IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller JA, Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL 93 OF 1983

BETWEEN

KIMOTHO KIARIE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nairobi, Cockar J)

JUDGMENT

The appellant, Kimotho Kiarie, was charged before the Senior Resident Magistrate Nairobi with robbery with violence contrary to section 296(1) of the Penal Code (cap 63). He pleaded not guilty and was later tried, convicted and, on March 18, 1982, sentenced to 5 years' imprisonment plus 3 strokes corporal punishment and ordered thereafter to be subjected to police supervision for 5 years. His appeal to the High Court (Cockar J) against conviction and sentence was dismissed. He appeals to this court against conviction on the grounds that :

1. The learned judge erred in law in not considering sufficiently the first ground of appeal before him.

2. Further, or in the alternative, the learned judge erred in law in holding that the evidence before the trial court as to identification of the accused was beyond reasonable doubt adequate to support a conviction of the appellant.

3. The learned judge erred in law in his consideration of the defence of alibi and the manner of disproving it before the court and particularly erred in holding that the complainant's word of mouth could in law disprove the appellant's defence of alibi.

4. Having held that it was for the trial magistrate to decide which evidence to believe and which evidence to disbelieve, the learned judge erred in not concluding that the learned trial magistrate had applied the wrong standard of proof in criminal cases is on the balance of probabilities.

5. The learned judge erred in law in not considering and making a finding on ground 4 of the petition of appeal before him.

Mr Khaminwa, the appellant's advocate, said there is no dispute that there was a robbery, that a report was made to the police that same day, that on October 15, 1981 the appellant was arrested while in a bar at Dagoretti but not produced in court until October 21, 1981. The issue for argument, said Mr Khaminwa, was whether the appellant was identified as the person who robbed the complainant on that material morning. It was submitted that the appellant was not properly identified because Peter (PW 1) and Leah (PW 2) were so shocked, so frightened and in such fear when armed men entered their house that they simply could not have identified the appellant as they testified before the trial court. Mr Khaminwa urged that the Senior Resident Magistrate failed to consider that there existed circumstances which did not permit safe identification and, further, that in those circumstances the senior resident magistrate should not have omitted to consider a defence of honest mistake on the part of PW 1 and PW 2.

The other complaint made on behalf of the appellant was that the Senior Resident Magistrate did not, as expected of her, consider the defence of alibi, did not advance any cogent reason as to why she disbelieved that alibi which, on the totality of the evidence, raised a reasonable doubt.

Turning to the judgment of the High Court, Mr Khaminwa argued that there was no evaluation and assessment of the whole evidence, that the judge had misdirected himself on the issue of alibi, on the matter of honest mistake of identity and on the Senior Resident Magistrate's decision to reject the defence evidence. The submission was that because of the misdirections there were not proper concurrent findings of fact and therefore that this court has jurisdiction to interfere.

In supporting the conviction on behalf of the respondent republic, Mr Chunga pointed out that this is a second appeal and so under section 361(1) of the Criminal Procedure Code (cap 75) only matters of law can be raised and considered. The position in law, argued Mr Chunga, is that as long as there is some admissible evidence on which concurrent findings of fact have been made by the trial and the first appellate courts this court could not question the sufficiency or reasonableness of those facts. It was contended that the two substantial issues in the appeal are identification and/or recognition in the defence of alibi. Mr Chunga submitted that on PW 1's evidence the issue is recognition rather than identification and that there is sufficient evidence from him which is of such high evidentiary value, and so positive that he could not have been wrong. In Mr Chunga's opinion, the concurrent findings on identification were based on reliable evidence following proper directions

As regards the defence of alibi, Mr Chunga argued that it is a defence of fact falling within the province of the trial court and to a certain extent a matter for the first appellate court. The alibi was considered and rejected by the Senior Resident Magistrate. The judge assessed the relevant evidence and came to the same conclusion. Mr Chunga said it could therefore not be seriously argued that the alibi had not been considered or that there was any substantial misdirection in the finding on the alibi. Mr Khaminwa argued the whole appeal on the basis that there were misdirections amounting to errors of law in the findings of the Senior Resident Magistrate and of the judge in respect of the two material issues and that this court can therefore interfere. We say, at the outset, that it is not every misdirection or non-direction that would entitle this court to upset a finding of fact by the trial or the first appellate court. Paragraph 918 on page 942, *Archbold, Criminal Pleading, Evidence and Practice*, 40th Edition states the approach thus:

"Misdirection as to the evidence to be of any avail to an appellant must be of such nature and the circumstances of the case must be such that the jury would not have returned their verdict had there

been no misdirection."

So errors of law, if there be any, affecting the issue of identification and/ or recognition and the defence of alibi must attain the degree just stated.

The Senior Resident Magistrate was satisfied about the identification of the appellant after she believed the evidence of PW 1 and PW 2 and having watched the demeanour of PW 1. The Senior Resident Magistrate held that PW 1 did even better as a witness because he offered a description of the apparel of the appellant.

"which was the same way he was wearing it in court ..."

Confirmed that he had seen the appellant's face that night with the aid of electric light in the complainant's bedroom, described the clothes the appellant was wearing and told the Senior Resident Magistrate that on seeing the appellant's face during the material time,

"he realized that the accused was somebody he had seen once or twice within Dagoretti Market….."

The judge, on his part, considered PW 1's evidence that he had seen the appellant a couple of times before, that there was electric light in the room so that PW 1 had a clear view of the appellant for about 15 minutes and held:

"To my mind these conditions were favourable to proper identification and the chances of a mistake in identifying are completely ruled out."

The judge did therefore echo the Senior Resident Magistrate's findings that the evidence on identification was safe. The possibility of mistaken identity did not see the light of day before the Senior Resident Magistrate or before the judge. The two courts considered evidence about a robbery that took place in the very early hours of a morning when the house was broken into and owners awakened and forced to give out a large sum of money. The complainant's evidence that he had seen the appellant before was accepted. PW 1 said in that respect that he had seen the appellant.

"Once or twice before the robbery at Waithaka where there is a butchery."

He did not say he had ever talked to the appellant or had any personal contact with him. Peter and his wife must have been shocked by the gang. It is not unreasonable to hold that the presence of the robbers generated such fear as could and did interfere with the identification of the appellant. PW 1 and his wife had the Senior Resident Magistrate and the judge believe that the members of the gang cared next to nothing about being seen and being observed under electric light within a rather small bedroom for as long as thirty minutes during a robbery. All these relevant factors should have stirred the Senior Resident Magistrate to consider if PW 1 and PW 2 could have been genuinely mistaken about the identity of the appellant. We will not, as was urged by Mr Khaminwa, treat the evidence of the complainant and his wife as that of a single witness. For that reason the passages in *Abdallah Bin Wendo & Sheikh Bin Mwambere v Reginam* [1953] 20 EACA 166 and in *Wasaja v Uganda* (1975) E A 181 to which we were referred are not, with respect, relevant

The Senior Resident Magistrate and the judge thought PW 1 and PW 2 were honest witnesses. We do not quarrel with that assessment. However, a witness may be honest but mistaken: *Roria v R* [1967] E A 583 and a number of witnesses could all be mistaken. *R v Turnbull and others* [1976] 3 All ER 549. The trial and the first appellate court excluded altogether the possibility of a mistake on the part of the

complainant and his wife. In the circumstances of this case, that, in our view was a substantial error. It is relevant that the complainant did not tell Sergeant Mwangi, (Pw 3), that he had seen any of the robbers before the time of the robbery and that he could recognize or identify any of them. PW 1's report to PW 3 was an immediate report to a police officer and so the details of the report should have been given at the trial: *Rex v Shabani Bin Donald* (1940) 7 EACA 60. Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction *R v Eria Sebwato* [1969] EA 174. The Senior Resident Magistrate took into account the identification of the appellant in court by the complainant. Such identification is almost worthless without an earlier identificationparade – see for example, The Law of Evidence, (the *Indian Evidence Act) by Ranchhodas & Thakore*, 13th edition, page 151.

In support of his alibi, the appellant told the trial court in sworn evidence that on the material day he left his place of work at 6.30 pm, came to the city center, boarded a bus to Dagoretti and went to his home. He said he did not leave home where he lived with his parent, brothers and sisters. He was cross-examined without being shaken. The appellant's evidence was supported in the material particulars by Kairu and Kimotho each of whom stuck to his testimony during cross examination.

The Senior Resident Magistrate considered the alibi but was not convinced that DW 1 and DW 2 told the truth. The demeanour of the defence witnesses while they testified and during cross-examination persuaded the Senior Resident Magistrate to reject their evidence. A trial court is entitled to comment on the demeanour of a witness and take it into account in assessing the evidence of a witness. So, the Senior Resident Magistrate very properly made an unfavourable comment about the defence witnesses. But, there is not in the judgment of the trial court any material or recorded evidence on the behaviour or attitude of DW 1 and DW 2 upon which the senior resident magistrate took a perverse view of the two witnesses. That means that the judge was denied an opportunity of testing the Senior Resident Magistrate's finding on the alibi. The senior resident magistrate's entitlement to make remarks on demeanour is not a licence for not disclosing the factors which justify the finding on the demeanour. The necessity for the full disclosure of matters relied on as discrediting DW 1 and DW 2 is all the greater here because the Senior Resident Magistrate rejected the defence evidence on the alibi solely on the unimpressive demeanour of the defence witnesses. It was not therefore possible for the judge to tell whether or not the senior resident magistrate took into account relevant matters before she rejected the appellant's alibi. An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable; *Said v Republic* [1963] EA 6. The judge erred in accepting the Senior Resident Magistrate's finding in the alibi because the finding is not supported by any reasons. It is not possible to tell from the judgment of the Senior Resident Magistrate if the correct onus was applied and if the prosecution was required to discharge the alibi *Raphael v Republic,* [1973] E A 473. The defence of alibi was rejected for unrevealed reasons. That was a grave omission. The errors of law on the finding on identification and on the alibi are of such a nature that it is reasonably probable that without them the Senior Resident Magistrate would not have convicted the appellant. The appeal succeeds, the conviction is quashed, the sentence and the police supervision order set aside and the appellant shall be set at liberty forthwith unless he is otherwise lawfully held. That is the order of this court.

Dated and Delivered at Nairobi this 15th day of November 1984.

A.A.KNELLER

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JUDGE OF APPEAL

Z.R.CHESONI

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AG. JUDGE OF APPEAL

J.O.NYARANGI

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AG. JUDGE OF APPEAL

I Certify that this is a true copy

of the original.

DEPUTY REGISTRAR