 455**. The complainant (PW1) and her husband (PW 2) were asleep at their house at Top Suwerwa on the night of 11th and 12th July 2002. It appears the robbers hit and broke the bedroom window through which one of them, with a gun, gained entry into the house and shot at a child, Hillary Kirui, who was sleeping in his bed. He later died in hospital. According to PW1, after the gunman shot the child, he opened the door for other robbers who then entered the house. According to PW 1, 2 robbers came in.

She stated in her evidence:

"**I was able to identify the two people whom the gunman opened the door for. They had their own spotlights on. They were just flashing around the house as they checked for what to steal. One of these 2 people was a former neighbour five years ago. I attended two identification parades. There were several people on the parade. I identified a person on each parade. It was at the police station. I knew one person very well that is the former neighbour. On the first parade I identified accused 1. I had never seen him before the incident on the second parade I identified accused 2 who was a former neighbour.**"

PW 2 said in his evidence:

"**I ran through the window. There were bright torches outside. I tried to go through the fence in rain (sic). Since it was so bright and my house was white wash I managed to see two people who I recognized as my customers.**"

Later in his evidence he said:

"**Later we went to Kapsowar where some people had been arrested. I saw them. We were called at Kitale police station for an identification parade. I identified 2 people at the identification parades. These are the two people I had seen at night at my home. They are people I have been seeing at home….. The second person identified was accused 2. There was sufficient light was from their various torches. My house had white wash so light reflected. ……. Accused 2 is a neighbour I know him well……. I have never collided with accused 2." (**_underlining supplied_**).**

Thus the evidence on which the Senior Principal Magistrate founded the conviction against the appellant was that of identification by PW1 and PW2. In upholding the subordinate courts decision, the superior court had this to say:-

"**There was no dispute that the robbery took place and in the process a child Hillary Kibet (**_sic_**) was shot and he died later. The incident took place and the main issue was that of identification. PW1 and PW2 told the court that they identified the appellant well. They said that the robbers had bright torches and it is from their lights they identified the appellant. It has been held over and over again that where the only evidence which connects an accused person with an offence the court must threat (sic) it with alt (sic) of caution and test it properly………….. In this case the evidence of the two witnesses especially that of PW1 was straight forward and it was clear there were no doubts that the appellant was properly identified. The appellant was well known to the witnesses. He was their neighbour, a fact not denied. Theirs therefore was a case of recognition which was better evidence even than that of identification …………………………….. There are therefore no doubts that the appellant was one of the robbers. There was evidence that they were armed with a dangerous weapon an AK 47 rifle and they used violence which led to the death of Hillary Kirui.**

In the circumstances we find that the conviction of the appellant was proper and we uphold the same."

The superior court, as a first appellate court, reconsidered the evidence adduced before the subordinate court and evaluated it itself in order to draw its own conclusions in deciding whether to uphold the judgment of the said subordinate court. This is part of its duty. It came to the conclusion that the decision of the subordinate court to convict the appellant was sound (see **Ngui v Republic [1984] KLR 729**)

These are concurrent findings of the two courts below on both facts and law. No new legal point has been raised on this appeal to counter those findings which would compel us to interfere with the superior court's decision. We are of the view that this appeal has no merit and we order it to be dismissed.

Delivered and dated this 24th day of April, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. ALUOCH

……………………………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR