REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NYERI

Criminal Appeal 125 of 2006

IBRAHIM ALI HALAKE ……..……..…….… APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

***(Appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Sitati, JJ.) dated 26th January, 2006* In H.C.CR.A. NO. 33 OF 2005)**

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JUDGMENT OF THE COURT

The appellant herein, ***Ibrahim Ali Halake,*** *(as the 1st accused)* and ***Rashid Dima Halake*** *(as the 2nd accused),* were jointly charged with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code before the Principal Magistrate's Court at Isiolo. It was alleged that on the *17th day of December, 2003* at Isiolo Barrier area, in Isiolo District, jointly with others not before court, and being armed with dangerous weapons namely rifles, robbed ***Mariam Yatani Buko*** of ***KShs.60,000/=*** and at or immediately before or immediately after the time of such robbery used personal violence to the said ***Mariam Yatani Buko***.

The concurrent findings of fact made by the two courts below upon consideration of evidence tendered by prosecution witnesses and the appellant *(and his co-accused)* were that on the material day, the *17th December, 2003* at about *7:30 p.m.,* the complainant ***Mariam Yatani Buko (PW1)*** was at her house at Cheselesi area of Isiolo District when two people armed with guns entered through the door which was open at the time. ***Buko, (PW1),*** together with her two children were ordered to lie down and keep quiet by the two armed men. One of the men ordered her to give them money and although she said that she had no money she was pushed into the bedroom from where one of the men took ***KShs.60,000/=*** from her purse as he continued searching for more money. The complainant ***(PW1)*** was beaten by the same man who had taken the ***KShs.60,000/=.*** The second man also asked for more money. After about ten minutes the robbers fled from the house firing once as they fled past the gate. ***PW1*** and her children went out and screamed attracting neighbours to their compound. In her evidence, the complainant testified that the appellant was one of the robbers and that at the time of the robbery the appellant and his co-accused were identified as they had not covered their heads. It was the complainant's testimony that at the time of the robbery there was electricity light which enabled her to clearly see her assailants. She added that she knew the appellant before the incident as he used to buy goods from her shop.

It was the testimony of ***Cpl. Lewis Chani (PW2)*** that as a result of the robbery incident he and other police officers proceeded to the scene where they met the complainant who informed them *(police officers)* that she could identify the robbers. The appellant was subsequently arrested at his home on *19th*

December, 2003 following a tip off.

On *27th December, 2003*, ***Inspector John Kiarie (PW3)*** conducted identification parade at which the appellant was identified by the complainant.

When put to his defence, the appellant gave evidence on oath. In his testimony he denied robbing the complainant stating that he was arrested for no apparent reason. He concluded his evidence by stating that he was charged jointly with a stranger for robbing the complainant.

The learned trial magistrate considered the entire evidence before him and came to the conclusion that the appellant was one of those who robbed the complainant on the material evening. In concluding his judgment the learned magistrate stated:-

"***Looking at the evidence of PW1, PW4 and PW6 I am satisfied beyond reasonable doubt that accused 1 was clearly identified as one of the two robbers. I am thus convinced by the prosecution beyond reasonable doubt that he committed the offence with which he is charged. I find him guilty as charged and I convict him accordingly.***

As for accused 2, I find myself in doubt as to whether he was properly identified. PW4 did not see him. PW1 and PW6 claimed they saw him. Their evidence was however destroyed at the identification parade stage. As the law requires, I give the benefit of doubt to accused 2 who is acquitted and set free under Section 215 of the Criminal Procedure Code."

Consequent upon the conviction, the appellant was sentenced to suffer death as mandatorily provided by law.

Being dissatisfied by both conviction and sentence the appellant filed an appeal in the superior court. The superior court *(Lenaola and Sitati, JJ.)* reviewed the evidence and in the course of their judgment the learned Judges of the superior court stated:-

"***We have ourselves carefully and cautiously revaluated and reconsidered that evidence. We have also carefully considered submissions made by both the appellant and Mr. Oluoch for the Republic. Our irresistible finding is that the appellant was properly identified both during the robbery and at the identification parade. The evidence of PW6 which has been faulted by the appellant on the ground that he made reference to the presence of moonlight on the material night, in our view, strengthens the other evidence as to the sufficiency of lighting during the robbery. PW1 told the court that when the robbers struck, the lights were on and though she and the others were ordered to lie down, she was later pushed into the bedroom and asked for money. The bedroom was lit and the appellant's head and face were not disguised in any way. The robbery took about ten minutes. Outside the house, the security lights were also on. PW1 also stated that the appellant was not a stranger to her as he used to buy items from her shop; though she did not know his name. When she reported the matter to the police, she informed them that she could identify her attackers if she saw them. She consequently picked out the appellant from the parade which was conducted on 27th December, 2003. PW2 confirms that when PW1 made the report to him, she stated that she could identify her attackers if she saw them. We therefore have no doubts in our minds that the appellant, who was no stranger to PW1 was properly identified."***

Having so stated, the learned Judges concluded their judgment thus:-

"***In effect we find that the circumstances prevailing on the night of the robbery were conducive to proper and positive identification of the appellant as one of the two gangsters who robbed the complainant on that night. We have no doubt that the learned trial magistrate reached a correct conclusion when he convicted the appellant on the evidence before him. There is no compelling reason for us to want to interfere with the same.***

In the result, we find that this appeal lacks merit. The same is dismissed in its entirety. Both the

conviction and sentence are upheld."

It is from the foregoing that the appellant comes to this Court by way of second and final appeal. That being so only matters of law fall for consideration as provided by ***section 361*** of the ***Criminal Procedure Code (Cap. 75 Laws of Kenya)***.

The appeal came up for hearing before us on *14th May, 2007* when Mr. A.M. Ng'ang'a appeared for the appellant while Mr. C.O. Orinda, the learned Principal State Counsel, appeared for the state.

Mr. Ng'ang'a started his submissions by stating that the charge was fatally defective in that it referred to ***section 296(e)*** of the Penal Code and yet the appellant was convicted under ***section 296(2)*** of the Penal Code. Mr. Ng'ang'a sought to rely on the authority of this Court in its judgment in ***ELMAN JUMA ALIAS TOM V. REPUBLIC – Criminal Appeal No. 181 of 2002*** (unreported).

In our view, Mr. Ng'ang'a's submission lacked merit since we have perused the charge sheet which was handwritten and it would appear that the charge refers to ***section 296(2)*** of the Penal Code. The ***(2)*** might look like "***e"*** but it is to be observed that ***section 296*** of the Penal code has only two ***sub-sections viz (1)*** and ***(2)***. There can be no doubt that the appellant *(and his co-accused)* were charged under ***section 296(2)*** of the Penal Code. The authority relied on by Mr. Ng'ang'a was on the issue of particulars of the charge and not on the sub-sections of ***section 296*** of the Penal Code. Even assuming that there might have been an error in referring to ***section 296(2)*** as ***296(e)*** of the Penal Code we do not think such an error would have occasioned any prejudice to the appellant or a failure of justice. Indeed such an error would be readily cured by the provision of ***section 382*** of the Criminal Procedure Code which provides:-

"***382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

Provided that in determinating whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

That puts to rest the submission of Mr. Ng'ang'a on the validity of the charge.

Mr. Ng'ang'a then went on to submit that the Judges of the superior court erred in rejecting the appellant's defence and that since the appellant's co-accused was acquitted, then the appellant, too, ought to have been acquitted.

In asking us to dismiss this appeal, Mr. Orinda pointed out that the appellant's co-accused was acquitted on the basis that the officer who conducted the identification parade used the same members who had been used in respect of the first parade in which the appellant was the suspect. It was Mr. Orinda's submission that the identification of the appellant was proper.

We have considered the submissions by both Mr. Ng'ang'a and Mr. Orinda. In our view, the main issue in this appeal relates to identification of the appellant. This aspect of the case was considered by the two courts below and in their respective findings were of the view that the appellant was properly identified. Indeed, it would appear that this was a case of recognition rather than identification since the complainant testified that she knew the appellant prior to the incident as the appellant used to buy goods from her shop. As it has been stated on various occasions by this Court, recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger – ***see ANJONONI AND OTHERS V. REPUBLIC [1980] Kenya L.R. 59.***

Having considered what has been urged before us, we are of the firm view that the appellant was convicted on very clear evidence of identification, nay, recognition. As we have stated on numerous

occasions, a court of appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings. – see ***KAINGO V. REPUBLIC [1982] KLR 213*** and ***CHEMAGONG V. REPUBLIC [1984] KLR. 611***.

In view of the foregoing, we are satisfied that the appellant was convicted on sound assessment of the evidence on record and we therefore find no merit in this appeal.

Accordingly, the appeal is dismissed in its entirety.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR