



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 432 OF 2008

(Appeal against both Conviction and Sentence in Criminal Case No. 227 of 2007 in the Senior Resident Magistrate's Court

at Kajiado from the judgement of [MR. W. N. KABERIA, SRM] dated 18/11/08)

SAITOTI LENANA alias

LEMAYATAN.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **Saitoti Lenana alias Lemayian**, was charged with the offence of **robbery with violence** contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 27th January 2007, at Loitokitok Township, the appellant, jointly with others not before court, while armed with dangerous and offensive weapons, namely a panga and a metal bar, robbed Richard Aswanje Okwomi (the complainant) of KShs.2,800/= and at or immediately before or immediately after the commission of the robbery, wounded the complainant. The appellant pleaded not guilty to the charge. He was tried. After the trial, the trial court found that the prosecution had established the charge to the required standard of proof beyond any reasonable doubt. The appellant was convicted. He was sentenced to death as is mandatory provided by the law. The appellant was aggrieved by his conviction and sentence. He duly appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been tried after being unlawfully detained beyond the constitutionally mandated period and therefore his fundamental right to fair trial was infringed. He was aggrieved that he has been convicted on evidence of a single identifying witness which could stand up to legal scrutiny. He faulted the trial magistrate for failing to take in consideration the fact that the prosecution had adduced insufficient evidence which was not capable of securing a conviction. He was aggrieved that the trial magistrate had based the conviction on contradictory evidence and on evidence

which did not connect him to the commission of the crime. The appellant faulted the trial magistrate for reaching the decision to convict him without taking into account his defence that, according to him, had displaced the prosecution's case regarding his culpability. The appellant urged the court to allow his appeal, and set aside his conviction and sentence.

At the hearing of the appeal, the appellant presented to the court written submission in support of his appeal. He urged the court to allow his appeal. He urged Mrs. Gakobo for the State made oral submissions in support of the conviction and sentence of the trial magistrate. She submitted that the prosecution had established all the ingredients and elements of the offence of the **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. She stated that the evidence of identification that was adduced by the prosecution witnesses proved that it was the appellant, in company of others, who robbed the complainant. She reiterated that the complaint by the appellant to the effect that his constitutional right to fair trial was infringed by his long detention before he was arraigned before the trial court was not so fundamental as to vitiate the trial. She urged the court to dismiss the appeal and affirm the conviction and sentence of the appellant.

Before we give reasons for our decision, it is imperative that we set out the fact of this case, albeit briefly.

According to the complainant, on 27th January 2007, at about 7.15 p.m., while he was walking to his home from Loitokitok Township, he met three men sitted by the roadside near the AIC Primary School. The three men were sitted on an open field. The complainant testified that as he walked past the three men, he was able to recognize two of the men – infact he knew them by name. One of the men was the appellant, Saitoti Lanana, while the other was one Kamau Muthumbi. The complainant greeted them. The complainant testified that the three men the stood and walked with him towards the direction of his home. When the complainant was about to reach his homestead, he was accosted by the three men, who included the appellant. He was cut on his head with a panga. He fell down and temporary lost consciousness. When he came to his senses, he realized that he was being pinned down by his assailants. They robbed him of KShs.2,800/=. He screamed for help. He testified that he struggled with one of his assailants, in particular, the appellant, until neighbours, including some Tanzanians came to his rescue. The complainant stated that he held on to the appellant until members of the public came to his aid and arrested him. Due to the fact that both the complainant and the appellant were injured, they were first taken to Loitokitok Police Station where the report of the robbery was made, before they were taken to the hospital where they were both treated. According to the P3 form which was produced by **PW4 P.C. Kariuki**, (prosecution exhibit No.1), complainant sustained cut wounds on his head and on his chest region. The injuries evident in the medical report were consistent with the testimony that the complainant adduced in regard to the injuries that he had sustained. Among the persons who came to the rescue of the complainant was **PW2 Irene Mwariri** (his wife). PW2 made arrangements to have the complainant taken to hospital in light of the injuries that he had sustained. It was apparent that the appellant was injured in the course of the struggle with the complainant.

PW3, Josiah Mwicha, a watchman at a nearby college testified how on the material night PW2 came to the college to seeking assistance to have the complainant taken to hospital with the college's motor-vehicle. The complainant was emphatic that it was the appellant and his two colleagues who had assaulted him. The motive for the assault was robbery.

When the appellant was put to his defence, he denied that he had robbed the complainant. He testified that he was assaulted by a group of people as he was walking home on the material night. He claimed he was wrongly accused of having robbed the complainant. In essence, he was saying that he was a victim of mistaken identity.

This is a first appeal. The duty of the first appellate court is to reconsider and to re-evaluate afresh the evidence adduced before the trial court with a view to reaching a determination whether or not to uphold the conviction of the appellant (see – Okeno vs Republic [1972] EA).

In the present appeal, it was clear that the appellant's conviction was based solely on the evidence of identification. The complainant testified that he knew the appellant prior to the robbery. He explained that he had walked together with the appellant and his two accomplices for some distance before they assaulted him and robbed him of KShs.2,800/=. In the course of the robbery, they cut him with a panga, thus causing him to sustain injuries on his head and chest. The appellant denies that he was one who robbed the appellant. He testified that he was a victim of mistaken identity. He claimed that he was wrongly accused of robbing the complainant. He explained that he was walking home when he was so wrongly accused.

Having re-evaluated the evidence adduced before the trial magistrate, and in light of the grounds of appeal put forward by the appellant, it was apparent to this court that the appellant was properly identified by the complainant. Although the evidence of the complainant was that of a single identifying witness, it was clear to the court that the said evidence was actually evidence of recognition. The complainant knew the appellant prior to the robbery incident. The complainant held onto the appellant after the robbery incident. He cried for help. His neighbours came to his rescue and found the complainant struggling with the appellant at the scene of the robbery. His accomplices fled from the scene. It was clear to the court that the prosecution proved its case on the charge of **robbery with violence** contrary to **Section 296(2) of Penal Code** to the required standard of proof beyond any reasonable doubt. The ingredients of the charge were proved. The appellant, in company of others not before court, while armed with dangerous and offensive weapons, namely a panga, robbed the complainant of KShs.2,800/= and in the course of the robbery injured the complainant. The explanation that the appellant gave in his defence to the effect that he was a victim of mistaken identity does not hold water in light of the consistent and cogent evidence adduced by the prosecution witnesses. The evidence of identification was corroborated by PW2 and PW3 who arrived at the scene soon after the commission of the said offence.

In the premises therefore, having considered the totality of the evidence adduced in this case, it was clear that the prosecution proved its case on the charge of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code** against the appellant to required standard of proof beyond any reasonable doubt. His appeal lacks merit. It is hereby dismissed. The conviction and sentence of the trial court is upheld.

It is so ordered.

DATED AT MACHAKOS THIS 23RD DAY OF MAY 2011

P. K. KARIUKI
JUDGE

L. KIMARU
JUDGE