



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 111 OF 2009

CHAPARAKACH TIMOTHY KITAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO.112 OF 2009

JACK CHEROTWE KIPSANG (Alias) AMOSI.....APPELLANT

(from the conviction and sentence of M.Wambani, SRM in Bungoma CMC CRIMINAL Case No.221 of 2009)

J U D G M E N T

The two above appeals were consolidated for the purpose of a joint hearing on 8.12.2010.

The two appellants were originally jointly charged with Robbery with Violence contrary to Section 296 (2) of the Penal Code. They were both convicted and sentenced to death. They both separately appealed against both the conviction and sentence.

The facts behind the conviction are as follows, in a summary form:-

The complainant, Silas Ndiema, was asleep in his shop at Cheorerora Trading Centre on 13.1.2006. His wife was also sleeping there. Their two children and a sister in-law also slept in another room in the same house. About midnight the family was attacked by thieves who broke down the main door the house

through the door. Unfortunately the shots thereby killed the complainant's sister who was sleeping with the complainant's children.

Eventually, according to complainant's evidence, the thieves carried the complainant outside of the house where they tied his hands at his back with ropes. Before they escaped, the robbers stole the complainant's Kshs.200,000/- some of which was kept in his pocket and the other, in a drawer. The complainant who at the lower court, testified as PW1, stated that there was a bright moon light which he used to identify Chaparakach Timothy Kitai, the 1st appellant and Jack Cherotwe Kipsang, Alias Amos, the 2nd appellant. He also claimed that he saw their faces and the apparel they wore while inside the house using the light from a torch which the appellants or one of them flashed as they searched for money in the house.

At the hearing of the appeals the State Counsel, M/s Letting declined to support the conviction. She stated that the conviction was based upon the testimony of only the complainant. She stated further that the evidence of identification of the appellants by the complainant, PW1, was weak and unreliable, especially since the police identification parade result which could have corroborated the said evidence, was also based on a parade that took place three years after the robbery took place. That is why M/s Letting accordingly conceded the two appeals.

We have on our part as an appellate court, considered the evidence on the record with care. We are satisfied that the evidence from the complainant upon which the conviction was based, was not adequate, apart from coming from a sole source. We hold that there was no sufficient light upon which the complainant who was acting under stressful conditions, could have satisfactorily seen and identified the attackers, particularly, the two appellants.

We accordingly agree that it is dangerous to leave the conviction standing. We would allow the appeal.

The conviction of robbery with violence, is accordingly quashed and the sentence of death set aside. The two appellants herein are hereby ordered set free from prison, unless therein otherwise lawfully held.

Orders accordingly.

Dated and delivered at Bungoma this 31st day of May 2011.

D.A. ONYANCHA
JUDGE

F.MUCHEMI
JUDGE

Judgment delivered in the presence of Mr Ogoti State Counsel and the appellants on 31st day of May 2011.

D.A. ONYANCHA
JUDGE

F.MUCHEMI
JUDGE