



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 56 OF 2009**

**JOSEPH SAITOTI.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment of the Resident Magistrate, Kitale dated 16<sup>th</sup> October 2009 in Criminal Case No 5803 of 2005)**

**JUDGMENT**

**Introduction**

The Appellant, JOSEPH SAITOTI was charged jointly with Peter Nabiba with the offence of robbery contrary to Section 296(1) of the Penal Code, the particulars of the charge being that on the 17<sup>th</sup> Day of December 2005, at Kesegon Trading Centre in Trans Nzoia District within the Rift Valley Province they jointly robbed Mary Waithera of one basket, one kilogramme of sugar, arrow roots, a bunch of keys, Identity Card, one scarf and a thermos flask all valued at Kshs. 490/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Mary Waithera. Peter Nabiba was acquitted for lack of evidence but the Appellant was convicted and sentenced to five (5) years imprisonment effective 16<sup>th</sup> October 2009.

The brief facts of the case are that on 17<sup>th</sup> December 2005 at 7.10 pm, the Complainant, Mary Waithera was walking home from her shop and on reaching her gate, someone threw mud on her face, demanded for money and held her throat. The Complainant screamed thrice and her children, Peter Njuguna and Flora Kavoi as well as a neighbour, Peter Kaburia came to her rescue upon which the attackers fled taking the Complainant's property with them. The Complainant was treated at Kesogon Health Centre and made a report at Kesogon Police Post where she was issued with a P.3 form. The degree of her injury was assessed as harm.

**The Appellant's Appeal**

Being aggrieved by both conviction and sentence, the Appellant filed a Petition and the following Grounds of Appeal on 27<sup>th</sup> October 2009:

- a. That the learned trial Magistrate did not consider the Appellant's defence before convicting him to serve five (5) years imprisonment;
- b. That the Prosecution did not produce important witnesses such as the Investigating Officer and the Arresting Officer;

c. That the Prosecution did not prove its case.

The appeal was heard on 14<sup>th</sup> October 2013 with the Appellant appearing in person and Mr. Konga appearing for the State. The Appellant elected to rely on his written submissions in which he amplified his grounds of appeal. He submitted that the Prosecution relied only on the evidence of minors and that failure to call the Investigating Officer was fatal to the Prosecution case.

The Appellant further submitted that by failing to give any reason for rejecting the Appellant's defence the learned trial Magistrate demonstrated that he did not give any consideration to the said defence. Further, the learned trial Magistrate failed to pay attention to material contradictions in the evidence of the prosecution witnesses. Finally, in meting out the sentence, the learned trial Magistrate did not take into account the period the Appellant had spent in custody pending trial.

### **Opposition by the State**

In opposing the appeal, Mr. Konga learned Counsel for the State submitted that the Appellant was properly identified by PW 2 and PW3 at the scene of crime. PW 2 testified that the Appellant, who was known as "Boyi" was a porter at the market and would sometimes carry goods for the Complainant. PW 3 corroborated the testimony of PW2.

PW 3 further testified that although there was partial darkness, there was enough light to enable proper identification of the Appellant. As the Appellant was fleeing from the scene of crime, he turned to face PW2 and PW3 who identified him positively. Counsel for the State further submitted that the Investigating Officer was not an essential witness and the failure to call him could not therefore dent the Prosecution case.

On sentence, Counsel submitted that the offence of robbery carries a maximum sentence of fourteen (14) years and the five (5) years sentence meted out on the Appellant was therefore lenient, taking into account that bodily harm was caused to the Complainant.

### **Finding and Determination**

There are two (2) issues for determination in this case. First, whether there was adequate evidence to sustain a conviction of the Appellant for the offence of robbery contrary to Section 296(1) of the Penal Code. Second, whether having all the circumstances of this case in view, the sentence meted out on the Appellant was excessive.

It was the Appellant's case that since the Prosecution relied on the identification evidence of minors, the conviction could not stand. The law on the handling of the testimony of a minor is well settled.

In the case of *Johnson Muiruri Vs Republic (Criminal Appeal No 44 of 1982)* the Court of Appeal held that where a minor is called to testify, the court is required to conduct a *voire dire* examination to determine whether the child understands the nature of an oath. If the court is not so satisfied unsworn evidence may be received if in the opinion of the court the minor is possessed of sufficient intelligence and understands the duty of speaking the truth. The unsworn evidence of a minor requires material corroboration but if the minor gives sworn evidence, no corroboration is required although the court is required to properly guide itself.

In the case before me, the trial court relied on the evidence of two minors whose testimony was taken on oath. PW 2, Peter Njuguna was 16 years at the time he testified while PW 3, Flora Kavoi was 12 years. The learned trial Magistrate having duly conducted *voire dire* examination on both minors proceeded to take their sworn evidence.

The testimony of PW 2 and PW 3 remained consistent even under the scrutiny of cross examination. Both witnesses testified that the Appellant was known to them prior to the crime. They even had a nickname for him "Boyi" which the Appellant did not deny.

According to PW 2 and PW 3 the crime was committed at 7.15 pm when there was sufficient light for proper identification of the Appellant. PW 2 told the Court that he was about 50 metres from the scene of crime and that when the Appellant looked behind, he was able to identify him. PW 3 was able to tell that the Appellant wore a white shirt at the time of the crime.

Identification by recognition has a high probative value. In the case of **Anjononi and Others Vs Republic [1981] KLR. 594 p. 60** the Court of Appeal stated that:

*“recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”*

Having duly considered the evidence as recorded by the lower court, I agree with the learned trial Magistrate that there was sufficient evidence to convict the Appellant for the offence of robbery contrary to Section 296 (1) of the Penal Code. The fact that the Investigating Officer did not testify, did not in my view, affect the Prosecution case in any material way.

On sentence, I am guided by the well established principle that an appellate court will not normally interfere with the sentence imposed by a trial court unless the sentence is illegal or manifestly excessive.

In view of the foregoing, I find no reason to interfere with the judgment of the trial court which is hereby confirmed. Accordingly, this appeal fails and I order that the same be and is hereby dismissed in its entirety.

**DATED AND SIGNED AT KITALE THIS 18<sup>TH</sup> DAY OF OCTOBER , 2013**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT KITALE THIS 28<sup>th</sup> DAY OF OCTOBER, 2013**

**E.OBAGA**

**JUDGE**

**In the Presence of:**

.....Appellant

.....Respondent