REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 76 of 2007

MARTIN MUGAMBI KARINDI ……..…….APPELLANT

AND

REPUBLIC ……..……..…….RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Ouko, JJ.) dated 13th July, 2007

in

H.C.CR.A. NO. 37 OF 2006)

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JUDGMENT OF THE COURT

This is a second appeal, against both conviction and sentence.

The appellant, ***Martin Mugambi Karindi***, was charged and convicted of the offence of robbery with violence contrary to ***section 296(2)*** of the ***Penal Code*** and sentenced to suffer death as by law established, by the Senior Resident Magistrate's Court at Meru on 23rd March, 2006. The particulars of the charge, as stated in the charge sheet, were that:

"**On the 19th day of May, 2002 at Kathama Kaindi village in Kianjai location, Meru North District within the Eastern Province, jointly with others not before court while armed with offensive weapons to wit axes and knives robbed James Kinoti Ithula cash Kshs.20,000/=, one crate of soda, four bundles of cigarettes, seven pairs of dry cells and seven loaves of bread all valued at Ksh.22,445/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said James Kinoti Ithula."**

He appealed against conviction to the superior court (Lenaola and Ouko, JJ) who, in a judgment handed down on 13th July, 2007, dismissed the same.

Aggrieved by that decision, the appellant appealed to this Court initially by filing seven home-made grounds of appeal dated 16th July, 2007, and subsequently by way of a Supplementary Memorandum of Appeal dated 30th April, 2008, and filed by his advocate with leave of this Court, listing eight grounds of appeal.

The grounds of appeal are as follows:

"*1. The learned judge erred in law in ignoring and in not finding that the accused was arrested on 4/9/02 and charged and not produced in court until 29/11/02 period of about 3 months contrary to the provisions of s.72 of the Constitution of Kenya without any lawful justification.*

2. The learned judge ignored and failed to find that the accused was not provided with the intended prosecution witness copies of the statement contrary to the provisions of s.77 of the Constitution of Kenya therefore his defence was highly prejudiced.

3. The learned judges erred in law in ignoring and not finding that the subordinate court Maua could not transfer the matter to Meru Law Courts and therefore the proceedings were nullity.

4. The learned judges erred in law in ignoring and in not finding that s.198 CPC and s.77 of the Constitution of Kenya were breached in that the language of trial was not recorded.

5. The learned judges erred in law in ignoring and failing to find that the contradictions in the entire evidence on record cast doubt adequate to warrant the setting aside the convictions.

6. The learned judges erred in law in ignoring and failing to find that the trial court admitted highly prejudicial evidence of allegedly other offences committed by the accused contrary to the provisions of the Evidence Act which clouded the courts mind and eyes and therefore convicting the accused.

7. The learned judge erred in law in ignoring the fact that in visual identification, even close relatives are mistaken and that there was a possibility of error in the circumstances of the alleged identification.

8. The learned judges did not discharge their statutory duties in evaluating the evidence on record and arriving at the decision they did contrary to the law and the principles set down in the authority of OKENO VS. R. (1972) E.A. 32 + GD3."

According to the prosecution case, on 19th May, 2002 at about 2 a.m., the complainant (PW1) and his wife (PW2) were asleep in their shop at Kathama village, when they were attacked by robbers who first attempted to break into their shop through the rear door, and then, when that attempt failed, by cutting down the window grills, and gaining entry through the window. It was dark as the power had been disconnected by the robbers, who carried torches. The appellant was identified by PW1 and PW2 as one of the robbers who was wearing a face-mask, which got stuck into the window grill and came off. At that time the complainant (PW1) flashed his torch on the appellant's face and recognized him as "***Mugambi***" who was his customer and whom he had known since childhood. According to PW1 the robbers demanded, and were given money (Shs.20,000) as they beat him and his wife using "*pangas, whips and axes.*" The robbers also stole cigarettes, loaves of bread and a crate of soda. The following day, the matter was reported to the Ngudune Police Station. The appellant was arrested some five months later, and charged with the offence of robbery with violence, as stated before.

Those are the findings of facts made by the learned magistrate, and upon re-evaluation confirmed by the learned Judges of the superior court.

As we have stated, this is a second appeal. By *dint* of the provisions of ***sections 361*** of the ***Criminal Procedure Code***, we are enjoined to consider only matters of law and not matters of fact.

In our considered view, the only matters which could be considered as raising issues of law are: (i) identification, (ii) violation of the appellant's constitutional rights, and (iii) absence of recording the language of the court in the proceedings.

With regard to **identification**, the learned counsel for the appellant, Mr. Charles Kariuki, submitted before us that because of the absence of any light at the material time, there was sufficient doubt about the identification of the appellant as the person who committed the offence; that there were material and

significant contradictions in the evidence of PW1 and PW2; and finally that there was some doubt about the veracity of the O.B. report produced in court.

On the issue of identification, here is what the learned senior resident magistrate said in his judgment:

"**The evidence by the complainant and his wife that they identified the accused using their torch is believable in the circumstances if the mask came out and got stuck on the grills which had just been cut by the gang. The complainant could not have called the accused by name if he had not seen him and identified him.**

The entries made in the O.B. during the reporting time clearly shows that both the complainant and his wife clearly saw and identified the accused. The report was made within a few hours after the robbery and there would be no reason why the complainant could only pick on the accused in the entire village if he was not at the scene."

The superior court, as we have stated, considered the evidence in respect of identification by recognition afresh and having done so stated:

"**On the question of identification, it was the case for the prosecution that the robbers had torches but P.W.1 also used his torch or spotlight which he focused on them and at that moment and before it was taken away, he was able to identify and recognize the appellant. The appellant has taken issue with that purported recognition but we do not agree with him. It was the evidence of P.W.1 that the robbers had disconnected electricity to his shop and that being 2.00 a.m. or thereabouts he had to use a torch. Although only the appellant had a mask, the same fell off his face and it was exposed. Recognition is always better than identification and in this case, the appellant was well known to P.W.1 and more importantly as soon as the robbers left the scene, P.W.1 proceeded to the home of P.W.3 and told him of the suspect he saw and it was the appellant. P.W.3 confirmed this evidence as did P.W.4 who produced the Occurrence Book at Tigania Police station and that initial report was not challenged. P.W.2 corroborated the evidence of P.W.1 in all respects and any doubts one may have about the intensity of the light from the torch held by P.W.1 and the distance at which he saw the appellant or even the period he took to do so, must dissipate in the light of this otherwise very clear case of recognition. It is important to note that P.W.2 had regularly served the appellant at the same shop and had known him since her school days."**

With respect, we cannot say with the same certainty that the appellant was identified or could have been identified without any doubt as the one who committed the offence. Given that there was no power at the material time, the only light available was that from the torches, when lit, by either the witnesses, or the appellant. There is no evidence of the distance between PW1 and the appellant when the latter is alleged to have flashed his light on the appellant's face - just as his face-mask came off. Secondly, there is indeed evidence that the robber demanded money. That means the robber spoke to PW1 and PW2 who testified that they knew the appellant from childhood. So, then, why did they not recognize his voice? There is no evidence here of voice recognition.

Finally, we would wish to comment on the O.B. report that was made by the complainant. There is evidence that the O.B. went missing for a while, and was produced only after the lower court so ordered. The book produced before the court covered the period 6th May, 2002 to 2nd July, 2002, which we find unusual, as normally it should cover the period for the entire year in question. This also raises a doubt in our mind about the authenticity of the first report that was made to the police.

The sum total of the above is that, in our view, the conviction of the appellant was and still is unsafe. Having come to this conclusion, we do not find it necessary to address other issues of law raised in the Memorandum of Appeal.

Accordingly, we allow the appeal, quash the conviction, set aside the sentence, and order that the appellant be released from prison forthwith unless otherwise held for some other lawful cause.

Dated and delivered at Nyeri this 15th day of May, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR