IN THE COURT OF APPEAL

AT NYERI

(CORAM: SHAH, BOSIRE & OWUOR JJ A)

CRIMINAL APPEAL NO 108 OF 2000

BETWEEN

ANDREW NDAMBUKI MUTHIKE.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court at Nyeri, Juma & Mulwa JJ dated June 6, 2000

in

High Court Criminal Appeal No 250 of 1998)

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JUDGMENT OF THE COURT

This is a second appeal from the decision of the High Court of Kenya at Nyeri. The appeal before the High Court was lodged by two appellants, Andrew Ndambuki Muthike and David Mbogo Bundi. When the appeal came on for hearing, Bundi the second appellant in that court withdrew his appeal when he was warned that in the event his appeal against conviction was unsuccessful the sentence of imprisonment could be set aside and be substituted by the mandatory death sentence as the facts disclosed an offence contrary to Section 296(2) of the Penal Code. Andrew Ndambiri Muthike, the appellant now before us, decided not to withdraw his appeal. His appeal there was dismissed and the sentence of imprisonment was declared illegal. He was then sentenced to suffer death. He is now therefore before this Court.

There were two accused persons in the Senior Resident Magistrate's court at Kerugoya, that is, Bundi and Muthike. They were charged with 5 counts, two being those of robbery with violence, contrary to Section 296(2) of the Penal Code and the other three being those of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The alleged victims were Abel Muchiri Munyi, Titus Gachoki Shem and Alice Wanothare Ngare. Both the accused persons were acquitted in respect of assault charges. They were convicted in respect of count 2 which reads:

"1. David Mbogo Bundi, 2. Andrew Ndambiri Muthike on the 6th day of September, 1997 at Rwangondu

village in Kirinyaga District of the Central Province, jointly with others not before the court, robbed Jamlick Muriithi Gichobi of cash Kshs.5,000/= immediately (sic) before or immediately after the time of such robbery used actual violence to the said Jamlick Muriithi Gichobi." J

amlick Muriithi Gichobi (PW2) (Jamlick) recalled in the witness box that on 6th September, 1997 at 2.10 am he was in his shop with his wife, Caroline Waguthii Muriithi (PW3) (Caroline) when he heard footsteps outside. The footsteps stopped at the rear door. The intruders broke open the door. Jamlick screamed. He had a whip and a torch. The intruders beat him up with clubs and took him to the front of the shop. They took Shs.7,000/= from him. They also took his torch, radio cassette and left. The radio cassette was recovered next day in a nearby coffee farm. The intruders were many, about 9 of them, Jamlick said. They stayed inside the shop for about 30 minutes. Jamlick testified that he recognized two of the intruders, as Bundi and Muthike. He later identified them at identification parades. Jamlick stated that he knew Muthike as a barber at Ithare market. The shop in question was lit with a lamp. Jamlick had a torch. Jamlick's evidence was corroborated by that of Caroline who also knew the appellant, Muthike, as a barber.

Mr. Kigotho who appeared for the appellant argued that the appellant may have been framed or else it was a case of mistaken identity. The identification could well be mistaken in view of poor lighting in the shop, he urged. He complained that identification parade form or forms were not produced in evidence. Having narrated the circumstances which in his view negated a proper identification Mr. Kigotho argued that there was in reality no positive identification of the appellant. He lamented that no weapons of assault were produced in court, nor was there a police 3 (P3) form to show what injuries Jamlick suffered. He also lamented that the recovered radio cassette should have but was not subjected to finger print tests. In his view, there was not enough evidence to show that the appellant was one of the robbers.

The Senior Resident Magistrate dealt with the evidence of Jamlick and Caroline as well as the defence as follows:

"I have considered the defence evidence and any relevant material particulars. The defence evidence amounts to a mere denial. It is unbelievable in view of the identification by PW2 and PW3 (Jamlick & Caroline). I reject the defence evidence. I find ample evidence to prove that the two accuseds (sic) participated in the robbery at the premises of one Jamlick Muriithi Gichobi."

The learned Magistrate was satisfied that Jamlick and Caroline could not concoct the story of the appellant being there. He was known to them. He was with them inside the shop for about 30 minutes.

The first appellate court dealt with the evidence of identification as follows:

"In the instant case, the appellant was identified or recognized by the complainant and his wife. He immediately told those who came to his rescue that he had recognized two of the robbers. The complainant's wife stated that they left the lamp burning in the room as they had a child. In our view a lamp provides sufficient light for one to see. After all, in the countryside we all use lamps. That is the mode of lighting and it assists people in seeing or recognizing other people. It would be unrealistic on our part to insist that one can only be recognized where there is an electric light."

Mr. Kigotho, like Mr. Mahan who appeared for the appellant in the superior court, as pointed out earlier, took issue on lack of identification parade evidence. Whilst there is some justification in this complaint we are of the view, as were the judges of the superior court, that the failure to call the officer who carried out the identification parade was not fatal to the prosecution's case as the other evidence on record is

sufficient to support his conviction. In any event, the judges pointed out, the appellant in his own evidence stated that he had been identified at the Police Station.

Both courts below found as fact that the appellant was one of the robbers; that he was known to Jamlick and Caroline. We cannot fault the two courts below for doing so as we have no basis or proper basis for doing so. This, as already pointed out, is a second appeal where issues of law only can be dealt with. Whilst the issue of identification is an issue of mixed law and fact, we cannot discern any error or errors on the part of the two courts below to make us rule otherwise.

Mr. Kigotho took up the issue of there being no violence used and there being no proof of injury. He urged that on that the Magistrate was right in reducing the offence to that of simple robbery contrary to Section 296(1) of the Penal Code. That may be so, but Section 296(2) of the said Code envisages that when the robbery is committed by more than one person one of the ingredients of an offence under that sub-section is satisfied. That being so the sentence meted out by the superior court was the legal one. The reduction of the charge to simple robbery by the Magistrate was a misdirection.

Mr. Kigotho complained that the Judges of the superior court failed to formally enter a conviction under Section 296(2) of the Penal Code. That is so but it is clearly implicit from their judgment that they were substituting a conviction under Section 296(1) to one under Section 296(2). Quite clearly the conviction was for an offence under Section 296(2) of the Penal Code.

In the final analysis we see nothing to interfere with the judgments of the two courts below.

This appeal is ordered dismissed.

Dated and delivered at Nyeri this 13th day of December, 2002

A.B SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.