



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 352 of 2006

GEORGE BUNDI M'RIMBERIAAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Meru (Lenaola & Sitati, JJ) dated 26th January, 2006

In

H.C. Cr. A. No. 90 of 2004)

JUDGMENT OF THE COURT

GEORGE BUNDI M'RIMBERIA, the appellant, was after trial convicted on two counts of robbery with violence contrary to *section 296 (2)* of the Penal Code and sentenced to death by the Chief Magistrate at Meru. His first appeal to the High Court of Kenya at Meru (Lenaola and Sitati, JJ) was dismissed on 26th January, 2006 and hence this second and final appeal.

The prosecution relied upon the following facts. Godfrey Njue (PW1), a Mombasa businessman, was at his home in Kiirua area at midnight on 10th September, 2003 when his dogs started barking. He woke up and looked up whereupon he saw a man standing near his father's house, which is within the same compound as PW1's house. He screamed but the robbers nevertheless broke in, entered the house, placed a pistol on his head and robbed him of cash Kshs.16,600/-. PW1 saw that the robbers were six in number. As they left the house, PW1 peered through the window and by means of moonlight he claimed to have recognized the appellant whom he had known for a long time since they attended the same school and were in the same class as from Standards 1 to 7 and had completed Primary School together in 1992. PW1 testified that the appellant had no weapon but had a jacket which had black and white colours.

Simon Marangu (PW3), a herdsman and an employee of PW1, occupied a house next to the one of his employer. On the material night he was in his house when dogs started barking. When he came out he was confronted at the door by a man on whose face he pointed his torch. The man wore a black and cream jacket. The intruder also had a red cap. PW3 recognized him as the appellant, a person he had known before for about six months prior to the attack.

As this is a second appeal only matters of law fall for our consideration. The only point of law raised so far before us by Mr. Macharia for the appellant is whether the alleged identification or recognition of the appellant by PW1 and PW3 was free from any error.

As is clear from the evidence of these witnesses, PW1 and PW3, the only source of lighting was moonlight whose intensity was not ascertained. Though the witnesses claim to have recognized the appellant, the description of his attire varies.

Moreover, the more serious aspect of the matter was the total failure or omission by the witnesses to give the name of the appellant to the police as they would have been expected to do. We think that the failure by the witnesses to mention the name of their assailant at the earliest opportunity can only weaken their evidence that they had seen and recognized the appellant as one of the robbers who raided their houses during the material night.

We see from the judgment of the trial court that the trial Magistrate did not consider the possibilities of mistaken identification which present themselves from the evidence. Also, had the learned Judges in the first appellate court directed their mind to these issues they might well have reached a contrary decision. See **Okeno v. R [1972] EA 32.**

The upshot of all that we have said herein is that the appellant's convictions were and are unsafe and ought not to be allowed to stand.

Accordingly, the appeal is allowed, the convictions are quashed and the sentence of death is set aside. The appellant is to be set free forthwith unless he is held for some other lawful cause.

Dated and delivered at Nyeri this 18th day of May, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.