



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 146 OF 2010

PATRICIA ESIBITAR APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Appeal arising from the decision of Hon. T. Nzyoki SRM in Lodwar Senior Resident Magistrate's Court
in Criminal Case No. 529 of 2010)*

J U D G M E N T

The Appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars are that on the 15th day of July, 2010 in California village in Turkana Central District within Rift Valley Province, jointly with another not before Court robbed Lydia Eyanae of her mobile phone make Nokia 6070 valued at Kshs. 4,500 and cash Kshs. 3,000 and at the time of such robbery used actual violence to the said Lydia Eyanae.

The Appellant was convicted and sentenced to death. At the hearing of the appeal, the Appellant applied to have her petition amended. This application was contained in her written submissions which she wished to rely on during the hearing. As the Court accepted to hear her by way of written submissions, her application was contained in those submissions was thereby allowed. In the new grounds, she raised among other grounds the issue of recognition.

The brief facts of the case are that on 15th July 2010, Pw 1 Lydia Eyanae the complainant herein was coming from her mother's place headed to her house at California village. The time was around 8.00pm. While she was at a distance of about 20 metres away, she saw a man and a woman who appeared drunk. As she was about to go past the two, the man held her by the neck and strangled her as the woman removed her Nokia mobile phone from the pocket as well as her Kshs. 3,000 in cash. She became unconscious and lay on the ground until about 9.00pm when she came to her senses and proceeded to her home. She testified that she was able to recognize the Appellant who was close to her. On the following day, she went and reported the incident to Lodwar Police Station. She proceeded to Lodwar District Hospital where she was treated.

On 27/07/2010 she saw the Appellant at a drinking den at California market. She called one David (Pw 2) who came and assisted her to arrest the Appellant who was taken to Lodwar Police Station.

On 28/07/2010, the complainant went to Lodwar Police Station where she was issued with a P3 form which was filled by Pw 4 Hosea Kiplagat Kiring. The Appellant was subsequently charged and arraigned in Court on 03/08/2010.

In her defence in the Lower Court, the Appellant stated that she was arrested on 27/07/2010 after

which she was assaulted and taken to Lodwar Police Station in a motor vehicle. She denied committing the offence.

The Appellant's appeal was opposed by Mr. Onderi for the State who argued that the complainant recognized the Appellant through moonlight. He argued that the complainant reported to the Clinical officer and to the police that she had been assaulted by a known person. He urged the Court to dismiss the appeal contending that the Trial Magistrate had warned himself on the danger of convicting on the evidence of a single identifying witness.

We have analyzed and evaluated the evidence adduced by the Prosecution witnesses as well as the defence. Our duty as a first appellate Court was set out in the case of **Okeno Vs Republic [1972] EA 32**. We are expected to subject the evidence adduced at the Lower Court to fresh and exhaustive examination. We are expected to weigh conflicting evidence and reach our own conclusions and findings. However in doing so, we are expected to give allowance to the fact that we neither saw nor heard the witnesses testify.

The robbery is alleged to have occurred at night at about 8.00pm. The complainant testified that there was bright moonlight and that she recognized the Appellant and the other man as they were residents of California. There was no evidence adduced to show whether the Appellant and the other man were neighbours of the complainant or for how long she had known them. She merely stated that the Appellant and the other man were residents of California. When the complainant was cross-examined by the Appellant, she stated that she used to see the Appellant at California market. It is therefore not clear that one may safely conclude that the Appellant was a resident of California or used to be seen at California market.

The complainant testified that she was strangled by a man who was with the Appellant and that she lost consciousness for about an hour. She regained consciousness at around 9.00pm. The robbery took place at 8.00pm. The complainant's evidence is that she recognized the Appellant who was close to her. It is unlikely that the complainant who was being strangled would have been able to recognize the Appellant in the circumstances.

When the Appellant was arrested, there is evidence from Pw 2 David Opat who testified that the Appellant was identified to him by his wife the complainant. The complainant herself did not disclose in her evidence that she arrested the Appellant with assistance of her husband. In the complainant's testimony, she testified that she arrested the Appellant with assistance of one David. She did not disclose that David was her husband.

The evidence of the complainant is that she was issued with a P3 form on 28/07/2010. This is confirmed by the evidence of Pw 3 Cpl. Gideon Kirيامa of Lodwar Police Station who testified that he issued the complainant with a P3 form on 28/07/2010. In the P3 form, the complainant is alleged to have been sent to hospital on 26/07/2010. The complainant never went to hospital on 26/07/2010. Her testimony is that she went to Lodwar District Hospital on 17/07/2010. The P3 form was signed on 29/07/2010. The Clinical Officer was not clear as to when he examined the complainant. In his evidence, he stated that the injuries were two days old. It is therefore not clear whether he was referring to 17/07/2010 or 29/07/2010 in reference to the two days period of the injuries.

As at the time the complainant was given a P3 form, the Appellant was already in custody having been arrested by the complainant and her husband. There were no investigations conducted in this case. Pw 3 Cpl. Gideon Kirيامa testified that he saw the dirty trouser and top dress at the Police Station when the complainant came to report. There is no evidence from Pw 3 as to whether he is the one who received the trouser and top which were produced as *exhibit 1* and *2* respectively. It is apparent that the Appellant was charged based on information given by the complainant. It is the complainant who also effected the arrest. The complainant said that she was given a note to go and effect the arrest which she did. This case was treated casually by the police.

Had the Trial Magistrate considered the evidence of the complainant critically, he would not have

convicted the Appellant. The evidence was not watertight to justify a conviction. The evidence of the complainant as to what happened was not free from possibility of error. There were doubts as to the whole evidence, from the point the Appellant was arrested to the manner of filling the P3 form. The complainant was left to run the show. She complained, effected arrest and testified and the trial Court based conviction on her evidence only.

For the reasons given hereinabove, we find that the conviction of the Appellant was not safe. We quash the conviction and set aside the sentence. The Appellant should be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kitale on this19th..... day of November, 2013.

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellant:

Respondent:

Court Clerk: