



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Criminal Appeal 7 of 2003

CLEOPHAS KIPKEMOI NGETICH APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was on 19th September, 2001 charged with the offence of Robbery with Violence contrary to Section 296 (2) of Penal Code. The particulars of the offence were that on the 4th September, 2001 at Forest Nursery area in Lugari District within Western Province, robbed Jescah Nafula one umbrella, one omax wrist watch, a pair of rubber shoes, one kikoi, one head dress, 1 ½ bottle of milk and cash Shs. 350/= all valued at Shs. 2,000/= and at or immediately before or immediately after the time of such robbery wounded the said Jescah Nafula.

Upon trial, the Appellant was convicted of the offence and sentenced to death. Being aggrieved with the conviction and sentence he lodged this appeal.

We have considered the appeal, the proceedings and submissions by Counsel. We have re-evaluated the evidence and testimonies on record.

PW 1 the complainant testified that she was attacked and robbed on 4th September, 2001 at 6 p.m. However, it is noted that she did not report the incident to the Police. It is her husband who reported the matter to the Police on 13th September, 2001. This is confirmed by PW 7 a police officer at Turbo Police Station who testified that the report was made on 13.09.01 at 8.45 a.m.

There are no reasons given for the delay in reporting the robbery by PW 1 to the Police. It is not as if the Complainant was hospitalized such that she could not make the report. She testified that she went to Turbo Hospital the next day with her husband but no mention of any admission.

It appears that things started happening after the report by her husband on 13.09.01. PW 7 told the Complainant's husband to come with her to record a statement. On the same day PW 7 in his words, **“sent members of the public to the scene of the robbery to walk and see if they will be robbed so that we arrest the suspects.”** He said that they laid an ambush at night. That the Assistant Chief and youth wingers were supposed to be there at 6 p.m. and the Police to join them at 9 p.m. He said that before they reached, the Accused and another person stopped some people **“they wanted to rob.”** That

the Assistant Chief and youth wingers managed to arrest the accused and recovered a whip. That one called Songa ran away. PW 7 said that the Accused was taken to the Police Station by the Assistant Chief and other police officers out on duty. He later organized an identification parade when the Complainant identified him.

PW 5 said that he is the one who conducted the identification. It was carried on 16th September, 2001.

The manner in which the Accused was arrested raised some questions about the police investigations. The Accused was never charged with attempting to rob other people. He was arrested on the basis that he was at the scene of the earlier robbery in the evening of 13.09.01 when the vigilantes were sent out to scout for possible offenders. It is not the police who arrested the Accused. The interesting aspect is that the vigilantes were sent out by the Police after the complaint of the Complainant's husband the very same day. The coincidence places this Court on the inquiry as to the propriety of the arrest of the Accused in respect of the present Charge.

How is it that the complaint is lodged on the morning of 13.09.01 and the Accused is arrested at the alleged scene of the robbery on the Complainant the same evening by vigilantes sent by the Police to the said scene to see if they would be robbed!

PW 2 the Assistant Chief who was in the arresting party said that the Complainant had complained that she had been beaten and robbed at the said place. PW 2 said that after the arrest of the Accused the Complainant was called and she identified the Accused as the one who robbed and beat her.

This Court wonders about the coincidence and convenience that the attacker of the Complainant is arrested on the very day her husband lodges the complaint with the Police and at the very scene of the attack on his wife. The Complainant did not lodge the complaint with the Police from 4.09.01. It was not until nine (9) days later that the husband reported the matter to the Police.

PW 1 the Complainant said that her attacker on the material evening held her on the back of the neck. He had followed her after he alighted from a matatu. She said that he had a bag and umbrella as he followed her. However, she said that when he started beating her he had a small iron bar in his fist. She had not mentioned this earlier.

She said that she saw the man who robbed her. She said that during the identification parade she identified the Accused since he had a scar on the back of his head. PW 1 did not tell the Court how she could see a scar on the back of the neck of the Accused yet he attacked her from behind and even if later faced her how she could see his back.

This Court happened to look at the Appellant while his appeal was going on and also when he complained of having been beaten in Prison pending the hearing of his appeal. The Appellant did not have a scar but a permanent growth or swelling at the base of his head. The identification parade was mounted.

The other participants procured by PW 5 were members of the National Youth Service from Turbo Camp. We agree with Counsel for the Appellant that this was not a fair or regular parade as the Youth Service members are always youthful, crew-cut, fit and of similar build. An ordinary person and of a different age group would stand out like a sore thumb.

PW 6 was the Clinical Officer who examined the Complainant on 17.09.01, two weeks after she had been attacked. He said that she had blood stains on her clothes and mud. How could the Complainant be still wearing the clothes in which she was attacked two weeks earlier. This seems bizarre and strange. PW 6 also said that the Complainant had a cut wound on the upper hip, tenderness on the head, a bruise and swelling on the right jaw and a cut wound on the left elbow. He opined that the injuries were caused by a sharp object. PW 6 was a clinical officer at Turbo Health Centre. In her testimony PW 1 had said that she went to the Turbo Hospital with her husband the next day after the attack. The attack was on 4.09.01. It comes out clearly that PW 1 did tell the truth as she went to the said Hospital on 17-09-01 after the Accused had been arrested on 13.09.01. -One wonders why the complainant did not go for

medical attention and treatment immediately after the attack yet the described injuries appeared to be serious and grievous?

In the light of all the foregoing, it is our view that conviction on basis of identification evidence of PW 1 only was unsafe. In the circumstances of this case, it was necessary that the evidence of PW 1 was corroborated.

The circumstances of arrest of the Accused, the identification parade, the delay in making the report to the police and delayed medical treatment and examination all demanded that her evidence be corroborated. It is doubtful that the Complainant could have identified the Accused by the growth on his back which she called a scar.

The Accused was facing a serious charge which if convicted attracted and indeed did attract the death sentence. For him to be convicted the evidence had to be cogent, water-tight and beyond any reasonable doubt.

With respect, the evidence in this case did not reach the said standard. It was unsafe and improper for the trial Court to have convicted the Accused of the offence.

As a result, we do hereby quash the conviction of the Appellant and set aside the sentence. We do hereby order that the Appellant be released from custody forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF JUNE 2009.

M. K. IBRAHIM

P. M. MWILU

JUDGE

JUDGE

In the presence of: