



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(Coram: Akiwumi, Tunoi & Shah, JJ A)**

**CRIMINAL APPEAL NO 58 OF 2000**

**JAMES KIMANI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from a Judgment of the High Court at Mombasa, Hayanga J &

Comm Khaminwa, dated 22nd October 1999 in H C Cr A No 175 of 1998)

**JUDGMENT**

The appellant was charged in the subordinate court and convicted of the offence that on 7th March, 1998, he jointly with others not before the Court, robbed Dickson Kahindi of Kshs 145,000/-, a radio cassette player and a video machine, and that immediately before or immediately after the robbery, threatened Kahindi with actual violence.

The evidence adduced by the prosecution was that at about 2.30 pm on 7<sup>th</sup> March, 1998 five men one of whom had a pistol, manoeuvred their way into the compound of Holiday Cottages where Kahindi was employed as a cook, after one of them pretended that he had come to inspect the cottages in order to bring holiday makers to stay there. After they entered into the compound, they ordered Kahindi and Vale Rimba who also worked at the Holiday Cottages, to take them to the cottage of their employer, Hans Frederick. There, the intruders led by the appellant, searched the cottage and put away things into bags which they took away. The evidence of Kahindi which was supported by that of Rimba, was that the man with the pistol in hand, accompanied the others as Hans Frederick's cottage was ransacked, and, this is crucial in this appeal, that the ransacking was being directed by the appellant whom Kahindi and Rimba said they recognised, even though he wore a mask, as one who had worked with them at the Holiday Cottages for some nine months, three years ago.

Kahindi, said in this regard that:

"The man who had a mask - I checked him very well. I recognised him as James who I had worked with at the cottages for 9 months. I knew him even by his footsteps and features. I suspected he wore the mask because we already knew him. I could tell his eyes even in the mask. He signalled to the other robbers to go out through the rear door and they made sure we never went near the alarm buttons. They jumped over the rear gate. The accused was my friend. I used to visit him even after he left employment."

When cross-examined by the appellant, he said:

"I recognised you. You were the only one who was masked. I recognised your features. I checked you as you led us from the gate to the reception. I knew even your gait."

And in re-examination, Kahindi gave the following vivid evidence.

"He had brownish trouser and shirt which I had seen him in before. I knew his gait and features. I would know the accused even if his head was cut off. We worked together for nine months. All together I knew accused for over 2 years as we continued to meet even after we stopped working together."

Rimba in describing the role played by the appellant, also said that:

"Among the 4 who came...I recognised the accused who had been one of us but had left employment. He was wearing a mask so that we could not recognise him. I had worked with him for about one year. I knew his physique, complexion and gait...The accused gestured to the back gate. The others followed, they jumped over the gate and left."

In cross-examination, Rimba went on with this damaging response:

"I worked with you for about 8 months. I recognize you even if you had a mask. You never spoke. You knew the rear gate and were the one who led us wherever (sic) we were taken. I know the way you walk. You used to work in the rooms. You used to work even in our employer's room, whenever Dickson was off duty." When the police came after the raid, they were told by Kahindi and Rimba that the appellant was one of the robbers. The next day the police arrested him.

As regards the appellant's movement that afternoon, his employer at the time, Amina Yusuf, also said that on the day in question, the appellant, had at about 1.00 pm, unusually asked for money to go and buy vegetables in the afternoon rather than in the morning as he was wont to do. He had then gone away on a bicycle and did not come back till between 3.30 and 4.00 pm and when asked why he had taken so long, the appellant did not say anything. Significantly, the appellant did not cross-examine Amina Yusuf. According to Police Constable Waithaka, he, in the morning after the robbery, searched the room of the appellant's girlfriend Mary, where the appellant had spent the night with her, and recovered Kshs 55,788/- of which Kshs 55,000/- were in two bags. Mary told him that of this amount, Kshs 13,780/- belonged to her and did not know where the rest came from. When Mary was called to give evidence for the prosecution, she changed her story and said that Kshs 45,780/- found in her room now belonged to her and that the appellant had given her only Kshs 7,000/-.

She was treated as a hostile witness, because of her statement to the police which was the same as the evidence as recounted by Police Constable Waithaka. In her re-examination, however, Mary explained the change

in her evidence by saying that:

"I am afraid of putting my boyfriend in trouble by telling the truth."

The appellant objected to the production of the incriminating statement he had made to the police upon being charged with the offence of robbery with violence. After a trial within a trial, this statement which was written by the appellant, was admitted in evidence. In this statement, the appellant admitted that though he had not taken part in the robbery on 7th March, 1998, Kahindi had at 2.20 pm that day, given him Kshs 60,000/- which had been stolen from Hans Frederick and that at 9.30 pm that day, Kahindi had come for his share of half of the loot, leaving the other half for him.

In his defence, the appellant dwelt at some length on his allegation that between 1.30 and 4.00 pm on 7th March, 1998, he was with Amina Yusuf in her shop. He of course, did not call Amina Yusuf to support this alibi for the obvious reason that Amina Yusuf had in her evidence for the prosecution already referred

to, complained about the appellant's absence from her shop during the time the appellant now said, he had been with her in the shop. And also worth noting, is the fact as may be recalled, that the appellant did not cross-examine Amina Yusuf. The evidence of the appellant is rendered ineffective and dubious.

It is no wonder that the learned magistrate preferred the evidence of the prosecution particularly those of Kahindi and Rimba that, notwithstanding that the appellant was masked, they recognised him for the reasons they gave. A person may be masked but that does not mean that he cannot be adequately identified by those who knew him well, including his stature, complexion and gait, such as Kahindi and Rimba. As to the defence of alibi the learned magistrate had no difficulty in accepting the demolishing evidence of Amina Yusuf which together with that of Kahindi and Rimba, constituted proof beyond all reasonable doubt, of the appellant's guilt. In her well reasoned judgment, the learned magistrate summed up matters in this way:

"The key evidence against the accused is the evidence of PW2 and PW3. The two witnesses had worked with the accused at the scene of the robbery for close to 8 months. They know him well. One of them, PW2 even remained in contact with the accused after the accused's dismissal and they used to see each other often. PW2 even identified the accused person's clothes as those he had seen the accused in prior to the date of the robbery.

PW2 and PW3 knew the stature, general physique, complexion and even the gait of the accused well. It happens that the accused person is the only one who was masked and who never spoke during the incident, presumably for the reason that unlike the rest of the group he feared that he could be recognised by PW2 and PW3. The accused had never quarrelled with PW2 and PW3. There was therefore no reason why the two ex-colleagues of the accused could have lied against the accused. The Court therefore believes their evidence that even from behind the mask the accused person was wearing, they easily recognised him as one of the robbers and they saw the accused, who knew his way around the establishment well, leading the other robbers to the rooms and out through the back door. Apart from the foregoing evidence, there is on record the evidence of PW1, the current employer of the accused that between 1.00 pm and about 4.00 pm the accused was not on duty under circumstances that were not usual for example she did not understand why it took the accused who had a bicycle that long to go to the market. PW1 also explained that the accused used to buy vegetables in the morning but that day he chose to go to the market for that purpose in the afternoon. PW1 was not even cross-examined by the accused and there was no reason for her to lie against him. I therefore also believe the evidence of PW1 that at the time of the robbery, the accused had unusually absconded himself from duty. In addition, to the foregoing evidence, there is the confession of the accused, that he was involved in the robbery and that out of the entire loot he got his share of Kshs 30,000/-. The above statement is corroborated by that of PW5 his girlfriend who revealed to police that out of the money that was found in her house, Kshs 35,000/- which belonged to the accused was even hidden and she did not have any knowledge that it was in her house. This is in addition to Kshs 7,000/- she also told police belonged to the accused.

The fact that the accused kept that sum of money in PW5's house and never even told her about it goes to show that he must have obtained the same unlawfully. The fact that he had such money, which he has tried to deny in vain, at around the same time that the robbery occurred also goes on to show that the money must be his share of the loot that was stolen from PW4's house during the robbery."

In his appeal to the High Court, the appellant, not unexpectedly, criticized the acceptance by the learned magistrate of the evidence of Kahindi and Rimba concerning what he regarded as their unreliable identification of a masked man. He also argued that his statement to the police which had been unlawfully obtained, should not have been relied on by the learned magistrate and that the evidence of Mary that the money found in her room belonged to her, did not only, establish his innocence but also, at worst, required corroboration. After a careful re-evaluation of the evidence adduced in the trial before the learned magistrate including the identification of a masked man and its unreliability, and the evidence in this issue; Mary's admission that most of the money found in her room did not belong to her; the acceptance of a retracted statement; and the validity of the appellant's defence of alibi, the High Court came to the concurrent finding that the appellant had been properly convicted of the offence of robbery with violence.

The grounds of appeal argued before us are, except for one, which is not on question of facts, really the same as those argued in the High Court. We cannot see any wrong in the concurrent findings of fact by the High

Court. This Court will only interfere in such findings where the conclusions are unsupported by the established facts. This is not the case. In our evaluation of the facts as appears at the beginning of this judgment, we have clearly expressed views which show our support not only, for the findings of fact by the learned magistrate but also, for the concurrent estimation of these facts by the High Court.

As indicated above, an issue of law was raised before this Court by counsel for the appellant, namely, that the charge of robbery with violence which was levied against the appellant, was defective as the particulars of the charge, though it set out the date on which the offence was alleged to have been committed, did not contain as required by s 137(f) of the Criminal Procedure Code, the time when it occurred. This defect was also prejudicial to the appellant. It is true that the particulars of the charge lacked this detail, but the evidence of Kahindi and Rimba indicated when the offence took place and the appellant being well aware of this, sought though unsuccessfully, in his evidence to show that he was at that time, in the shop of Amina Yusuf. We do not think that the appellant was in any way unfairly prejudiced by this lack of detail as to time, which could and should have been raised during the trial before the learned magistrate, but which was not done. We do not also think in all the circumstances of the trial as narrated hereinbefore, that this lack of detail as to time caused a failure of justice. Apart from this, section 382 of the Criminal Procedure Code deals with such a flaw as follows:

"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 determining 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."

In the result, the appellant's appeal is hereby dismissed. It is so ordered.

Dated and delivered at Mombasa this 19<sup>th</sup> day of January, 2001

**A.M. AKIWUMI**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**