



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL APPEAL NO. 236 OF 2013

LETATOL LEKUTET TINGA.....APPELANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Principal Magistrate's Court, Narok (Mr.. Temba A. Sitati)

Ag SRM) dated the 20th September, 2013 in Criminal Case No. 1203 of 2012)

JUDGMENT

1. The Appellant, **Letatol Lekutet Tinga**, was charged before the Senior Resident Magistrate's Court at Narok with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.
2. The particulars of the offence were that on the 16th day of September, 2012 at Oloeka Village, Ntulele Location in Narok North District within the Rift Valley Province jointly with others whilst armed with offensive weapons namely Somali swords and rungus robbed Francis Lampeshua of a mobile phone make Alcatel valued at Kshs.2000/- and Kshs.1500/- all valued at Kshs.3500/- and at or immediately before or immediately after time of such robbery used personal violence against the said Francis Lampeshua.
3. The brief facts of the case before the trial magistrate are that Francis Lampeshua (**PW1**), was a farmer and a cattle herder in Ntulele area. On the material day, at about 9.00 p.m. while he was guarding his harvest of wheat, three people, one of whom was the Appellant, attacked him with rungus, pangas and knives. They took Kshs.1500/- from his pocket and a mobile phone before tying his hands behind his back with a *shuka*. The robbers then started to fill the sacks with wheat, whilst they were pre-occupied, **PW1** managed to escape into the night. At home, he was assisted and taken to Ntulele dispensary and thereafter reported the incident at Ntulele Police Station and named the Appellant whom he identified from the huge flames emanating from a fire he had put up to keep warm.
4. Simon Dapash (**PW2**) a casual labourer who lives in Ntulele, was at his house when he heard screams from the wheat farm. He proceeded towards the farm where he saw six men packing wheat into sacks. He recognized the Appellant and sought to find out what was happening. The rest of the men retreated into the thick of the night. **PW2** was ordered to remain silent by the Appellant.
5. Police Constable Jackson Magori (**PW4**) attached to Ntulele Police Station was on duty on the material day while at about 12.00 a.m. **PW1** escorted by other members of the public reported the incident. **P.W.1** reported to **P.W.4** that he had recognized one of the robbers as Letatol. The officer arrested the Appellant the following day with the assistance of **PW1**.

6. **PW1** was examined by Enock Kotikot (**PW3**), a clinical officer at Narok District Hospital on 17th September, 2012. **PW1** had various cuts at the back of his head, forehead, face and neck. He also complained of pain on his chest and right shoulder. **PW3** stitched the cuts and administered some medication. He classified the degree of injury suffered by **PW1** as harm.

7. The Appellant gave unsworn statement. He introduced himself as a farmer from Loita area. His defence was that on 18th September, 2012 he woke up and went to sell his sheep at the market. Thereafter he met Police Officers who arrested him. He denied committing the offence and contends he was framed.

8. Upon receiving all the evidence the trial court observed that there was no material basis and evidence tendered by the Appellant to support the claim that the charges had been fabricated by **PW1** due to a grudge and therefore the trial magistrate proceeded to disregard the defence of the Appellant. The court held that the identity of the Appellant was established by **PW1** from the light generated by the fire and that he was well known to **PW1** and **PW2** and the trial court accordingly convicted and sentenced the Appellant.

9. Being aggrieved by the judgment, the Appellant preferred an appeal faulting the trial court's decision on twenty three grounds of appeal listed in his Amended Petition of Appeal as summarized here-in-below;

- i. That the trial magistrate erred in law and fact by convicting the Appellant on flawed proceedings which were a nullity for want of compliance with the fair trial provisions of the **Constitution, 2010**.
- ii. That the trial magistrate erred in law and fact by basing his conviction on identification evidence whereas the conditions prevailing at the time were not conducive for proper identification.
- iii. That the trial magistrate erred in law and fact by holding that the prosecution had proved its case beyond reasonable doubt as required by law in the circumstances;
- iv. That the trial magistrate erred in law and fact in convicting the Appellant on inconsistent and contradictory evidence;
- v. That the trial magistrate erred in law and fact for failing to call critical evidence and in particular the Occurrence Book.

10. At the hearing of the appeal, Learned Counsel, Mr. Ole Kamwaro assisted by Ms Grace Some represented the Appellant while Prosecuting Counsel M., Omari represented the State.

11. Mr. Kamwaro argued that the proceedings of the trial court were a nullity because the Appellant's constitutional rights to a fair trial were infringed upon. The Appellant was arrested on 18th September and arraigned in court on 20th September 2012 which was more than the twenty four hours provision as set down in the Constitution. Further that there was no acceptable explanation tendered by the Police despite the court being within a short distance from where the Appellant was held.

12. Counsel further argued that the evidence before the trial court was inconsistent and contradictory. He argued that the initial report does not give description of the persons who attacked **PW1**. Further, it was difficult to ascertain the time the robbery took place as **PW1** evidence contradicts the Police statement recorded. Counsel also argued that the evidence of **PW1** is inconsistent with that of **PW2** as to whether **PW1** was tied up using shukas or ropes and whether **PW2** in fact assisted **PW1** to escape. To sum up these discrepancies Counsel urged the court to find that the evidence did not meet the required threshold and cast doubt as to whether the Appellant committed the offence. He relied on the decision in **Ndungu Kimanyi V. Republic**, [1976] 1KLR 1442-1443.

13. Ms. Some submitted that the trial court erred by relying on the evidence adduced on identification.

She relied on the case of **Fatuma Baraza V. Republic**, (1998) Mombasa HCCRA NO.340 of 1998 which makes reference to **Turnbull V. Republic** [1970] 3 All ER 549 on the inherent danger of identification evidence and the likelihood of a mistake in recognition of close relatives and friends. According to Counsel the amount of light was not sufficient and therefore identification was difficult. Further the evidence does not provide the proximity of the Appellant from **PW1** at the time of the robbery incident.

14. Counsel therefore concluded that the conviction was unsafe as there was no conclusive evidence on identification and no evidence on recent possession and Counsel urged this court to quash the conviction and set aside the sentence and set the Appellant free.

15. The appeal was opposed by Prosecuting Counsel for the State who differed with the submissions of Counsel for the Appellant Mr. Kamwaro on the issue of the OB extract and raised an objection that this was an attempt to introduce new evidence in the form of the Occurrence Book, and that the same did not form part of the evidence in the trial court and should be disregarded.

16. On identification, Counsel submitted that it was by recognition. The Appellant was a person known to both **PW1** and **PW2**, that **PW1** had lit a huge fire for the purposes of warming himself and to also scare away wild animals. With the aid of the light from the fire both **PW1** and **PW2** were able to see and recognize the Appellant.

17. Counsel for the State contended that the burden of proof was properly discharged and that the prosecution case was proved beyond reasonable doubt and Counsel for the State prayed that the appeal be dismissed and conviction and sentence be upheld.

ISSUES FOR DETERMINATION.

18. There are three issues for determination which we set out here-under;

i. Whether the Appellant's constitutional rights were infringed as he was not arraigned within the 24 hour time limit?

ii. Whether the Appellant was positively identified?

iii. Whether an initial report was made and entered in the Occurrence Book?

19. Issue number (i) is not an issue for us to belabor ourselves with as the authorities on this issue are legion and the Appellant is at liberty to seek redress by way of damages.

20. On issue number (iii) Prosecuting Counsel for the State raised an objection that the Appellant was introducing new evidence in the form of the OB Extract. We have disregarded this issue as it was not brought up in evidence before the trial court.

21. Therefore the only issue left for us to address and determine is issue number:

(ii) which relates to identification of the Appellant.

ANALYSIS

22. This being the first appellate court it is incumbent upon us as we re-assess and re-evaluate the evidence on record so as to reach our own independent conclusion, that we must bear in mind that we did not have the benefit of seeing or hearing the witnesses. Reference is made to the case of **Okeno V. Republic**, [1972] EA 32.

23. The appeal is based on visual identification by two prosecution witnesses. The incident occurred at 9.00pm at night and it was the evidence of **PW1** that he had lit a big fire to ward off wild animals and at the same time warm himself. He states that he was able to see the Appellant by the light that emanated

from the big fire. But we note that his evidence did not indicate the proximity between himself and the Appellant nor did he clearly state the duration of the whole incident and how long he kept the Appellant and other robbers under observation. He only states in his evidence that and we quote:

‘.....the three stayed there for long.....’

24. The evidence of **PW2** is also based on visual identification by recognition. But upon perusal of the court record and upon close examination of the conditions and circumstances in which identification was done by this witness we note that the identification was also at night yet his evidence is devoid of the lighting prevailing at the time. He makes no mention in his evidence of the big fire alluded to by **PW1**.

25. The test for the correctness of identification in difficult circumstances is set down in the case of **Turnbull V. Republic (supra)**. This case has been adopted in Kenyan case law and the important factors that ought to be taken into consideration are the lighting that prevailed, distance, proximity and duration of observation.

26. The evidence of **PW2** falls short of the test and his evidence on identification of the Appellant becomes mere dock identification which has been deemed in many instances to be worthless.

27. There is also the element of contradictory evidence that lends credence to fact that it was dark and the witnesses may have been frightened and therefore the conditions and circumstances for identification may have been difficult leaving room for error. Firstly, **PW1** testified that there were three robbers whereas **PW2** said there were six robbers.

28. Secondly **PW1** testified and we again quote that he;

‘.....managed to spring up and took to my heels and ran off completely.....’

29. Whereas **PW2** states that he found **PW1** still bound by a shuka.

30. Reverting back to the issue of identification, having found that the identification by **PW2** was mere dock identification and of no cogent value then what is left is identification by a single witness (**PW1**). But due to the contradictory evidence as stated hereinbefore we are not satisfied that this identification is free from error. We make reference again to the case of **Turnbull V. Republic (supra)** at page 552 where Lord Widgery, CJ observed:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

31. Other than P.W.2's contradictory evidence, we also note that there is no direct or circumstantial evidence to corroborate **PW1's** evidence or to connect the Appellant to the robbery and that none of the stolen property was found and or recovered from the Appellant.

FINDINGS

32. After re-evaluation and re-assessing the evidence we make the following findings and determination;

a) we find that the conditions prevailing at the time were not conducive for proper identification of the Appellant and find that the Appellant was not positively identified, and

b) we find that the conviction is unsafe and cannot be sustained.

DETERMINATION

i) The appeal is found to be meritorious and is hereby allowed.

ii) The conviction is quashed and sentence set aside.

iii) The Appellant be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 30th day of July, 2014.

ANYARA EMUKULE

JUDGE

A. MSHILA

JUDGE