IN THE COURT OF APPEAL

AT ELDORET

(Coram: Omolo, O'Kubasu & Githinji JJ A)

CRIMINAL APPEAL NO 125 OF 2001

RICHARD CHEMNJOR NGEIYWA …..……..... APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Nambuye

&Visram, JJ) dated 29.05.01 in HCCRA No 64 of 1998)

JUDGMENT

The appellant and one Alfred Kibor Maindi (Alfred) were jointly charged in the Senior Resident Magistrate's Court Kitale with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge alleged that on the 17th day of March, 1997, at ADC Farm Chorlim being armed with dangerous or offensive weapons namely AK 47 assault rifle robbed Stanley Kariuki Karanja cash Shs 220,000/= and at or immediately before or after such robbery shot dead John Muturi Karanja.

The appellant was convicted as charged and sentenced to death being the sentence authorized by the law. Alfred was acquitted. The appellant appealed to the superior court on two main grounds namely, that he was admitted at Kaptama Health Centre on the date he is alleged to have committed the offence and that the Court erred in law in convicting him on the basis of the evidence of PW1 and PW2 when PW3 and PW4 had denied seeing him at the scene of the crime. His first appeal was dismissed and he now appeals to this Court on four grounds:-

1. The learned judges and trial magistrate erred in law and fact in convicting the appellant without the evidence of essential witnesses ie the investigating officer and Ali Wanyonyi which leaves the case unproved (sic).

2. The learned judges and trial magistrate erred in law and in fact in convicting the appellant in reliance on the evidence of PW1 who was the only single identifying witness.

3. The learned judges and trial magistrate erred in law and fact in convicting the appellant on the evidence which was contradicted and therefore unreliable.

4.The learned judges and trial magistrate erred in law and in fact in rejecting his defence of alibi which

was supported by medical evidence thereby putting the burden on the side of the defence.

The complainant Stanley Kariuki Karanja (PW1) was a trader dealing in buying and selling of maize and beans. According to his evidence at the trial, one Ali Wanyonyi brought the appellant to him on 17.3.97 at 9.30 am at Kitale town. The appellant was wearing a green cap and blue jacket.

The appellant then told Karanja that his (appellant's) father had 135 bags of maize and 14 bags of beans at a place called Chorlim (past Endebess) for sale. They agreed on the price of each bag of maize and beans respectively. The complainant then hired a lorry Reg No KXB 346 driven by Charles Kihara Muranga (PW2) to collect the maize and beans at Chorlim. The lorry left Kitale for Chorlim at 10 am. The complainant was accompanied by his brother John Muturi Karanja, the appellant, Ali Wanyonyi, Tom Simwa Kesoli (turnboy) and four other loaders. Neither Ali Wanyonyi nor Tom Simwa Kesoli was called to testify.

The complainant, his brother and the appellant sat at the front in the cabin, the appellant being sandwiched between the complainant and his brother.

Ali Wanyonyi, Tom Simwa Kesoli and four other loaders sat at the back of the lorry. According to the evidence of Charles Kihara Muranga at the trial, on reaching Chorlim ADC Farm, the appellant directed them to take a narrow rough road. Charles Kihara then drove for about a kilometer and then crossed a bridge. The road was rough and stony and the lorry was going uphill very slowly. Charles Kihara then saw a person who was ahead near a tree stop the vehicle and as he approached him the appellant told him to stop for that man. But before Charles Kihara could stop, the man went to the front of the lorry and started firing at the vehicle indiscriminately.

Charles Kihara then stopped the lorry and laid on the floor. Meanwhile, the appellant started talking to the gunman in a language that the complainant would not understand. The gunman then stopped firing. The appellant then told the complainant to give the gunman money to save their lives. The complainant threw the sum of Kshs80,000/= through the window to the gunman. The gunman demanded more money. The appellant then alighted from the lorry. The appellant shouted to the complainant that he still had more money which he should produce. The complainant removed Kshs140,000/= from the pockets of his brother John Muturi who had by then been shot dead and gave the money to the appellant who was standing outside the lorry in the company of the gunman. The complainant then fell on the floor of the lorry in shock. After a while the complainant rose up. The appellant and the gunman had disappeared.

The complainant noticed that his brother had been shot dead while the driver of the lorry had been shot on the leg.

Four of the loaders who were at the back of the lorry had run away leaving Ali Wanyonyi and Tom Simwa Kesoli both who were injured. The driver Charles Kihara was unable to drive due to injuries on the leg. The turn boy Tom Simwa Kesoli drove the lorry back towards Kitale. The lorry had an accident on the way. The robbery was reported on the same day to a police officer on traffic duties. The appellant was arrested on information on 24/3/97 in Kitale Town by Corporal Peter Omosa (PW 6). The appellant led Corporal Peter Omosa to his house where a blue jacket was recovered.

On 27/3/97 the appellant was identified by the complainant at an identification parade.

At the trial, the appellant testified that he knew nothing about the offence as he was admitted in hospital from 15/3/97 until 19/3/97. He produced a treatment card from the hospital.

In a well considered judgment, the trial magistrate tested the evidence of identification of the appellant as given by the complainant and Charles Kihara, the lorry driver. She took into account the fact that the complainant talked to the appellant at length before they set off for Chorlim and was thus in a position to see him well; that the complainant and appellant sat in the lorry at the driver's cabin for the next one hour thereby giving the complainant an opportunity to see and observe him well; that the journey to'Chorlim and the robbery was in broad daylight and the appellant was not disguised; that the complainant

successfully picked out the appellant at an identification parade 10 days after the robbery; that the appellant's blue jacket was recovered from his house and positively identified by the complainant as the one he was wearing on the day of the robbery. After considering all these factors, the learned trial Magistrate was convinced that the possibility of error in identifying the appellant had completely been eliminated.

The learned trial magistrate next considered whether the prosecution had connected the appellant with the subsequent robbery and proceeded thus:

"That notwithstanding, it is not enough that the accused 1 (appellant) caused PW 1 to go to Chorlim on that day. The prosecution must connect him with the subsequent robbery and in this regard, evidence was adduced to show that when they saw the gun-man, it was accused 1 who told the driver to stop. It was accused 1 who talked to the gun-man in a language that neither PW 1 nor PW 2 understood. It was accused 1 who told PW 1 to give the gun-man money. Thereafter accused 1 came out of the lorry after the firing stopped and the first batch of Ksh 80,000/= had been given out by PW 1. It was accused 1 who said, once out of the lorry, that PW 1 and his brother still had more money and should produce the same and according to PW 1 when he took out Ksh 140,000 from his brother, it was accused 1 who received it still shouting at them to produce more money. He thereafter disappeared together with the gun-man.

All these clearly demonstrated common intention between the accused 1 and the gun-man and that the 2 (two) had designed this thing right from the beginning with the intention that the robbery was to take place.

There cannot be any other explanation for accused 1's aforesaid actions at the scene of the robbery. Thus, I am satisfied that the complicity of accused 1 in the offence charged has been proved beyond reasonable doubt. In arriving at this conclusion, I have given due consideration to his defence and the alibi he has raised and the document he has exhibited in support thereof but I find, that that is a defence that has been completely ousted and displaced by the express and candid evidence adduced herein by the prosecution which does prove that the accused 1 could not have been admitted in hospital as he now alleges.

I therefore find no merit in that defence of accused 1 and I have rejected it accordingly as an afterthought. I am satisfied that he participated in this robbery and was the one who caused PW 1 to leave Kitale Town in the pretext that his father had maize and beans that he wanted to sell."

By the first ground of appeal the appellant is in essence saying that the prosecution case was not proved because essential witnesses namely, Ali Wanyonyi and the investigation officer were not called to give evidence.

That ground does not say as Mr Ruto, the learned counsel for the appellant, submitted that the Court should infer that his evidence if called would have been adverse to the prosecution case. The superior court considered this ground of appeal and observed that the appellant did not ask that Ali Wanyonyi be called as a witness and that the exclusion of his evidence did not prejudice the prosecution or defence case.

It is true that the complainant testified that it was Ali Wanyonyi who brought the appellant to him. It is possible that if he was called as a witness his evidence could have added more weight to the prosecution case. However, the mere fact that he was not called as a prosecution witness does not itself help the appellant's case. The question which should concern this Court is whether in the absence of his evidence there was nevertheless evidence to support the findings of fact made by the two courts below. That is the subject of the remaining grounds of appeal.

We now turn to consider the second, third and fourth grounds which we deal with together. The trial Magistrate exhaustively considered the prosecution case particularly the evidence of the complainant and Charles Kihara Muranga together with the defence of alibi raised by the appellant and concluded that the appellant participated in the robbery and that his defence of alibi had been disproved by the prosecution case and was an afterthought. There is no doubt from the judgment of the superior court, and it has not

been suggested otherwise, that the superior court discharged its duty as a first appellate court as it reconsidered the evidence, reevaluated it itself and arrived at the same findings as the trial court. By raising the defence of alibi, the appellant was in fact saying that the evidence of his identification as the person the complainant dealt with and as the one who led him to Chorlim and ultimately as the person who joined the gunman in the execution of the robbery was not reliable. In addition, the appellant's counsel submitted that the evidence of the complainant was contradictory (counsel in fact meant that the evidence was inconsistent). It is true the complainant testified in his evidence in cross-examination by the appellant's counsel that it was the first accused (the appellant) who took the first batch of Sh 80,000 and that the second accused took the second batch of Sh 140,000. That could have been an innocent error or confusion for he was consistent in his evidence in chief that he first threw out the Sh 80,000 through the window to the gun-man and when the appellant alighted from the lorry and demanded more money, he gave the Sh 140,000 which he removed from the pockets of his deceased brother to the appellant. That inconsistency in his evidence is in our view immaterial, as it does not relate to the vital question of the identification of the appellant.

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 v the Republic* [1980] KLR 149.

This is what the learned trial magistrate did in this case. She appreciated that the prosecution case depended on the correctness of the identification of the appellant and found that the identification of the appellant was free from error. Although the superior court did not specifically mention the defence of alibi, it concurred with the finding of the trial court including the basis of rejection of the appellant's defence of alibi and made its own independent finding that the appellant was positively identified to be among the two people who robbed the complainant. By accepting the evidence of the identification of the applicant, the superior court in effect rejected the defence of alibi.

Although it is not our duty to re-evaluate the evidence which was before the trial court, it is our view that the defence of alibi was justifiably rejected as an afterthought. The appellant tendered a hospital card in support of his defence of alibi. That hospital card did not support his evidence that he was admitted at Kaptama Health Centre in Kitale on the material day.

The card indicates that it is an outpatient card printed for use by Friends Lugulu Hospital Webuye and not Kaptama Health Centre where the appellant says he was admitted. The card lacks the essential details such as the patient number, diagnosis, treatment and so on. It does not appear a genuine hospital card.

In conclusion, this is a case where there are concurrent findings of fact by the two courts below. We are satisfied that there was overwhelming evidence to support the decision of the two courts below and that there are no grounds on which this Court can lawfully interfere with those findings.

We have no hesitation in dismissing this appeal in its entirety which we hereby do.

Dated and delivered at Eldoret this 1st day of October, 2004

R.S.C OMOLO

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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