IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, TUNOI & O'KUBASU, JJ.A.)
CRIMINAL APPEAL NO. 123 OF 2001

BETWEEN

JONATHAN MUTISYA VALAIU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Mwera, J.) dated 9th July, 2001 in H.C.CR. APPEAL NO. 59 OF 2001)
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JUDGMENT OF THE COURT

The appellant, Jonathan Mutisya Valaiu, was convicted of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. His first appeal to the High Court of Kenya at Machakos, Mwera, J (proceeding under the provisions of **Section 359 a(1) of the Criminal Procedure Code)** was dismissed and hence this second appeal.

We think that the conviction of the appellant cannot be sustained on the evidence tendered by the prosecution to the trial court.The robbery, the subject of the charge against him, occurred at about 1:00 a.m. during the night of the 18th December, 2000 at Lita Market, Kathiani Location of Machakos District. There was only one identifying witness, PW 1, a watchman of the premises which was raided by a gang of robbers. This witness was also the victim.

PW 1 testified that the appellant whom he had known before when they were in primary school together several years ago was wearing a jacket and a hat.He had been able to recognise him by the aid of a torch whose power he did not reveal and was also able to identify him in an identification parade which was held two months after the robbery. However, PW 1 admitted that a long period of time had lapsed since he and the appellant had met and moreover, there was no regular contact between them. It is possible therefore, and we think that visual memory had faded with the passage of time.

The identification parade was of no evidential value because the police officer who conducted it did not testify and no records of it were ever availed to the court. Further, the hat allegedly worn by the appellant during the material night and was said to have dropped at the locus was disowned by the appellant and his wife who testified on his behalf.

In the circumstances, we are unable to say that the two courts below correctly directed themselves on the issue of identification, for if they had done so, they would have come to the conclusion that the identification by the single witness of the appellant was free from any error.As we are unable to make that conclusion on a second appeal, the benefit of doubt must go to the appellant.

The appellant's defence was that he was not in the market area on the night on which the robbery was committed. He was in his home at Kaviani asleep with his wife and never left the homestead during the material night. His wife testified likewise and was never cross-examined at all. We cannot understand why the two courts below never considered the matter of alibi set up by the appellant.The police, moreover, never checked and tested it though it had been raised by the appellant soon after his arrest. We think that this aspect of the defence is of great significance and was sufficient to have raised doubt in the mind of the trial magistrate.

It is trite that an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer; and it is a misdirection to refer to any burden resting on the accused in such a case. See Ssentale v Uganda [1968] E A 366.

In the result the appeal is allowed, the conviction is quashed and the sentence of death is set aside. The appellant shall be released forthwith unless he is held for some other lawful cause.

Dated and delivered at Nairobi this 21st day of December, 2001.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR