



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 140 OF 2011**

**JAMES LOKWAMERI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an appeal from original conviction and sentence of Hon. T. NZYOKI, SRM at Lodwar in Criminal Case No. 692 of 2010 on the 29th day of September, 2011]***

**J U D G M E N T**

The appellant, **James Lokwameri**, appeared before the Senior Resident Magistrate at Lodwar charged with Robbery with violence, contrary to section 296 (2) of the penal code, in that on the 6th October, 2010 at Kakuma town in Turkana West District jointly with others not before court while armed with a dangerous weapon namely knife robbed Lucas Munyen of one mobile phone make Nokia worth Kshs.3,500/= and a wallet containing Kshs.5,000/= all valued at Kshs.8,500/= and at the time of such robbery used personal violence to the said Lucas Munyen.

After trial, the appellant was convicted and sentenced to twenty five (25) years imprisonment.

Being dissatisfied with the conviction and sentence the appellant preferred this appeal on the basis of the grounds contained in his petition of appeal dated 4th October, 2011.

At the hearing of the appeal, the appellant relied on his written submissions filed herein on 23rd October, 2013, when he first appeared before a different bench of two Judges and when the matter was partly heard before he requested for an adjournment to enable him consider the possibility that the sentence may be enhanced.

When the hearing resumed on 3rd November, 2014 before a new bench of two Judges the appellant continued to rely on his earlier filed written submissions. Learned Prosecution Counsel, **M/S Kiigi**, appeared for the State/Respondent. She opposed the appeal and submitted that the evidence adduced against the appellant was strong enough. That, PW1 identified the appellant whom he had previously known. That, the presence of electric lights at the scene made the evidence of identification reliable. That, during the offences the appellant was joined by a second person who was armed with a knife and it was at that juncture that the complainant was robbed and injured.

Learned Prosecution Counsel submitted further that the appellant's defence was considered by the trial court but dismissed as an afterthought.

On sentence, the Learned Prosecution Counsel contended that the sentence of twenty five (25)

years imprisonment was improper as the offence carried a mandatory death sentence.

Learned Prosecution Counsel urged this court to dismiss the appeal and enhance the sentence meted out against the appellant.

In his response to the foregoing, the appellant submitted that PW1 did not mention the distance from the electric light to the scene of the offence.

We have considered the submissions by both sides and being a first appellate court our duty was to re-visit the evidence and draw our own conclusion's bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

In that regard, the case for the prosecution was briefly that on the material date, the complainant **Lucas Munyen (PW1)**, left home at 2.00 p.m. and proceeded to Kakuma town to purchase a mobile phone. After the purchase, he returned home to allow the phone to be charged by the vendor. He was back at the vendor's shop at 7.30 p.m. He collected the phone and embarked on his journey back home while in the company of **Lokwang Nanok (PW2)** and **Etabo Ejikon (PW3)**. The three were walking towards home and on arrival at the Kakuma Football field a person suddenly appeared from the rear and strangled the complainant, (PW1) by neck. The complainant put up a struggle and wrestled the man to the ground. A second person armed with a knife appeared at that juncture but the complainant managed to knock down the knife from the second assailant.

The complainant briefly struggled with the two assailants before he ran away to join his two colleagues. He said that he was able to see and recognize the first assailant when the cap he (assailant) was wearing fell down on the ground. He also said that there was electric light from the nearby Our Lady Secondary School. He said that the first assailant was the appellant whom he previously met at a video house and whose name was Lokwameri.

The complainant indicated that on the following day after the offence they proceeded to the appellant's workplace at a hotel called Masheikh where they found the appellant and reported the matter to the chief. The appellant was thereafter arrested and taken to Kakuma police station.

Lokwang (PW2) and Etabo (PW3) confirmed that they were attacked by a group of between two and five men but in the process they ran away leaving the complainant behind. Later, the complainant informed them that he had been robbed of his mobile phone and cash Kshs.5,000/= but was able to identify Lokwameri (appellant) as having been one of the assailants. They (PW2 and PW3) accompanied the complainant to Masheikh hotel where the appellant was found on the following day and apprehended.

**P.C Yusuf Shune (PW4)**, investigated the case and prepared the present charge against the appellant who had been arrested by C. IP James Odera (PW5), an administration police officer based at Turkana West District.

A clinical officer at Kakuma Mission hospital, **Jeremiah Lodea Ewoton (PW6)**, examined the complainant and completed the necessary P.3 form indicating that the complainant suffered bodily harm.

In his defence, the appellant stated that he was employed at Masheikh hotel Kakuma and on the 7th October, 2010, he was at the said place undertaking his duty when he was told that he was required at the chief's office. A group of people gave him the information after they had arrested him at his work place. He proceeded with the group to the chief's office where things turned against him after allegations were made that he was responsible for robbing the complainant. He was taken to Kakuma police station where he was asked to record his name on a white paper. His finger prints were taken before he was arraigned in court for an offence he knew nothing about.

All the foregoing evidence was considered by the Learned trial magistrate who found that the offence of robbery with violence was committed against the complainant and that the appellant was among those responsible. On our part, we are satisfied that indeed the offence was adequately established by evidence from the complainant, his colleagues (PW2 and PW3) and the clinical officer (PW6).

With regard to evidence of identification which forms the basis of this appeal, the learned trial magistrate appreciated that there was a need for caution since the offence occurred in the hours of darkness and that only a single person (the complainant) was able to identify at least one of the offenders. The learned trial magistrate therefore warned himself accordingly and proceeded to find that the appellant was positively identified by recognition due to the presence of electric light at the scene and the fact that a cap worn by the appellant fell down thereby exposing his face to the complainant.

In our view, considering that the evidence of identification against the appellant was that of a single witness in difficult circumstances it was doubtful whether indeed the complainant made a positive identification of the appellant. We say so because the situation at the time of the offence was stressful. The complainant was engaged in a struggle with one or two people in the dark and even if a cap from one of the assailants fell down it was not possible for him (complainant) to see and recognize anybody unless he was in close proximity to the assailant and was clearly in a position to see him and only if favourable conditions for proper identification existed.

The complainant indicated that favourable conditions for identification were created by the presence of electric light at a school called Our Lady. He did not however state the distance between the school and the Kakuma football field where the offence occurred nor did he mention the intensity of the light to show that it was possible to see and identify a person who was a distance away from the school.

Surprisingly, when the offence commenced the complainant was in the company of his colleagues (PW2 and PW3) who did not mention the school or even the presence of any light at or near the scene. In the circumstances, we do not think that the alleged identification of the appellant by the complainant was free from the possibility of error or mistaken identity. We therefore do not agree with the learned trial magistrate as supported herein by the State/Respondent that the appellant was positively identified as having been part of the gang which attacked and robbed the complainant of his property. We therefore find that his conviction by the learned trial magistrate was neither sound nor safe.

Consequently, we allow the appeal to the extent that the conviction of the appellant be and is hereby quashed and the sentence although erroneous is now set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**J. R. KARANJA**

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**JUDGE**

**K. KIMONDO**

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**JUDGE**

**[Delivered & signed this 18<sup>th</sup> day November, 2014]**

**[In the presence of the appellant and Koga for the State]**