



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CRIMINAL APPEAL NO. 7 OF 2009.**

**RAMADHAN ALI SAKWA.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

**J U D G M E N T.**

1. The appellant **Ramadhan Ali Sakwa** was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal code. The particulars of the charge stated that on the 3<sup>rd</sup> day of July, 2007, at *[particulars withheld]*, in West Pokot District within the Rift Valley Province, jointly with others not before court while armed with dangerous weapons, namely pangas and runigus robbed **JOHN WANDAKI MUKHWANA** of cash Ksh. 515/= a Sonitech Radio St 48, a coat, a pair of black leather shoes two slashers and one hammer all valued at Ksh. 4,200/= and at or immediately before or immediately after the time of such robbery, he used actual violence on the said **J.W.M.** The appellant also faced a second charge of gang rape contrary to section 10 of the Sexual Offences Act of 2006. The particulars of the offence stated that on 3<sup>rd</sup> day of July, 2007, at *[particulars withheld]*, in West Pokot District, within the Rift Valley Province, jointly with others not before court had canal knowledge of **D.K.W** without her consent.
2. The appellant was tried, convicted and sentenced to death. Being aggrieved by the conviction and sentence, he has appealed. In addition to the grounds set out in the petition of appeal, the appellant also filed written submissions. The appellant has challenged the decision of the learned trial magistrate on the grounds that the quality and the quantity of the prosecution evidence was wanting. The identification was not positive because the prevailing circumstances when the offence took place were difficult for a positive identification. Moreover, there were contradictions on whether the complainant especially PW1 who was the victim of robbery and rape recognized the assailant. The offence took place at 10.00 p.m. PW1 who was the star witness testified that she was able to identify the appellant through the moonlight which she confirmed was faint. PW1 said she was able to recognize the appellant when she was removing money and the appellant flashed a torch and that was how she was able to identify him.
3. This appeal was opposed; Mr. **Onderi**, the learned Senior Principal State Counsel supported the conviction which was based on identification through recognition by both PW1 and PW2 who were victims of robbery and rape. They were able to recognize the appellant using the light from the torches which the appellant and his accomplice had. The evidence of the complainant was corroborated by PW4, the arresting officer who also received the first report of the robbery and rape and he said the complainant gave the name of the appellant.
4. This being a first appeal, this court is mandated to re evaluate the evidence before the trial court and arrive at its own independent decision on whether or not to uphold the decision of the learned trial magistrate. This court must however bear in mind that it never saw or heard the witnesses and give due allowance for that. In brief summary of this case, on 2<sup>nd</sup> July, 2008 at about 10.00 p.m. **D.K.W**, PW1, and her husband **J.W.M** were sleeping with two of their children in their house which was at *[particulars withheld]*. They heard a knock on the door and when they enquired the assailants said they were police and when PW1 peeped through the curtain she saw six people standing outside their house. They opened the door, three people entered while two remained outside. The assailants demanded to be given money and mobile phones. They started assaulting PW2, PW1 told the assailants that she would give them money and while opening her pulse to remove the money, the appellant flashed a torch and she recognized the appellant. The assailants dragged PW1 out of the house and locked the door from outside. PW1 tried to scream but she was hit with a hammer. She was dragged outside and raped by all the thugs. The assailants stole items which are stated in the charge sheet but the items were never recovered.
5. This matter was reported to **P.C. John Owiti** on the same night. The police went to the scene and found the complainant who reported that they had been robbed by six men who were posing as police officers. In the first report the complainant did not give the name of the suspects. The police took the complainant to the hospital and the P3 forms in respect of PW1 and PW2 were filled by **Danstone Litola**, PW3. Upon examination of PW1, the clinical officer found she had bruises on the right shoulder and thighs. There was evidence that she was raped. The clinical officer certified the injuries sustained by PW1 as harm. PW2 was also examined; he had a wound on the upper eyelid and other bruises on the hands and knees. It was the following day that the complainants reported to the police that they had recognized one of the assailants by the name **Ramadhan Ali Sakwa**.

6. The police started looking for the suspects. After six days the complainant reported to the police that she had seen the appellant. The police rushed to the place where the appellant was reportedly seen and arrested him. The appellant was put on his defence and denied having committed any offence. He stated that on the day he was arrested there were people gambling when a young child was rude to him. He chased the child but the mother (PW1) of the child accused him of having assaulted her husband. After about half an hour, the police came and arrested him and charged him with the offence of robbery with violence. The learned trial magistrate was satisfied that the prosecution's case was proved to the required standard because PW1 and PW2, the victims of the robbery were able to recognize the appellant using the light from the torch that the robbers had. The appellant was convicted of the 1<sup>st</sup> count and sentenced to death while the sentence in respect of the 2<sup>nd</sup> count was held in abeyance.

7. We have considered the evidence before the trial court with an anxious mind especially because the robbery took place at 10.00 p.m. There was no electricity and PW1 testified that the moonlight was faint. She said that she recognized the appellant when he lit the torch when she was removing the money from the pulse that is when she recognized the appellant. We are aware that identification by recognition is more reliable because it is based on familiarity between the witness and the assailant. However, in this case, there is no evidence that was adduced to show the length of familiarity or the circumstances in which the complainants had become familiar with appellant. This matter is compounded further by the evidence of PW4 who recorded the 1<sup>st</sup> report on the same night after the robbery. It is important to reproduce this evidence briefly. PW4, NO. 82238 P.C. John Owiti...

***... "we rushed there and found the two complainants a husband and a wife. They told us they had been robbed by about six men who had crude weapons posing as police officers. The report had been booked – according to the complainant they had not given the name of the suspects... The next day around 11.00 a.m. they came to the station and the complainant stated that they had recognized one of the suspects among the six. The name was Ramadhan Ali Sakwa and they said they knew his voice and physically and that another suspect directed a face of a torch and they recognized them. They said they had stolen a number of things including cash 515/=, a radio, a coat, panga, black leather shoes, 2 slasher, one hammer, all of this estimated to a value of Ksh. 3,400/=."***

9. From the above evidence it is obvious in the 1<sup>st</sup> report the complainant did not indicate that they had identified the appellant by recognition. They subsequently reported the following day that they had recognized the assailant. Taking the totality of the evidence that the offence took place at 10.00 p.m. and the only light was a faint moonlight and a flash from the torch that the appellant lit when PW1 was removing money from the pulse. We entertain doubts in our minds whether this was positive identification. The items stolen from the complainants were never recovered. We are of the view that the conviction against the appellant is not safe from possible errors.

Accordingly, we allow this appeal, quash the conviction and set aside the death sentence. The evidence in respect of the 2<sup>nd</sup> count was not evaluated by the trial court. However, for the same reasons that we have found regarding the identification of the appellant would also affect the second charge. We also quash the conviction in respect of the 2<sup>nd</sup> charge. Unless the appellant is otherwise lawfully held, he is to be set at liberty.

Judgment read and signed this 8<sup>th</sup> day of April 2011.

**M. KOOME.**

**JUDGE.**

**F. AZANGALALA**

**JUDGE.**