REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 194 of 2003

GERALD THEURI MUCHEMI ……..…… APPELLANT

AND

REPUBLIC …… RESPONDENT

(*Appeal from a judgment of the High Court of Kenya at Meru (Juma & Tuiyot, JJ) dated 14th February, 2000* In H.C.Cr. A. No. 146 of 1999)

****

JUDGMENT OF THE COURT

This is a second appeal from the judgment of J.V.O. Juma and W.K. Tuiyot (JJ). dated 14th February 2002 in Meru Criminal Appeal No. 146 of 1999.

Gerald Theuri Muchemi (hereinafter "the appellant") had been convicted by the Senior Resident Magistrate Mr. Nduku Njuki in Criminal Case No. 305 of 1999 for the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. It had been alleged in the particulars that the appellant did on the 20th March, 1999 at Kigame sub-location, in Meru District, jointly with another one not before court rob Mwiti Bundi cash Kshs.1350/-, two pairs of shoes, one travelling bag, one bed-sheet, two pillow cases, valued at Kshs.4500 and immediately before or after the robbery used violence on the said Mwiti Bundi.

This being a second appeal it is incumbent upon the appellant to show that the superior court erred on matters of law in reaching its decision on appeal from the trial court.

Mr. Miano appeared before us as advocate for the appellant and relied on the following grounds of appeal:-

"1. ***That the learned High Court Judges erred in law in basing the appellant's conviction on the identification evidence given by PW 1 Mwiti Bundi, PW 2 Regina Karimi and PW3 Joseph Mutua Manyara without observing that the prevailing circumstances during the commission of the alleged offence could not warrant any positive identification.***

2. That the learned High Court Judges erred in law in failing to appreciate that the alleged identification being of recognition in nature was not supported in all material particulars by a conclusive first report to the person in authority or any parade conducted to confirm its veracity, thus rendering their allegations as mere assertions without satisfactory proof.

3. That the learned High Court Judges erred in law in arriving at a different finding from the submissions put forward by the State Counsel which was in my favour but issued diverse sentiments in this regard which anomaly fervently worked to my prejudice.

4. That the learned appellate Judges further erred in both law and fact in declining to attach any due weight to my defence and to give cohesive explanations before reaching the decision to reject since the burden of proof was clearly shifted to the appellant."

The trial court recognized that the issue of identification of this appellant was "the crucial question and holds the future of the accused in balance." and went on to say the following:-

"***The evidence on record is real damning on the accused. All the three prosecution witnesses, PW 1, his wife PW 2 and their watchman PW 3 are positive that they clearly saw the accused. A lamp was in the bedroom. They were able to recognize him during "negotiations" which took some time. All the three witnesses are unanimous that they had been seeing the accused person gambling at Marangu's place at Nkubu next to the Consolota Hospital.***

The complainant, a teacher at the neighbouring Nkubu Secondary School used to see the accused every day while going to school. His wife, who claimed to have been operating at Nkubu Market before going to run the family business at Kianjogu, used to see the accused. She even claimed to have seen the accused the previous morning when she was at the market.

The court is of the opinion that the lighting system and all the prevailing circumstances were in favour of the witnesses identifying the assailant inside the complainant's house. Each of the three witnesses corroborated each others evidence. I do believe their testimony.

I have considered the evidence of PW 3, the watchman and do not find any traces of any grudge or hatred he may have held against the accused.

The description given to the Police on the night of the raid led P.C. Wamae to have no doubt who he was looking for. He also knew the accused.

I do conclude that the accused is the one who committed the offence"

The description above referred to is in the evidence of PW 4, Police Constable Michael Wamae who recounted how the complainant reported the robbery to him at about 4.50 a.m. on 20th March 1999 and claimed to have identified one of the robbers as a "**short black young man whom he had been seeing gambling in Nkubu Bar near the road."**

The superior court in the course of its judgment on the appellant's appeal stated:-

"***We have heard the submission of both counsels (sic) in this appeal. We have also read the lower court's proceedings as well as the judgment of learned trial magistrate Mr. Nduku Njuki.***

We found that the appellant was recognized at the scene by the complainant PW 1 and PW 2 as they knew him prior to the robbery. The appellant was armed with two pangas. PW 3 was the complainant watchman. There was light at the scene because of the hurricane lamp. We found that there was sufficient evidence adduced by the prosecution witnesses to warrant the conviction of the appellant in this appeal."

The appellant did raise the defence of alibi claiming in his unsworn defence that at 5.00 p.m. on 20th

March, 1999, on the afternoon prior to the robbery one of his cows calved. He stayed with the cows until 6.00 p.m. and did not leave home.

On the next day (the day after the robbery) the appellant stated:-

"***My wife got sick , I then brought her to hospital at about 7.00 p.m. We stayed there up to 9.00 p.m. when she was admitted. I left with the driver of my brother's vehicle.***

We then entered Kagwiria bar. I do not drink. I went to watch video. After the show, I was going to Kagwiria but was robbed of a jacket, Kshs.1,500/- and my shoes. I found the driver having left. I then decided to come and report to the police but P.C. Njeru and Irungu locked me up without telling me anything."

The date and timing of this alibi defence is not at all clear but the gist of it would appear to be that the appellant claimed to be at the Kagwiria Bar watching a video or being robbed of his jacket, cash and shoes or being locked by the police at the time of the robbery from the complainant.

Having come to the conclusion, as we do, that the identification of the appellant as one of the robbers, indeed the leader of the robbers, was consistent and credible, it was impossible for the appellant to have been elsewhere such as being locked up by the police.

In the case of **Ngeiywa vs. Republic [2004] 2 KLR 152** in which this Court said at page 157:-

"***The defence of alibi was first raised in the appellant's defence and not when he was called up to answer the charge. In that case it is sufficient for the trial court to weigh the alibi against the weight of the prosecution case – see Wangombe vs. Republic [1980] KLR 149."***

By accepting the evidence of the identification of the applicant, the superior court in effect rejected the defence of alibi."

The two courts below having accepted the evidence of P.W1, P.W2 and P.W3 that they saw and recognized the appellant at the scene of the robbery, the appellant's alibi, if he raised that defence, was inevitably to be rejected and was in our view, rightly rejected. Mr. Gacheche Wa Miano further contended that as there was no identification parade, the evidence of P.W1, P.W2 and P.W3 was, in effect, a dock identification. There was no need for an identification parade because all the three witnesses said they had seen the appellant before on many occasions. No useful purpose would have been served by such a parade. We reject that contention. Nor can we find any support for Mr. Miano's contention, that the learned Judges' decision was influenced by the submission of the State Counsel that the appellant was arrested while drunk and in possession of a gun.

Lastly Mr. Miano contended that the State Counsel in the superior Court conceded the appeal as recorded in the notes of Juma, J. The record of the second Judge, Tuiyot , J is however different as it records the State Counsel as opposing the appeal. Be that as it may, the submissions of counsel are not binding on the court and in the end both Judges were of the unanimous view that the appeal be dismissed. That ground of appeal has no substance.

We consider that, in view of the concurrent findings of fact by the trial court and the superior court on the essential features of the case, there is no valid legal issue raised before us to warrant our allowing the appeal. The appeal is for dismissal, and is accordingly hereby dismissed.

Dated and delivered at Nyeri this 11th day of May, 2007.

R.S.C. OMOLO

……

JUDGE OF APPEAL

P.N. WAKI

……..

JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.