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

Criminal Appeal 214 of 2006

LEGUS LEYAMO SAKWA ……..……. APPELLANT

AND

REPUBLIC …….....……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya

(Lesit, Makhandia, JJ) dated 27th July, 2004

in

H.C.CR.A.NO.671 OF 2001)

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JUDGMENT OF THE COURT

The appellant, ***LAGUS LAYAMO SAKWA,*** a Tanzanian national was charged before the Senior Principal Magistrate's court, Kibera on 28th June 2000 on one count of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the first account were that on the 25th day of June, 2000, at Kiserian Game Area in Kajiado District within the Rift Valley Province, the appellant jointly with another not before the Court robbed ***JOHN GAITUGU MUITURI*** of a T.V. set make, great wall black and white valued at Kshs.5,500/- and at or immediately before or immediately after the time of such robbery used actual violence to the said ***JOHN GAITUGU MUITURI.***

The appellant was also charged with a second count of being unlawfully present in Kenya contrary to section 13 (2) of the Immigration Act. The particulars of this count as per the charge sheet were that on the 25th June, 2000 at Kiserian Game Area in Kajiado District of the Rift Valley Province, the appellant being a Tanzanian citizen was found present in Kenya without a valid pass or permit.

As regards the second count, the appellant pleaded guilty and was accordingly convicted on his own plea of guilty and sentenced to serve 6 months imprisonment.

On the first count, the appellant pleaded not guilty and after a full trial by the trial court, the appellant was found guilty of the offence of attempted robbery with violence contrary to section 296(2) of the penal Code and sentenced to death as provided by the law.

A brief background as per the evidence adduced by the prosecution in support of the charge was that, on 25th June, 2000 at midnight, the complainant ***JOHN GAITUGU MUIRURI*** (***PW1***) a soldier by profession, was in his house at Kiserian when he heard dogs barking. He was in the company of his wife ***NANCY WANJIKU (PW2).*** He switched on the lights and saw the light of a torch through the window. Soon thereafter he heard the main door being broken with a big stone. He ran out of the house and met two people. One was holding a panga. He held onto one of the two who drew a knife and attempted to stab him on the head. Using his hand, he held on the knife but was cut in the process. The other person who had a panga attempted to cut him but he ducked, picked a stick and hit one of the robbers who was in the process of removing the T.V. The robber dropped the T.V. and the two of them ran out of the house with the complainant (***PW1***) in hot pursuit. The complainant caught up with one of them after a 40 metres chase, and he identified him as the appellant. The complainant was shortly thereafter joined by neighbours who responded to an alarm which had been raised, and who then helped him arrest the appellant and take him to the police station.

In this Court, the appellant has relied on his own Memorandum of Appeal filed on 10th August, 2004 and his counsel's Supplementary Memorandum of Appeal filed on 30th October, 2006.

This being his second and final appeal, his counsel ***MR WAMWAYI*** in his submissions, quite rightly confined himself to only one point of law namely, alleged lack of identification of the appellant.

Ground 2 of the Supplementary Memorandum of Appeal states:-

"**That the learned Judge of the High Court erred in law in affirming the conviction by holding that the appellant was positively identified whereas the evidence to sustain such a conviction was not watertight."**

In support of this ground, ***MR. WAMWAYI*** contends that it was not shown that the lighting outside the house was sufficient to enable proper identification especially taking into account that ***JOHN GAITUGU MUIRURI (PW1)*** and his wife ***NANCY (PW2)*** testified that the attempted robbery took place at night time. ***P.C. FELIA GUMBI PW4*** received the report of the incident at Kiserian police base, at about 4.30 a.m. ***MR WAMWAYI*** submitted that there was no evidence of any light at the point where the appellant is alleged to have been arrested. He added that as the police did not conduct an identification parade, the identification of the appellant was not watertight and it could be a case of mistaken identity. He asked the court to take into account the defence of the appellant which in his view supports that conclusion.

The appellant stated in his defence that on 24th June, 2000 he was given work to drive 6 cows to Rongai and that he was usually paid Kshs.150 for each cow. On the material day he woke up at about 4.00 a.m. to start his work. He locked his house and started going to his place of work and on the way near a bridge, he was stopped by some people. He did not stop and out of fear he started running whereupon the people caught up with him, beat him up, broke his scapula and he fell down unconscious. Upon regaining consciousness he found himself at Ngong police station and was charged with the offence.

MR WAMWAYI concluded by saying that since ***PETER MWORI MURIITHI (PW3)*** testified that the appellant was arrested about ½ km from where the witness was and the witnesses gave different versions as to the time of the offence and in absence of clear proof of the strength of the light used to identify the appellant, the identification, should not have been relied on. In support of his submissions ***MR WAMWAYI*** cited the case of ***KIARIE v REPUBLIC [1984] KLR 735*** where in holdings 2 and 3, this Court stated:-

"**It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken."**

"**Where the evidence relied on to implicate an accused person on is entirely identification, that evidence should be watertight to justify a conviction."**

In further support of his submission, the learned counsel also relied on the case of ***KARANJA & ANOR v REPUBLIC [2004] 2 KLR*** where this Court held:-

1. "**Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger."**

2. "**Whenever the case against an accused person depends wholly or to**

a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification."

On his part, the learned Senior State Counsel, ***MR B.L. KIVIHYA*** submitted that the two courts had made well grounded findings that there was ample light in the house. Thus, ***PW1***, using the house lights, was able to note that the appellant was armed with a knife and a rungu when he confronted them after breaking into his house. In addition ***PW2*** was able to see the appellant in the house as the violent confrontation between ***PW1*** and the robbers took place inside the house. He further submitted that as regards the area outside the house, there is evidence on record that there were security lights. Moreover, ***PW1*** never lost sight of the appellant and that the appellant could not offer an explanation of his presence in the neighbourhood at such ungodly hour of the night. On the need for an identification parade, the learned Senior State Counsel submitted that it was not necessary since all the witnesses were at the scene and the appellant was immediately identified and arrested and therefore all the evidence placed the appellant at the scene of crime.

We think that the superior court did handle the point of identification in an admirable manner. The learned judges analysed the evidence of the complainant and his wife, quoted excerpts from their evidence and were satisfied not only that the circumstances favouring a correct identification of the appellant existed, but also that the circumstances of the case as a whole left no doubt as to the identity of the appellant.

PW1 did not lose sight of the appellant after the struggle in the house and there is evidence that there were security lights outside the house and that the appellant was overpowered within a very short distance of 40 metres from the house. The appellant was also in possession of a knife and a rungu which ***PW2*** identified in court and which ***PW3*** testified as having been in possession of the appellant at the time he assisted ***PW1*** to overpower him.

Besides, the appellant's defence was clearly at variance with the line he took in his cross-examination of ***PW1***, and it was therefore untenable. It was properly rejected. One cannot be at the scene of crime and away from the scene of crime at the same time for different purposes. We agree with the findings of the superior court on the issue of identification.

Our view is that the identification of the appellant was watertight, and as this was the only point of law for determination by us, we hereby dismiss the appeal. It is so ordered.

DATED and delivered at NAIROBI this 3rd day of July 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR