



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: GICHERU, OWUOR & KEIWUA, JJ.A)
CRIMINAL APPEAL NO. 31 OF 2001
BETWEEN**

**JACKSON KIMATHI MARETE APPELLANT
AND
REPUBLIC RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at
Meru (Mr. Justice Etyang) dated 27th November, 1998
in
H.C. CR. APPEAL NO. 99 OF 1996)**

JUDGMENT OF THE COURT

In his statement under inquiry which was admitted in the court of first instance after a trial within a trial, the appellant is recorded to have acknowledged having been cut with a "simi" on his left hand by the complainant, **JEREMIAH MUNGANIA AYUB alias AYUB MUKULIMA (P.W.1)**, at the time of the robbery in the latter's house. He also admitted having been given **K.Shs. 3,900/=** as his share of the **K.Shs. 25,000/=** which was the subject-matter of the robbery in the complainant's house. In his evidence before the trial Magistrate, **P.W.1** had testified that he had cut the appellant on his left hand between the thumb and the first finger as he and others broke and entered into his house at about 1.30 a.m. on 9th November, 1993 armed with "simis", axes, "pangas", "rungus" and other dangerous weapons and violently robbed him of **K.Shs. 25,000/=**.

According to **P.W.1**, at the time of the robbery the security lights to his house were on. These lights were situated at the main entrance of the gate to the door of his house; at one of the corner of his house; at the front and rear verandahs of his house; and outside the house. The two verandahs were inside the house and as the robbers were braking the kitchen grills and the wire mesh enclosing them at the back of the house, the electric tube light at the back verandah was of such intensity that **P.W.1** was able to clearly see at least seven of the robbers as he was only two metres away from them.

They broke the kitchen grills and the kitchen door and entered into the complainant's house and after his initial resistance he was overpowered and assaulted on his head with a blunt object and cut with a "panga" three times on the head, on the waist, right leg and ankle and became unconscious. He regained his consciousness at 8.00 a.m. after admission in Milimani Hospital. He was discharged from that hospital two weeks later and on his return home he found that his torch, sword and milling cloth had been stolen together with the **K.Shs. 25,000/=** on the date of the robbery.

At the identification parade conducted by **NO. 216312 I.P. WILMOT MWAKIO (P.W.10)** on 17th February, 1994 at Meru Police Station, **P.W.1** identified the appellant and being worked up he slapped

him and asked him why he had stolen his torch and cut him. To this reaction, the appellant responded by saying that he was not the one who took the complainant's torch.

In his unsworn statement in the trial court and in reference to the scar on his left hand to which **P.W.1** had testified was due to a cut wound which he had inflicted on him at the time of the robbery, the appellant said that he had had that scar since 1980 when he was still in school. To this acknowledgement, the learned trial Magistrate held that the appellant had said in his statement under inquiry that **P.W.1** had cut him on his left hand as he and others broke and entered into the complainant's house on the material date and time. This acknowledgment together with the identification evidence of **P.W.1** as outlined above led the learned trial Magistrate to conclude that the appellant was among those who violently robbed **P.W.1** and in the process seriously injured him as is set out above. The learned trial Magistrate therefore found the appellant guilty of the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** as charged, convicted him of the same and sentenced him to suffer death in the manner authorized by law.

The appellant's first appeal to the superior court was dismissed on 27th November, 1998 with that court holding that the identification evidence of the appellant which connected him with the robbery in the complainant's house on the material date and time was overwhelming to sustain his conviction on the charge of robbery with violence as is set out above. Against that dismissal, the appellant has appealed to this Court putting forward six grounds of appeal the burden of which is principally his identification as one of the robbers who violently robbed **P.W.1** on 9th November, 1993 at or about 1.30 a.m. as is indicated in this judgment.

Eyewitness identification is the evidence by which one who has seen the event testifies as to the person or persons involved from his own memory of the event. In recent times, there has been a good deal of learning in our law on eyewitness identification so that it is platitudinous for us to rehash the same. Suffice it to say that where the conviction of an accused person is predicated on eyewitness identification, evidence in that regard must conclusively show that the conditions favouring his correct identification were satisfactory. In the instant appeal, the electric tube light at the enclosed back verandah to the complainant's house, the scar on the appellant's left hand between his left thumb and first finger which, according to his statement under inquiry, was consequent to his having been cut with a "simi" by the complainant in the course of the robbery and the complainant's own testimony of having cut the appellant on his left hand between the left thumb and the first finger as he and others broke and entered into his house at the material date and time culminating with his identification of the appellant at the identification parade conducted at Meru Police Station on 17th February, 1994 left no doubt that the conditions favouring the correct identification of the appellant were satisfactory and that he was correctly identified by the complainant as one of the robbers who at the material date and time violently robbed him of his **K.Shs. 25,000/=**. His conviction for the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** was therefore sound and we can find no merit in his second appeal to this Court. The same is therefore dismissed.

Dated and delivered at Nairobi this 14th day of December, 2001.

J. E. GICHERU

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL



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