



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
CRIMINAL APPEAL 296 OF 2005

KIMANI MWANGI .....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(An appeal from judgment of the High Court of Kenya*

*Nairobi (Lesiit & Ochieng, JJ.) dated 21<sup>st</sup> October, 2004*

in

H.C.C.R.A. NO. 925 OF 2000)

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**JUDGMENT OF THE COURT**

The appellant herein, *KIMANI MWANGI* together with three others were arraigned before the Senior Principal Magistrate’s Court at Kibera in Criminal Case No. 2677 of 1999 on two counts of robbery with violence contrary to *section 296(2)* of the Penal Code. There was a third count of rape contrary to *section 140* of the Penal Code but as the appellant was acquitted together with his co-accused, we shall not unduly concern ourselves with that count.

The particulars of the offence in the first count stated as follows:-

“1. MUJAZI KAIRU 2. KIMANI MWANGI 3. ALAN NYOIKE 4. JOHN MWAURA: On the 9<sup>th</sup> day of March, 1999 at Railway Golf Club within the Nairobi area Province, jointly with others not before court, robbed N.N. of cash Kshs.17000/=, and at or immediately before or immediately after the time of such robbery, used personal violence on the said N.N.”

And the particulars of the offence in respect of the second count stated:-

“1. MUJAZI KAIRU 2. KIMANI MWANGI 3. ALAN NYOIKE 4. JOHN MWAURA: On the 9<sup>th</sup> day of March, 1999 at Railway Golf Club within the Nairobi area Province, jointly with others not before court, robbed MAINA MACHARIA of cash Kshs.35000/=, and at or immediately before or immediately after the time of such robbery, used personal violence on the said MAINA MACHARIA.”

The appellant who was the 2<sup>nd</sup> accused and his co-accused pleaded “Not Guilty” to the charges and their trial commenced on 23<sup>rd</sup> September, 1999 before the learned Principal Magistrate (Mrs. Ondieki).

The prosecution relied upon the following facts: *N.N.* (PW2) the complainant in the first count and *Maina Macharia* (PW3) the complainant in the second count were at the bus stage near Nyayo Stadium on 9<sup>th</sup> March, 1999 at about 7.00 p.m. when they were confronted by a group of about five or six people who were armed with knives. These people forced the two complainants (PW2 and PW3) to walk into the neighbouring Railway Golf Course where Macharia (PW3) was assaulted and robbed of the various items stated in the particulars of the offence. Macharia was then chased away by the attackers. Some of the attackers abducted *N.N.* (PW2) and took her further into the darkness where she was beaten up and robbed of her belongings. During the incident the two complainants identified the appellant as one of the attackers and it was the appellant (and another person) who remained with *N.N.* and walked with her back to the road. But when Macharia was chased away he met some watchmen who directed him to police officers to whom he reported the incident. He led the police officers to the scene where they found *N.N.* still being held captive by the appellant and his companion. While the appellant’s companion escaped the appellant was not so lucky. He was immediately arrested, taken to the police station and subsequently charged as already stated earlier in this judgment.

When put to his defence the appellant elected to make an unsworn statement in which he stated that on the material day (9<sup>th</sup> March, 1999) he was stopped by police officers who arrested him and later charged him with these offences, which he knew nothing about.

The learned trial magistrate considered the evidence before her and came to the conclusion that the appellant (who was the 2<sup>nd</sup> accused) had been positively identified by the two complainants during the robbery that took place at a place which was properly lit by street lights. In the course of her judgment the learned trial magistrate stated:-

**“Clearly she had sufficient time, opportunity and the means to clearly and positively identify 2<sup>nd</sup> accused. Also from the evidence of PW2 and PW3 the 2<sup>nd</sup> accused was arrested by the police the same time while the other escaped ..... The evidence of PW2 and PW3 is however very clear that 2<sup>nd</sup> accused was arrested even as the police assisted PW3. In that event, an identification parade was not necessary.”**

The learned trial magistrate considered the other aspects of the case and concluded her judgment thus: -

**“As for the 2<sup>nd</sup> accused I find that the prosecution had proved that he was one of those who robbed PW2 and PW3 and used violence on them. Accordingly, I find him guilty of the offences he is charged with on the 1<sup>st</sup> and 2<sup>nd</sup> counts and I convict him of the same under 215 C.P.C.”**

The appellant was consequently sentenced to death on both counts.

Being aggrieved by that decision of the trial court the appellant preferred an appeal to the High Court at Nairobi (Lesiit & Ochieng, JJ.) who after re-evaluating the evidence dismissed the appeal by stating:-

**“In conclusion, we are satisfied that the appellant was properly convicted and sentenced. Therefore, the appeal herein is dismissed.”**

The appellant now comes before us by way of a second and final appeal. That being so, only matters of law fall for consideration by virtue of **section 361** of the Criminal Procedure Code. This is the appeal that came up for hearing before us on 13<sup>th</sup> November, 2007 when Mr. Hesbon O. Momanyi appeared for the appellant and Mr. J. Kaigai the learned Senior State Counsel appeared for the State.

The two main issues argued by Mr. Momanyi were identification and the *alibi* defence. It was Mr. Momanyi’s submission that the circumstances under which the appellant was identified were not clear

and that his defence of *alibi* was not considered by the two courts below.

In asking us to dismiss the appeal Mr. Kaigai submitted that the evidence against the appellant was overwhelming in that the evidence of PW2 was very clear and consistent. He went on to submit that the evidence of PW2 was corroborated by the evidence of PW3 and that there was sufficient light from the street lights and moonlight. As regards the defence of *alibi* Mr. Kaigai submitted that this was, indeed, displaced by the evidence of prosecution witnesses.

As already stated elsewhere in this judgment, this is a second appeal and hence only matters of law fall for consideration and that this Court would not interfere with concurrent findings of fact of the two courts below unless they are shown to have not been based on evidence – see **KAINGO V. REPUBLIC [1982] KLR 213**.

In our view the main issue raised in this appeal relates to the identification of the appellant. That issue of identification has to be considered against the defence of *alibi* raised by the appellant. We have concurrent findings of the two courts below that the appellant was identified by both complainants N.N. (PW2) and Macharia (PW3). Against that evidence of identification we have the defence of the appellant to the effect that he was not at the scene at the material time. His defence was an *alibi*. As this was a criminal trial it was upon the prosecution to prove its case against the appellant beyond any doubt. When the appellant raised an *alibi* as his defence he assumed no burden to prove the *alibi*. The burden of proof lies on the prosecution throughout the trial. On the issue of *alibi*, we can do no more than refer to the decision of this Court in **MACHARIA V. REPUBLIC [2001] KLR 155** at p. 158 in which we said:-

**“We would state here that when the appellant put forth an *alibi* as his defence it was upon the prosecution to disprove it since an accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused remains on the prosecution throughout the trial. In SEKITOLEKO V. UGANDA [1967] EA p. 533 Sir Udo Udoma CJ said:-**

**“In R V. JOHNSON [1961] 3 All ER 969 the general principle of law applicable to defence of an *alibi* was enunciated. It was laid down as a general rule of law that if an accused puts forward an *alibi* as an answer to a criminal charge, he does not thereby assume a burden of proving his defence and that the burden of proving his guilt remains throughout on the prosecution.”**

Hence it was upon the prosecution to demolish that defence of *alibi* and go on to show that the appellant was, indeed, at the scene and participated in the offence as charged. We must therefore examine the evidence of identification as considered by the two courts below. The incident took place at night but the complainants testified that there was sufficient light from the street lights and the moonlight. It must also be remembered that the appellant was at the scene in a manner suggesting that he was indeed caught red-handed. We were referred to the decision of this Court in **KIARIE V. REPUBLIC [1984] KLR 739** in which it was held, *inter alia*, that where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. We agree with that exposition of the law on the issue of identification.

The learned trial magistrate was satisfied that the appellant was properly identified as one of those who attacked and robbed the complainants. The superior court as a first appellate court went over the evidence and came to the same conclusion as did the trial magistrate that the appellant was, indeed, properly identified. In their judgment the learned Judges of the superior court stated *inter alia*:-

**“Upon our perusal of the record of the proceedings before the trial court, we noted that the appellant was arrested at the scene of the crime. At the time of the appellant’s arrest, both PW2 and PW3 were present. Effectively therefore, in our considered view there was no need for the two complainants, PW2 and PW3 to be requested to try and identify the appellant at any identification parade. Furthermore, as the police arrested the appellant at the scene, there was no need for the complainants to describe the appellant in their “first report” as the appellant was already in custody.”**

The learned Judges of the superior court considered other aspects of the evidence and finally concluded thus in their judgment:-

**“It is very clear that both PW2 and PW3 positively identified the appellant. The moonlight was strong, and there was also other electric lighting from the streetlights.”**

In view of all the foregoing we are satisfied that the appellant was properly identified during the robberies complained of by the two complainants and that his conviction was indeed inevitable. Consequently, we find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety.

*Dated and delivered at NAIROBI this 14<sup>th</sup> day of December, 2007.*

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**