



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NO 11 OF 2020

BENSON RUTO LIMAPUS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgement and sentence of Hon. S.K.Mutai, PM, dated 18th May 2020 in Criminal Case No 833 of 2019 in the Senior Principal Magistrate's Court at Kapenguria, Republic v Benson Ruto Limapus)

JUDGEMENT

In his petition to this court, the appellant has appealed against his judgement and sentence of fifteen years' imprisonment in respect of the offence of robbery with violence contrary to section 295 as read with section 296 of the Penal Code (Cap 63) Laws of Kenya

The appellant has raised six grounds in his amended grounds of appeal.

I will start with main ground, being ground 4 in which the appellant has faulted the trial court in convicting him on the evidence of identification, that is questionable and insufficient to sustain a conviction.

The evidence of Simon Pkior (Pw 1), who was the complainant, was that on 25/8/2019, at around 12.30 am he was asleep in his house with his children aged 8, 7 and 5 years. He heard a knock on the door and he saw the appellant push it open. Pw 1 flashed a torch and saw the appellant armed with a knife. The appellant demanded and was given shs 10,000/= by Pw 1. The appellant threatened to kill him, if he raised an alarm.

Pw 1 further testified that in the morning he went and told his brother, Joseph Limapus (Pw 2), what had happened. Pw 2 sent the complainant to the village elder, Nelson Lopusiya Kira (Pw 3). Pw 1 told Pw 3 that the appellant had robbed him of shs. 10,000/=

Pw 1 further testified that he had a small torch with a big flash. Pw 1 also testified that his children did not wake up.

I have re-assessed the evidence of Pw 1 in respect of his recognition of the appellant. I find that the circumstances favouring recognition of the appellant were difficult; since it was a dark night. I further find that there were other circumstances that favoured the recognition of the appellant by Pw 1. These are as follows. First, Pw 1 flashed a torch at the appellant; which was a small torch but had a big flash. Second, Pw 1 knew the appellant as his cousin. Third, the appellant talked with the complainant at that time and he recognized him (appellant).

Furthermore, Pw 1, Pw 2, Pw 3 and Pw 4 testified that they had no grudge against the appellant.

Pw 1 reported the incident to his brother (Pw 2), then to the village elder (Pw 3) and finally to Festus Pkior (Pw 4). Pw 4 is the brother of the appellant.

In his defence, the appellant testified by way of making an unsworn statement, in which he stated that he was framed. It was his testimony that he was arrested for assaulting his sister and not for robbery.

The appellant submitted that his identification was not positive.

In his well-written submissions, the appellant cited a number of authorities including *Abdalla bin Wendo v R (1953) 20 EACA 166* and *Turnbull v R (1977) QB 224*; in which those courts observed that evidence of visual identification should be considered carefully especially when the circumstances favouring identification are difficult. In a case depending on identification by a single witness, corroboration is usually required as a matter of practice.

The appellant further submitted that he was framed in this case. In this regard, the appellant drew the attention of the court to the evidence of Pw 4 (the brother of the appellant), who testified in cross examination that: “*We have framed the accused.*”

I find that the evidence of Pw 4 is not credible that the appellant was framed in view of the ample evidence of Pw 1, Pw 2, Pw 3 and Pw 6. Although the trial court did not specifically address the issue of credibility of Pw 4, I find that court impliedly rejected the evidence of Pw 4. I therefore find that the appellant was not framed.

Furthermore, the appellant submitted that the complainant told Emmanuel Lokorwa (Pw 5), the area chief that he was robbed on 3/9/2019; whereas the evidence of the complainant was that he was robbed on 25/8/2019. According to the appellant this contradiction shows he was framed. He has further submitted based on *Pandya v Regina (1957) EA 339*, that where the evidence of witnesses is contradictory or inconsistent the court should not rely on such evidence. In this regard also the appellant posed the question as to why it took the complainant over eight (8) days to report the robbery.

The answer to the foregoing immediate submission lies in the evidence of No. 92386 PC Eunice Achieng (Pw 6), who was the investigating officer. Pw 6 testified that she recalled on 26/08/2019 she was instructed to investigate this case. She continued to testify that the complainant had reported that he was robbed by the appellant at mid-night, who is his cousin. The complainant further reported that the appellant was armed with a knife when he robbed him of shs 10,000/=. Pw 6 visited the scene. She found that the complainant lived in a one roomed house with his children.

Furthermore, Pw 6 confirmed that the complainant had sold a cow a day before the incident. She also testified that did not recover the knife. Pw 6 further testified that the offence was committed on 25/8/2019. I therefore find that the evidence of the complainant (Pw 1) that reported the offence to the chief on 3/9/2019 is not correct in view of his report to Pw 1, Pw 2, Pw 3 and Pw 6. I therefore find that the chief is mistaken as regards the date of the complainant’s report as to when the offence was committed.

Furthermore, I find that Pw 1 spoke with the appellant when the appellant robbed him of his money. The submission of the appellant that there is no evidence that the complainant did not recognize the voice of the appellant is lacking in merit and is hereby dismissed.

I further find that the contradiction in the evidence of the prosecution in respect of the ages of the complainant’s children is a minor contradiction. I therefore reject the submission of the appellant that this contradiction showed that he was framed.

I also reject the submission of the appellant that the contradiction in the prosecution evidence that the door was broken or not is immaterial. In other words, it is a minor contradiction.

Finally, I find that on the evidence the offence of robbery was proved; since the appellant threatened to kill the complainant if he raised an alarm. The elements of robbery in terms of section 296 (2) of the Penal Code were proved.

The upshot of the foregoing is that the appellant was positively identified by Pw 1.

In the premises, the appellant’s appeal fails with the result that his conviction is hereby confirmed.

As regards, sentence, I find that the trial court failed to take into account that the appellant had been in remand custody for about nine months and to date the appellant has been in custody for about one year and seven months, which period the court is mandatorily required to take into account by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

In the premises, I hereby reduce the sentence imposed from **15 years imprisonment to eight years imprisonment**, which will begin to run from the date of instant judgement.

Judgement dated, signed and delivered in open court at Kapenguria this 20th day of April 2021.

J. M. BWONWONG’A

JUDGE

In the presence of :-

The appellant

Mr Makori for the respondent

Mr. Juma and Hellen Kaspan, court assistants