



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 81 OF 2009
LESIIT & KASANGO, J.J

MOSES GIKUNDI LITHARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the judgment of Hon. Mr. J. N. Nyaga S. P.M. in Maua Criminal Case No. 81 of 2008

delivered on 22nd February 2009)

JUDGEMENT

The 1st Appellant MOSES GIKUNDI LITHARA and the 2nd Appellant JOANINA KABURU MURIUNGI were charged together with another with one count of robbery with violence contrary to section 296 (2) of the Penal Code. The two Appellants were also charged with assault contrary to section 251 of the Penal Code. Both appellants were convicted for the capital charge and sentenced to death. The appellants were aggrieved by the convictions and thus filed these appeals. We have consolidated their appeals as they arose from the same trial each appellant raised three similar grounds of appeal which are that the learned trial magistrate relied on the evidence of recognition made in difficult circumstances, that the witnesses were of doubtful integrity and that their defences were not given due consideration. The State was represented in this appeal by Mr. Kimathi. Counsel informed the court that the State was opposing the appeal. Counsel submitted that the complainant PW1 was attacked at her house at 8 pm., by men who were armed with pangas and rungun. Counsel submitted that the evidence of identification was that of recognition. Counsel urged that the complainant had known the 1st appellant for 15 years and the 2nd appellant since birth. Mr. Kimathi counsel urged that the robbery took half an hour. He urged that weapons used by the two attackers were recovered in their houses and by PW 1 and 3 victims of the attack. The arrest was same night after PW1 the complainant in the main count mentioned the appellants names to PW2, the Assistant Chief.

We have carefully considered the grounds of appeal together with the appellants written submissions. We have also considered submissions by learned counsel for the state. We subjected the evidence adduced before the trial court to a fresh analysis and evaluation giving due allowance for the fact we neither saw nor heard the witnesses See **Okeno –vs- Republic (1972) EA.**

The complainant told the court that at 8.30 p.m. as she and her husband were asleep, some two men

knocked and then broke the door to their house and entered. They attacked her husband with pangas before tying his hands to the back. They turned to her and ordered her to produce the Ksh.200,000/- she had received from her son. She gave them 4000/- they ransacked her house and before leaving tore the clothes she was wearing from her body. She said the two talked with her for the half hour they were in her house and that they were flashing torches. The complainant stated that there was a tin lamp on in her house. She said she recognized the two men who entered as the appellants were village mates and whom she had known for over 15 years.

The complainant's evidence was corroborated by the evidence of her husband PW3. The two eye witnesses described the clothing the robbers were wearing at the time of attack. Similar clothes were found in the houses of the two appellants and produced as exhibits.

The appellants denied that they were involved in the robbery and said they were at home at the time we have also considered defence.

In the case of Karanja & another –vs- Republic [2004]2 KLR 140 the court of appeal held:

(1) Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is examined carefully to minimize this danger.

(2) Whenever the case against an accused persons depend wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of identification.

(3) Recognition may be more reliable Than identification of a stranger but even when a witness is purporting to recognize someone he knows it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.”

We have carefully considered the evidence of identification by the complainant and P.W. 3. We have cautioned ourselves of the dangers of relying on the strength of visual identification even where it was that of recognition like the identification by the witnesses in this case. We considered that both P.W. 3 knew the appellants before the incident being then neighbours in the village where they come from. We also considered that the two witnesses were clear the incident took about half an hour and that during that time the robbers were conversing with them and harassing them to produce money.

We find that the witnesses P.W. 1 and 3 spent a long period of time with the two robbers sufficient to hear and recognize their voices. Even though the circumstances of visual identification were difficult, we are satisfied the words spoken by the robbers in the course of the robbery were sufficient for the two witnesses to hear and recognize their voices. The witnesses knew the appellants well for over 15 years. We are satisfied that the evidence of identification by recognition was safe in the circumstances.

The appellants' defences were denials. We are satisfied the evidence against them was water tight.

Having come to this conclusion we dismiss the appellants' appeals uphold the conviction and confirm the sentence.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF OCTOBER, 2010

LESIIT, J
JUDGE

KASANGO, M
JUDGE