



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 345 OF 2009

NOOR ABDULLAHI IBRAHIM

ALIAS FARAH ARTE IBRAHIMAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 275 of 2009 in the Senior Magistrate's Court at Wajir – Mr. A. Ingutya (SRM) on 18th June 2009)

JUDGEMENT

1. **Noor Abdullahi Ibrahim**, the appellant herein was tried for the offence of simple robbery contrary to **Section 296(1)** of the **Penal Code**. He was however, convicted for the offence of robbery with violence under **Section 296(2)** of the **Penal Code**. He was sentenced to suffer death in accordance with the law.
2. The chief particulars were that on the 24th day of September 2008 at around 05 40 a.m. at KAPU Police lines in Wajir District within the North Eastern province, he robbed Sofia Ibrahim of her mobile phone make Nokia 3500 valued at Kshs.13,500/= and at, or immediately before, or immediately after the time of such robbery used actual violence against the said Sofia Ibrahim.
3. He subsequently filed a petition of appeal grounded on arguments that:
 1. *His testimony regarding his real names and identity was disregarded.*
 2. *The interrogation into the averments by the appellant that he was arrested with another person by the name Noor Abdullahi Ibrahim who was later released by the police, was overlooked.*
 3. *The Arresting Officer was not summoned to produce all*

the documents found on the appellant at the time of arrest.

4. *The trial Magistrate relied on evidence of hearsay regarding the appellant's identity*

5. *The court erred in directing the appellant to take plea in the name of Noor Abdullahi Ibrahim.*

6. *The court relied on uncorroborated evidence.*

7. *The fact that the appellant knew the complainant was disregarded.*

8. *The arrest and prosecution were actuated by malice and abuse of police power.*

4. The appeal was conceded by learned State counsel Miss Maina, on the ground that having looked at the evidence on record she noted that the appellant was charged of the offence of simple robbery but was convicted of the offence of robbery with violence. That looking at **Section 179** of the **Criminal Procedure Code** one can only be convicted with a minor offence when the evidence on record supports a minor offence, if he had not been charged with it, but cannot be convicted of a serious offence if he had not been charged with it.

5. Miss Maina also urged that a look at the evidence showed that **PW1** and the appellant knew each other before because **PW1** stated that the appellant asked her as follows:

“What I was doing at that time he started following me insisting to know what I was doing at that time.”

That on cross examination the appellant seemed to have known the complainants relatives and even had the complainant's photograph even though the appellant said that she did not know him.

6. After a careful re-evaluation of the evidence on record we are of the humble view that this appeal must succeed on several grounds. On the ground of identification it is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken. - See the decision of the Court of Appeal in **Ogeto v Republic [2004] 2KLR pg. 14.**

7. The reasons why this appeal must succeed are set out below. First, the court did not interrogate the evidence to settle the issue of the names and identity of the appellant. The appellant told the court that his name is Farah Arte Ibrahim, while the police insisted that he is Noor Abdullahi Ibrahim. According to the appellant, Noor Abdullahi Ibrahim was someone else who was arrested together with him but who was released by the police.

8. Second, there exists a real possibility of the existence of some unresolved issues between the appellant and the complainant. The evidence shows that while the complainant swore that she did not know the appellant before the date of the said robbery, the appellant knew which High School she attended and he even had her photograph.

9. Third and most important however, is the fact that the appellant was charged and tried for the

offence of simple robbery contrary to **Section 296(1)** of the **Penal Code**, but was convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. **Section 179** of the **Criminal Procedure Code** is the section under which a trial court may convict a person for an offence other than that for which she/he was charged.

“When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.”

The learned trial magistrate therefore, exercised mandate which he did not have in purporting to convict the appellant for an offence which was more serious than that for which he was tried.

10. We therefore find that this conviction is unsafe for the reasons given above and consequently cannot be allowed to stand. We 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 this3RD..... day of
DECEMBER..... 2013.

MUMBI NGUGI

L. A. ACHODE

JUDGE

JUDGE