



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO.20'A' OF 2007

ALEX WABWIRE NYONGESA.....
APPELLANT

VERSUS

REPUBLIC OF KENYA.....
RESPONDENT

**(BEING AN APPEAL ON CONVICTION AND SENTENCE FROM ORIGINAL CRIMINAL
CASE NO 225 OF 2007 IN BUSIA LAW COURTS).**

JUDGMENT

The Appellant was on 15th February 2007, charged before the Lower court with the offence of robbery contrary to section 295 as lead with section 296(1) of the Penal Code in that on 5th February 2007, at Lukandanyi Village in Sidende Sub-location, jointly with another not before court, robbed Cleophas Barasa Odiwya one mobile phone make Alcatel, one spectacles and cash 1000/= all valued at Kshs. 6000/=. During the hearing the prosecution called five witnesses in support of the charge and after the closure of the prosecution's case, the Appellant was placed on his defence. In his defence, the Appellant gave a sworn statement and thereafter the learned trial magistrate delivered his judgment on 7th November 2007 finding the Appellant guilty of the offence as charged.

The Prosecutor informed the court that the Appellant was to be treated as a first offender, after which the Appellant presented his mitigation asking for leniency saying that he was married with two children who depended on him. The learned trial magistrate after considering the mitigation, found that the offence was a serious one that required a deterrent sentence. He sentenced the Appellant to seven years imprisonment.

The Appellant, not being satisfied with the sentence, filed this appeal on 12th November 2007, relying on the following five grounds;

1. That he had pleaded not guilty.
2. That Pw 2 who was the only witness, who said to have known him, indicated that she had not identified him during the robbery.
3. That the learned trial magistrate relied on hearsay evidence.
4. That none of the items robbed from the complainant was found on him.
5. That the sentence should be quashed and he be set free.

During the hearing Mr. Kelwon for the State, conceded to the appeal and gave the following reasons;

1. That considering the robbery occurred during the night, and that the only source of light available

- was a lit matchstick, it was not possible for the witnesses to make a reliable identification.
2. That though the Appellant was arrested shortly after the alleged robbery none of the items stolen from the complainant were found on him.

I have carefully gone through the evidence that was adduced by the five prosecution witnesses during the hearing in the lower court and I agree with the State that the testimonies of Pw 1 and Pw 2, leave alot to be desired as to their ability to have seen and properly identified the person or persons who attacked them. The light from a single lit matchstick would not be enough under the circumstances to enable the two witnesses to have clearly seen and identified the person who attacked them. Secondly, the Appellant had offered an alibi defence indicating that he was not at the place where the alleged robbery took place. There is nothing to show that his defence was challenged or rebutted by the Prosecution, who had the responsibility of proving their case against the Appellant beyond reasonable doubt.

The above clearly shows that the conviction of the Appellant was not safe and the same is set aside, the sentence vacated and the Appellant should be set free immediately unless otherwise lawfully held.

It is so ordered.

S. M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON...17TH.....DAY OF OCTOBER, 2013.

IN THE PRESENCE OF;

JUDGE.