



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 663 OF 2010

ABDULLAHI MOHAMED MOHAMUDAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 256 of 2010 of the Principal Magistrate's Court at Mandera by Richard Odenyo – Principal Magistrate on 18th November 2010)

JUDGMENT

1. The appellant, **Abdullahi Mohamed Mohamud** was convicted and sentenced to suffer death for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 30th June 2010 at Bulla Amin North Eastern Province, jointly with others not before the court, being armed with dangerous or offensive weapons namely pangas and swords, they robbed Abdullahi Yusuf of his mobile phone make Nokia 3110 valued at Kshs.7000/= and at, or immediately before the time of such robbery they used actual violence against the said Abdullahi Yusuf.
2. The appellant filed an appeal in which he advanced ten grounds that may be summarised as follows:
 - a. ***His case was not proved beyond reasonable doubt;***
 - b. ***His conviction and sentence were based on contradictory and insufficient evidence.***
 - c. ***The burden of proof was shifted on to the appellant.***
 - d. ***Relevant issues that arose from the offence were not analysed and therefore wrong assumptions were made and erroneous conclusions drawn.***
 - e. ***Medical evidence was not considered.***
 - f. ***The appellant did not understand the language of the court.***
 - g. ***The sentence was excessive and oppressive.***

3. Miss Maina, learned counsel for the respondent, conceded the appeal on the ground that identification was not positive, because the offence was said to have occurred at 8.30 p.m. and **PW1, PW2** and **PW5** who were present when **PW5** was robbed, testified that there was no light at the scene of robbery. Further, that the witnesses testified that they only got to see the face of the appellant after he was arrested by members of the public and after the police came to the scene and shone their torches in his face.
4. Miss Maina also urged that **PW3** the Police Officer stated that they were informed of the offence at 11.30 p.m. which was three hours after the robbery and that it was not in evidence that during the chase the witnesses never lost sight of the appellant or that they identified him by his clothes. She therefore urged the court to allow the appeal.
5. We have carefully analysed the evidence as it is our mandate as the court of first appeal to do and observed that to begin with, the record shows that **PW1, PW2** and **PW5** were in Primary School in class 6 and 7 respectively at the time of the offence. It is a matter of public notoriety that pupils in those classes are minors and it is therefore very probable that these witnesses too were minors.
6. If that be the case there ought to have been an interview to establish their ages, and also to establish whether they understood the importance of giving truthful testimony, before their evidence was taken.
11. More importantly, the witnesses admitted that they only identified the appellant after he was arrested by members of the public, because the scene of the attack was dark. There is no evidence that they did not lose sight of the appellant from the time of the attack to the time of arrest, nor that the chain of events was not broken during the chase. The circumstances of identification were rendered more precarious by the appearance on the scene of many members of the public from a mosque nearby to join in the chase.
12. In view of the foregoing we are satisfied that the appeal has merit and that the learned state counsel was prudent to concede it. We therefore allow the appeal, quash the conviction, and set aside the sentence. We order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **11th** day of **November 2013**.

R. MWONGO

L. A. ACHODE

JUDGE

JUDGE