



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 70 OF 2007

SAMWEL ESINYEN ATOT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This appeal arises from the conviction and sentence by Hon. M.K Nyakundi in Criminal Case NO. 4391 of 2005 at Eldoret.

The Appellant was found guilty and convicted of the offence of robbery with violence and given the death sentence. The other two (2) co-accused were acquitted.

The Appellant being aggrieved filed this appeal and set out five (5) grounds of appeal as set out hereunder:

- 1) That the learned trial magistrate erred in both law and fact when he convicted me on the evidence of single identification witness who did not give material description of me the Appellant to the Police when he saw the suspect and his actual appearance.
- 2) That the learned trial magistrate erred in law and fact when he convicted me on prosecution case which was not proved beyond reasonable doubt as they failed to call essential witnesses especially Faithlene, Julia, police informer and etc.
- 3) That the learned trial magistrate erred in both law and fact when he convicted me while relying on exhibits which were not found in my possession.
- 4) That your lordship the learned trial magistrate erred in both law and fact when he convicted me on contradictory evidence adduced by prosecution witness.
- 5) That your lordship the learned trial magistrate erred in both law and fact when he convicted me while rejecting my defence without giving cogent reasons for his rejection, thus violated section 169 (1) of CPC

At the hearing of the Appeal the Appellant was acting in person and relied on his written submissions whilst the State was represented by Learned State Counsel Mr. Oluoch.

A brief summary of the trial case is that the Appellant together with two others, on the night of 6th June, 2005 at Elgon view Estate they jointly robbed John Kimakio Mutia and Faithlene Maria Kimugo and immediately after the robbery used actual violence on the above named.

I have perused the Appellants Record of Appeal, heard and read the submissions of both the Appellant and Counsel for the State.

The issues for determination are:

- (i) Identification by a single witness
- (ii) Recent possession of stolen property.

On the issue of identification, an identification parade was carried out at Langas Police Station on the 1st July, 2005. The Appellant was identified by PW 1 and his wife. The Appellant not being satisfied objected to the said parade and the same was duly noted by the police officer PW 6 by the name Donatha Ripha. The Appellant objected to the identification parade on the grounds that PW 1 had seen him at the crime office prior to the parade being conducted.

The trial magistrate nevertheless relied on the evidence of PW 1 on the issue of identification and convicted the Appellant.

I am satisfied that PW 1 positively identified the Appellant as on the night of robbery there was sufficient light from an electric bulb of 100 watts. PW 1 was also able to observe the Appellant for a period of three minutes. I am satisfied that PW 1 gave truthful and reliable evidence and confirmed that he had not seen the Appellant at the crime office prior to the identification parade being conducted. I find that PW 1 positively identified the Appellant to the Police.

I am also satisfied that the trial magistrate cautioned himself beforehand on the dangers on the evidence of a single witness on the issue of identification.

On the issue of recent possession the evidence of PW 3 directly connects the Appellant to the offence. The skirt suit PW 3 bought was bought in a neighbours house, Mama Sheila and the Appellant was present in the said neighbours house. PW 3 later learnt that Mama Sheila had been arrested and PW 3 and others who had purchased clothes from Mama Sheila opted to surrender them to Langas Police Station. The skirt suit surrendered by PW 3 was positively identified by PW 1 as belonging to his wife and formed part of the property stolen from them on that material date.

The conduct of the Appellant when police arrested him establishes his guilt. The Appellant when asked to show the police his house, took them to a house approximately 600 meters from the place of arrest. The neighbours and landlord denied knowing the Appellant. An informed later took the police to the Appellants house and stolen merchandise was recovered therefrom which was identified by PW 1 as belonging to him.

The Appellant gave no reasonable explanation as to how he came into possession of the property.

On the grounds enumerated above, I find no reasons to interfere with the decision of the trial magistrate in convicting the Appellant. I find that the appeal has no merit and is hereby dismissed and conviction upheld. As for the sentencing the death penalty has been declared unconstitutional therefore I commute the same to life imprisonment.

Dated and Delivered at Eldoret this 19th day of January 2012.

A. MSHILA
JUDGE