



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 19 OF 2011

THOMAS LOMONGIN EKENO}
NATOM LOKOLONYEI} APPELLANTS

VERSUS

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. T. Nzyoki - SRM, in Lodwar Senior Resident Magistrate's Court in Criminal Case No. 432 of 2009)

J U D G M E N T

These are two appeals which were consolidated and heard together. They arise from the decision and judgment of the Senior Resident Magistrate at Lodwar in which the appellants viz **Thomas Lomongin Ekeno (Appellant one)** and **Natom Lokolonyei (Appellant two)**, were convicted and sentenced to death for two concurrent acts of robbery with violence contrary to Section 296 (2) of the penal code. It was alleged that on the 12th April 2009 at Narangewoi Manyatta Turkana North District, jointly with others not before Court and being armed with a dangerous weapon namely a firearm make AK 47 rifle robbed Apua Ewoi of her Kshs. 10,000 and Samuel Emekwi of Kshs. 30,000, a crate of soda and a carton of milk and at the time of such robbery shot and killed the said Samuel Emekwi.

Being dissatisfied with the conviction and sentence, the appellants filed these appeals on the basis of the grounds in their respective petitions of appeal filed herein on 3rd March 2011. The said grounds are more or less similar.

At the hearing of the appeals, the appellants appeared in person and presented written submissions which they relied on in support of the appeals.

Learned Prosecution Counsel, **Mr. Onderi**, appeared for the State Respondent. He opposed the appeals and relied on the evidence of Pw 1, 2 and 4 to submit that the appellants were identified by recognition as they were previously known to the said Pw 1, 2 and Pw 4. That, the circumstances for identification were conducive in that bright lights from the attacker's torches made it possible for the appellants to be identified. That, the evidence by Pw 1, Pw 2 and Pw 4 with regard to identification was corroborative. That, there was also moonlight which enabled the witnesses to identify the appellants.

Learned Prosecution Counsel submitted that the ingredients of the charge were proved and contended that the appellants were positively identified.

In his response to the foregoing submissions by the Respondent, the first appellant contended that he was not identified by voice by Pw 2 who did not describe the voice and lied to the Court.

The second appellant contended that the alleged identification through torchlights was insufficient.

Having considered the rival submissions, our duty is to re-visit the evidence and draw our own conclusions bearing in mind that the trial Court had the benefit of seeing and hearing the witnesses.

In brief, the Prosecution case was that on the material night at about midnight, a group of armed people invaded Narengewoi village, intimidated and threatened some of the villagers before robbing them of their property and in the process killing one of the villagers with a gunshot.

Selina Apua Ewoi (Pw 1), was one of the victims and the complainant in the first Court. She said that she was called out of her house by one of the invaders whom she saw and recognized as Natom (second appellant). He demanded money from her. She also saw and recognized a second invader whom she identified by name Lomongin (first appellant). She said that the first appellant was carrying a firearm. She said that she was able to identify the two appellants with the help of light flashes from a torch in possession of the second appellant. She managed to escape from the scene but on her return she realized that her money Kshs. 10,390 had been stolen.

Margaret Asukuku (Pw 2), was also a victim of the offence. She said that she was called from inside her house by her cousin, the first appellant. He wanted medicine. She recognized his voice. She called her deceased brother Samuel Emekwi, who was in a separate house within the same compound. She called him so that they could assist the first appellant with medicine. The deceased opened his house door and was shot. At that juncture a group of people made attempts to break into her shop. She heard the second appellant speaking in the Turkana language demanding money. He had a torch which flashed on her face.

Apart from the first appellant, Margaret (Pw 2) said that she also recognized the second appellant who was also her relative. She said that her late brother was shot dead by the first appellant. She indicated that her recognizing the appellants was made possible by the flashes of the torches in possession of the appellants. She said that she was also able to recognize the first appellant by his voice.

Lopenyamoe Apor Naftott (Pw 4), was at the material time at the home of Apua (Pw 1). He said that he was able to identify two of the attackers and that these were the two appellants. He said that he was sleeping outside the house when the attack commenced and that he was able to see and identify the two appellants with the help of light from a bright moon. He ran away from the scene on hearing Apua (Pw 1) scream.

Phillip Korobe (Pw 5), a Police Reservist, visited the scene of the offence after the offence had occurred. In the process, he met and was informed by Margaret (Pw 2) that the two appellants were among the attackers. He knew the two appellants and with the help of his colleagues, he traced and arrested them. He was at the time in the company of an Assistant Chief **Nangolia Awoi Longiron (Pw 6)**.

Dr. Donald Mongoi (Pw 7), conducted a post mortem on the body of the deceased and compiled the necessary report which indicated that the cause of death was severe haemorrhage secondary to a perforated abdominal aorta due to gunshot wound.

The Officer Commanding Lokitaung Police Station (O. C. S.) **C. IP James Muli (Pw 3)**, and his junior colleague **P. C. Ian Liru (Pw 8)**, investigated the matter after it had been reported to them. In the process, they visited the scene and confirmed that concurrent acts of robbery had occurred. Later, they re-arrested and charged the two appellants who had been apprehended after being suspected of having been involved in the offences.

In their defence, the two appellants denied the charges.

The first appellant (Thomas) stated that he was a fisherman at Kalokol and that he was shocked to be arrested on the 12th August 2009 while repairing fishing nets. Thereafter, he was taken to Lokitaung

Police Station and then to Lodwar. He contended that he did not commit the offences and that the complainants herein did not state the truth in Court.

The second appellant (Natom) stated that he was not at the scene of the offence when it occurred. He said that he was at Longech area and that after his arrest he was taken to Lokitaung Police Station. He contended that he knew nothing about the offences.

From all the foregoing evidence, it is our view that there was sufficient evidence to establish the occurrence of the two concurrent acts of robbery with violence. The necessary ingredients of the offence were established without any particular dispute.

The basic issue for determination was therefore whether the two appellants were positively identified as having been in the group of people who attacked and robbed the complainants (Pw 1 and Pw 2) and in the process shot dead the deceased Samuel Emekwi.

Both appellants denied the offences. The first appellant indicated that he was implicated by the complainants without sufficient reason while the second appellant raised an alibi defence. Undoubtedly, the offences occurred in difficult circumstances i.e. in the hours of darkness..

It was therefore incumbent upon the Prosecution to provide sufficient and credible evidence of identification against the appellants who had no obligation to prove their innocence.

Herein, such evidence of identification came from Selina Apua (Pw 1), Margaret Asukuku (Pw 2) and Lopenyamoe Apro (Pw 4). The question was whether that evidence was credible and reliable enough as to leave no doubt in the mind of any reasonable Court that indeed the two appellants committed the offence. The Learned Trial Magistrate believed the aforementioned witnesses (i.e. Pw 1, 2 and 4) and held that they made a correct identification of the two appellants. The Learned Trial Magistrate found that the identification was by recognition.

Indeed, identification by recognition is said to be the most reliable and satisfactory form of identification (see, **Anjononi & Other Vs. Republic [1980] KLR 59**). But even then, there must exist proper and favourable conditions for the identification of an offender whether by recognition or otherwise.

Herein, we do not think that the identifying witnesses (i.e. Pw 1, 2 and 4) gave a satisfactory account of how they were able to see and recognize the appellants with the help of torch flashes and/or moonlight. It was not sufficient for them to simply say that the attackers had torches and that is why they were identified or that the torches emitted bright light or for that matter, the moon was bright. Notwithstanding the brightness of the torch or moonlight, the complainants did not state the duration taken to look at and make a positive identification of the attackers or the distance or angle between them and the attackers in particular those that they said they identified.

It is our opinion that the circumstances or conditions existing at the time of the offences were not favourable for a positive and credible identification of the attackers. The possibility of error or mistaken identity could not be overruled in the circumstances. Even in cases of recognition, a witness could be honest yet mistaken.

We therefore find that the conviction of the two appellants by the Learned Trial Magistrate was neither proper nor safe. We quash the same in both counts and set aside the sentence.

Both appellants shall be set at liberty unless otherwise lawfully held.

(Delivered and signed this 26th day of November 2013)

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellants:

.....

Respondent:

Court Clerk: