



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 42 of 2005

ISMAEL OMOTO LUKASIO ===== APPELLANT

V E R S U S

REPUBLIC ===== RESPONDENT

J U D G E M E N T

The Appellant, ISMAEL OMOTO LUKASIO was convicted by Mumias Senior Resident Magistrate P. K. Sultan of an offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. He has appealed to this court on seven grounds which may be summarized as follows:

- 1) That identification was not satisfactorily done since the conditions for so doing were not favourable;
- 2) That evidence of the prosecution especially that of complainant and his wife was contradictory;
- 3) That the exhibit produced in court and which was allegedly recovered from him was not properly identified.

The Appellant was jointly charged with two others in the lower court

with two counts of robbery with violence contrary to section 296 (2) of the Penal Code. All the three accused faced separate alternative charges of handling stolen goods contrary to section 322 (1) of the Penal Code. The third accused faced an addition charge of burglary and stealing contrary to section 304 (2) and section 279 (b) of the Penal Code. The prosecution called six (6) witnesses who adduced evidence in support of the charge. The court acquitted the appellant of the second charge of robbery with violence and convicted him of the first one. He was also convicted of two alternative charges to Count I and II of handling stolen goods. He was sentenced to 18 months imprisonment on the first alternative charge. It appears no sentence was imposed on the second alternative charge. The 2nd accused was also convicted on one charge of handling stolen goods while the 3rd accused was acquitted of all the charges.

The relevant witnesses herein are PW4 and his wife PW5. PW4 A A I W told the court that he was in his house with his family in the night of 12th and 13th May 2004 around midnight. He put on a lantern lamp when he heard people knocking on the door. He asked who they were and they answered that they were police officers. He then opened the door. When they came in, the complainant was confronted by a man with a big torch he was flashing around the house. PW4 was pushed inside the house. He saw the Appellant and another armed with rungun and panga. The two tied him up with a rope. They took away several items including a battery, charging machine, radio, clothes, hacksaw watch, a phone and two

bicycles. They then took a hen and slaughtered it and sprinkled blood on the complainant and his wife. PW5 was raped by two of the attackers as they covered PW4'S face with a piece of cloth. The matter was reported to the police. On 25/5/2004, PW5 was called to the police station where he identified a skirt and a bra belonging to his wife. On 29th May 2004, he went to identify other clothing items stolen on the material night.

PW5 A M said the lantern was on when the attackers entered the house. She said:

“I recognized 1st accused and two others. I do not know their names. 1st accused (Appellant) had a panga and wore a jacket. 1st accused is a neighbour. He lives about 500 metres from me. I have known him for five (5) years.”

PW5 goes on to say that the attackers took several items from the house. They later tied up her husband with a rope. She was raped and later tied to her husband. The attackers put off the lantern as they left the house.

During cross-examination the two witnesses maintained their position that they had seen and identified the appellant who lived in the neighbourhood. Both described appellant as having been dressed in a black/blue jacket. The two explained that they could not scream because they were threatened with harm if they did so.

The appellant gave an unsworn statement of defence where he gave an account of how he was arrested. He said he was at Bungoma on the material day. The accused having raised an alibi ought to prove it since the burden of proof shifts to him. He did not call any witness to show that he was in Bungoma.

This is a case where the witnesses knew the accused person who was their neighbour. PW5 admitted that although she knew the accused, she did not know his name. This is likely to be so, that one may know a neighbour whom he has seen several times and even knows where he lives but does not know his name. The magistrate in the lower court believed the two witnesses. She said:

“PW4 said he recognized the 3rd accused one Nambaka and the first accused who was from the neighbourhood.”

“PW5 was attacked by people who claimed to be police.... Their lantern was on. She said she recognized the 1st accused (appellant) but did not know his name.”

In that case of recognition, there was no legal requirement that a parade be held as it is well established by the law. The light from the lantern was adequate because it enabled the two witnesses to see and recognize the appellant. It is our considered opinion that the conditions for recognition were favourable. The appellant was found in possession of a T-shirt stolen from the complainant. He did not challenge the possession in his defence. There was evidence to the effect that the appellant was armed with a panga at the material time which is a dangerous weapon. He was in the company of others at the time the offence was committed.

We are satisfied that the magistrate was correct in her finding when she convicted the appellant with the charge of robbery with violence contrary to S.296 (2) of the Penal Code. The conviction was based sound evidence which proved the case to the standards required in Criminal Cases. The sentence provided by the law was imposed.

It is our finding that the appeal has no merit and we dismiss it accordingly. The conviction and sentence the lower court is hereby upheld on the said offence.

As for the Alternative charge of handling stolen goods, we find that the magistrate erred in convicting the accused on both the main charge and the alternative charge. We hereby quash the conviction and set aside the sentence imposed on the said charge.

Dated, delivered at Kakamega on the 20th day of May, 2009 in the presence of the appellant and the learned State counsel.

FLORENCE N. MUCHEMI

SAID J. CHITEMBWE

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