IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 31 of 2005

JULIUS KALEWA MUTUNGA …….…….……APPELLANT

AND

REPUBLIC …….……RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Onyancha &

Okwengu, JJ.) dated 22nd July, 2004.

in

H.C.CR.A. NO. 125 OF 2001)

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JUDGMENT OF THE COURT

The appellant, ***JULIUS KALEWA MUTUNGA*** ("***Kalewa***" or "***appellant***") comes before us on a second appeal against his conviction on two counts of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. It had been alleged that on the 24th day of July, 1997, at Kinoria village in Meru district jointly with others not before the court being armed with dangerous weapons namely rifles, pangas and rungus he robbed ***Margaret Kinangaru*** of KShs.900 and ***Francis Kirimi M'turuchiu*** of KShs.20,000/=, a radio cassette valued at Kshs.2,500/=, and at or immediately before or immediately after the time of such robbery, used personal violence against ***Margaret*** and ***Francis***. Upon his conviction the appellant was sentenced to death which is the only punishment for the offence. His appeal to the superior court was dismissed, hence this final appeal.

As this is a second appeal, only matters of law may be raised –see ***section 361*** of the ***Criminal Procedure Code***. The issues of law raised in the Memorandum of Appeal drawn up by the appellant in person and argued by learned counsel for him, ***Mr. Mugambi Gituma*** are four -fold: -

1). There was no positive identification of the appellant.

2) The failure to call the arresting officer to testify in the trial was fatal.

3) The appellant was denied his constitutional right to call a witness in his defence.

4) The appellants alibi defence was not properly considered.

We shall examine those grounds presently, but first, the concurrent findings of fact made by the two

courts below.

At about 8.30 p.m. on 24th July, 1997, ***Francis Kirimi M'turuchu*** (PW2) (**Francis**) and his wife ***Margaret Kinangaru Francis*** (PW3) (**Margaret**) were relaxing in their house in Kiiru Location, Meru. Earlier that evening, their son, ***Joseph Mburugu Francis*** (PW1) (**Joseph**) had closed their bar which is only 100 yards away from their house and collected the day's sales, Shs.2,500/= which he took to ***Francis***. He also took with him the lighted pressure lamp which serves the bar and placed it on a table in the sitting room before retiring to his own house some 40 yards away. There was an external kitchen away from the main house and Francis walked from the sitting room to the kitchen to fetch some milk for his wife who was left in the main house. The light from the pressure lamp covered the area between the kitchen and the main house and the evening was not very dark as the stars were shining bright. On his way back, Francis suddenly saw a person carrying a gun in his hand. He ran and entered the main house and tried to close the door. The intruder however placed the gun between the door and the doorframe thus preventing Francis from fully closing the door. He struggled to keep the door shut but the intruder pulled the trigger and the bullet shattered his right palm. As Francis fell backwards the intruder burst into the sitting room and fired more shots inside. He then demanded all the money the complainant had collected from his bar and posho-mill business for 22 days. Both Francis and Margaret pleaded with the assailant not to harm them as another man who stood outside the house urged the gunman to finish them. The two immediately recognized the assailant standing before them as their former employee, Kalewa. He was not disguised and was standing in the full glare of the pressure lamp light about three feet away. Kalewa then took the pressure lamp and forced Francis into the bedroom where Kalewa went straight to a coat hanging on the wall and took out Shs.20,000/=. He asked for more money but Francis said he had no more. Kalewa picked up Margaret's box which was in the room and removed all the clothes. He took another Shs.10.000/= from the box. Then he moved to a visitor's bedroom where Margaret had gone in to hide and demanded money from her. He hit her with the gun on her back and hands. Margaret pleaded with him to spare her and she showed him a bag of beans in a store which Kalewa slashed open with a sword and retrieved some Shs.900/= hidden there by Margaret. From there Kalewa went to a store where some crates of beer were kept and drank some of it before asking Francis for a sack in which he put some more beers and took them to his colleague outside the house. Kalewa also collected various items from the house and put them in the sack. These included two wall clocks, clothes, radio cassette and gramophone. Kalewa then brought more beers into the sitting room table and started drinking.

Meanwhile, when Kalewa first entered the house and started firing, one of the bullets went off towards the house of Joseph (PW1) and hit the timber wall. On opening his door, Joseph overheard the commotion and noise coming from his parents' house and his mother pleading for mercy. He realised there was danger and he ran towards a shed some 20 yards away where he untethered three dogs in the hope that they would scare away the attackers. One bullet was however fired out and the dogs did not scare away the robbers. Joseph then ran to a neighbour's home some 100 yards away and sought help. The neighbour, ***David Muthuri*** (PW4) went out with Joseph and they both started hurling stones at the house from a safe distance hitting the roof and glass windows. That is when the robber who was outside the house called out to Kalewa and told him to give him the gun since there were people outside. Instead of giving up the gun, Kalewa went out shooting and both Joseph and David ran in different directions in the bushes for cover. From his hiding place Joseph saw the gunman and another person leave the house and disappear. He did not recognize them. The whole incident took about two hours.

David and Joseph then went into the house and found Francis writhing in pain as Margaret screamed for help. Immediately they arrived they were told by Francis and Margaret that the gunman who robbed them was Kalewa. Arrangements were made to take Francis to Nkubu Mission Hospital and the incident was reported to ***IP Damaso Kandia*** (PW6) just before midnight. IP Kandia took up the matter as the investigating officer and was given the full name of Kalewa as one of the robbers. He organized for police dogs to track the robbers that night but to no avail. He only collected some ten spent cartridges in the vicinity and some two wall clocks abandoned in the bush. He then circulated a signal to all police stations around informing them about the incident and the description and name of Kalewa as reported by Francis and Margaret. Later, on 29th July, 1997, IP Kandia received information that Kalewa had been arrested in Isiolo and he sent his officers to collect him. Subsequently he had Kalewa charged with the offence of robbery with violence as stated earlier. There is no record about the circumstances of

Kalewa's arrest or who made it.

A medical report produced by ***Stephen Mukira*** (PW5) confirmed that the bullet had shattered the right radius and ulna bones of the right palm of Francis and had caused grievous harm. Francis was admitted in hospital for more than 3 ½ months before he was discharged to continue treatment as an outpatient.

In his sworn defence, Kalewa put forward an alibi. He said his home was in Akithi Location in Tigania area of Meru, but between 16th July and 19th July 1997 he was fully engaged in ploughing his father's shamba at Isiolo. Thereafter between 21st July and 3rd August, 1997, he was engaged in ploughing the land of his friend who had assisted him in ploughing his father's shamba, one ***Salim Ali Ondongo***. When he returned to Isiolo on 4th August, 1997 he found a trespasser on his father's land and he chased him away. The trespasser reported to the police and he was arrested and falsely charged with the offence of robbery with violence. He had stayed in remand for four months when the charges in this matter were laid but he knew nothing about the incident which allegedly took place on 24th July, 1997. That night he was grazing the bulls which he had used for ploughing during the day. He denied having been employed by Francis and Margaret at any time in his life. In support of his defence, he applied to have Salim Ali Odongo, who was serving a prison sentence in G.K. Prison Meru, summoned as a witness and witness summons was duly served. Odongo however declined to testify and Kalewa dispensed with his testimony.

Turning now to the grounds of appeal, the first issue raised by Mr. Gituma is on identification. It was also a live issue before the trial court and the first appellate court. Upon consideration of the issue the trial court made the following finding: -

"**It is therefore the considered findings of this court that there was sufficient time for FRANCIS (PW 2) and MARGARET (PW3) to have seen and identified the accused as he moved from the tableroom, bedroom and the store. I do find that in the circumstances of this case there was sufficient opportunity for the accused to have been seen and identified by FRANCIS (PW2) and his wife. The opportunity to see and identify the accused is quite clear. There was sufficient light. The accused person took too long a time in the house. There was nobody else in house except the accused, FRANCIS (PW 2) and his wife MARGARET (PW3). The accused had not covered his face or head. The accused was moving from one part of the house to another. The accused was conversing or talking to FRANCIS (PW2) and MARGARET (PW3) from time to time. At one time accused asked for a sack to put the property he stole from the house among them the radio cassette and the wall clock. There was in one occasion that accused was alleged to have asked the complainant whether there was guiness beer in the store.**

The wife to the complainant MARGARET (PW3) gave out the names of the accused to IP DAMASO KANDIA (PW6) immediately the said officer visited the scene on the same night. The accused names were mentioned by MARGARET (PW3) to the first neighbour one MUTHURI (PW4) who reached their home first. I further find that FRANCIS (PW2) and MARGARET (PW3) mentioned the accused name to JOSEPH (PW1) upon reaching the scene of the offence. It is therefore clear that the fact that accused was identified by FRANCIS (PW 2) and MARGARET (PW 3) was not an after-thought. They were sure; double sure that the person who robbed them was accused herein."

On appeal, the superior court (Onyancha & Okwengu, JJ.) re-evaluated the evidence on identification and came to the same conclusion, thus: -

"**We have as earlier stated, also considered the evidence with care, while fully understanding that this is a serious charge. We have come to the same conclusion as the learned magistrate did. We accept the evidence that the two witnesses, PW 2 and PW3, had more than adequate time to observe the appellant. There was more than adequate pressure lamp light by which to observe the appellant. They knew the appellant very well before having employed him and had him as their close worker for a minimum of at least one year. We also accept that the appellant used to be sent into the house from time to time which gave him a good opportunity not only to know the situation**

of the house and the business which the complainant operated but also the level of the money the complainants received from the bar business and where he kept his income every day. It would also appear that for several days approaching the robbery day the appellant knew that the complainant did not bank his returns and that the money was somewhere in the house. That explains why the attacker sought for 22 days returns from the businesses.

It is our view that once the above evidence is accepted, then it creates an adequate situation for conviction. We are aware and accept that the court should recognize the danger of convicting on the evidence from a single identifying witness unless the conditions for positive identification are good. In this case the evidence came from not a single witness but two, and good and acceptable one under good conditions for positive identification, here recognition."

Mr. Gituma submits before us that those two courts erred in reaching the conclusion they did for the simple reason that circumstances surrounding the two identifying witnesses were so stressful that they could not allow for positive identification. The confusion caused by the firing of the gun at the door and inside the sitting room must have so shocked and terrorized the two that they could not identify anyone. Futhermore, he submitted, it was necessary for an identification parade to be held since the two witnesses testified that there were several robbers and that there was voice identification. For that proposition he cited **Francis Kariuki Njiru & others v R. Cr. A. No. 6/01 (ur)** where this Court stated: -

"**Where the only evidence linking the appellant is visual identification at night time this court has from time to time emphasized that identification parade evidence or other evidence is essential to test the correctness of the identification by the eye witness……**

…….. The whole essence of an identification parade is to test a witness's alleged visual identification of a subject during the commission of a crime. If the witness says that apart from visual identification he also identified the suspect by his voice, he should be allowed to confirm that".

We have carefully considered the submissions of counsel, but we cannot, with respect, accept that the two courts below committed an error of law or principle in considering the issue of identification. The court in the **Njiru case** (supra) summarized the general law on identifications as follows: -

"**The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R.v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:**

… **it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."**

The case before us does not relate simply to visual or voice identification by a single witness in stressful circumstances. An identification parade in such circumstances would have been necessary to test the prosecution case on the issue. In this case, there was not only visual and voice identification but also recognition of the appellant by two witnesses as the gun-totting assailant. Both courts below were alive to the gravity of the issue, and stated so, before subjecting the evidence to careful scrutiny. The trial court

in particular had the advantage of hearing and seeing the two witnesses testify and there was nothing in their demeanour that created reasonable doubts in their evidence. The two were not woken up from their sleep on a dark night. It was early in the evening and they were in a house brightly illuminated by a pressure lamp. Standing in the glare of that light, and only three feet away from the two witnesses, the appellant was seen and recognised. It was not a fleeting recognition but one that lasted for two hours as the appellant moved around the house undisguised and talked to the witnesses. His name was given to two other witnesses who arrived on the scene within minutes of the robbery. It was also given out to the investigating officer at the police station and was used in tracing him for arrest. In **Anjononi & others v Republic [1980] KLR** Pg. 59 at Pg. 60, this Court stated: -

"**The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v. The Republic* (unreported)"**

We think we have said enough to underscore our finding that the two courts below came to the right conclusion on the identification of the appellant. That ground of appeal fails.

The second ground of appeal relates to the failure by the prosecution to call the arresting officer to testify. It is evident, indeed conceded, that the person who arrested the appellant was not called to testify. As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see **Oloro s/o Daitayi & others v R. (1950) 23 EACA 493**. The investigating officer in this case testified that he circulated a signal to all police stations with details of the offence committed and the particulars of the appellant. He subsequently received information from Isiolo police station that the appellant was in their custody for another offence and he dispatched his officers to have him transferred to Meru police station for interrogation. He was brought to the station and was charged with the offence. In our view there was no oblique motive, and none was shown, for failure to call the person who made the arrest. We are also of the view that the omission did not cause a failure of justice in the circumstances of this case. That ground of appeal also fails.

As for breach of the appellant's constitutional right to call a witness in his defence, which is the third ground of appeal, we simply note that this was abandoned mid-stream by Mr. Gituma upon realization that indeed the trial court acceded to the appellant's application and made orders for the witness to be availed. When the witness, who was in prison custody, was brought to court for the first time on 10th November, 2000, he was sick. The matter was adjourned to 24th November, 2000 when the appellant is recorded as having stated: -

"**I have applied for Salim Ali Ondongo to be called as a witness for me. He is in G.K. Prison Nyeri. However, when he was brought on 10.11.2000 he had been burnt on the left side. He was sick. He was ordered to go back to hospital. I would wish to dispense with him and close my case."**

The case was not closed on that date but was adjourned to another date. On the resumed hearing, the appellant finally informed the Court as follows: -

"**My witness from G.K. Prison Meru refused to testify on my side. I do not want to call him. I dispense with him as my witness. I close my case; that is my defence."**

In the event, there was no basis for raising the issue and we dismiss that ground of appeal.

Finally, Mr. Gituma urged us to make the finding that the alibi defence put forward by the appellant was

not considered, or properly considered if at all. On that aspect of the matter the trial court rejected the alibi in view of the prosecution evidence which was accepted as truthful that the appellant was at Kinoria village and not at Isiolo on the night of the robbery. The superior court re-examined that defence and also came to the conclusion that it had failed, stating: -

"**We have also examined the appellants alibi and conclude as did the learned trial magistrate that it amounted to little especially since the only witness who would have testified for and in support of the appellant refused to do so although he was summoned and apparently attended court."**

As correctly submitted by Mr. Gituma, there was no burden placed on the appellant to prove his alibi and perhaps the statement made by the superior court in that regard appears to imply such a burden. The law, which has since been applied in many other decisions was stated by ***Sir Udo Udoma***, Chief Justice, in **Sekitoleko v Uganda [1967] EA 531** as follows: -

"**(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else *(R.v. Johnson, [1961] 3 All E.R. 969* applied; *Leonard Aniseth v. Republic* [1963] E.A 206 followed);**

(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself;"

Accepting however, as we do, the findings of the courts below, the truth of the complainants' account of events, it follows that the appellant was at the scene of the robbery, and logically, his assertion that he was elsewhere was displaced. That ground of appeal has no merit. It only remains for us to state that the appeal was opposed by learned principal state counsel Mr. Orinda whose assistance to the Court in his submissions is appreciated.

The upshot is that the appeal is not meritorious and must be dismissed. It is so ordered.

Dated and delivered at Nyeri this 27TH day of October 2006.

R.S.C. OMOLO

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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