

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL 12 OF 2008

JUMA NASHON TORKOCH..... APPELLANT

~VRS~

REPUBLIC..... RESPONDENT

JUDGMENT

The Appellant Juma Nashon Torkoch was convicted by Bungoma Principal Magistrate of an offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. His appeal is based mainly on lack of identification and contradictory evidence.

The evidence adduced in the lower court precisely, is that on 26/04/2005 around 11.45 p.m, PW1 and his wife PW2 were in their house sleeping. They heard their dog barking and peeped through the window. With the help of moonlight, he saw people under a tree in his compound. The assailants then forced the door open and entered the house. PW1 flashed his torch at them as they entered and saw the Appellant and two of his accomplices who were acquitted by the lower court. They demanded money and took away cash Ksh.1500/= as they beat up the witnesses. A report was made to the police the same night and the Appellant arrested from his house in possession of a knife.

The Appellant filed written submissions in which he dwelt at length on the contradictions in the evidence of the witnesses most of which we have observed and found convincing.

PW1 said he saw the Appellant and his accomplices outside his house under a tree as he peeped through a wooden window. PW1 said it was a glass window but change to wooden on cross-examination. The distance from the window to the tree was five (5) metres according to PW1 and (twenty) 20 metres according to PW2. The two witnesses were watching from the same spot. PW1 said he identified the assailants when they entered the house until during cross-examination. PW1 did not say the assailants were armed until he talked of recovery of a knife in the house of the Appellant during arrest. PW2 said the Appellant had a torch and a knife. The police officers PW3 and PW4 who recovered the knife differed on where the knife was recovered. It was either on the table or beneath the mattress. On being shown their statements, the witnesses kept changing their story.

PW1 said the assailants wore caps on their heads while PW2 said the Appellant wore nothing on his head. As PW1 said the Appellant had a long knife which he placed on his neck, his wife said the Appellant had no weapon. As much as the two witnesses said they identified the Appellant whom they knew before the incident, PW2 admitted in cross-examination that she identified the assailants only by appearance. This is what she recorded in her statement. Yet no parade was held in respect of the Appellant. In the P.3 form issued on 26/04/2005, PW1 gave the history to the Clinical Officer that he was assaulted by three people whom he could only identify by their faces and did not know their names. In the P.3 form of PW2, the history is similar, but the word “*unknown*” was later erased to read “*known*”. The erasure is crystal clear.

PW3 who received the report of PW1 recorded in his statement that only one assailant was identified by PW1 contradicting his evidence in court that three of the assailants were identified. PW4 said they followed footsteps from the complainant's house which led them to the houses of the 2nd and 3rd assailants. Yet PW3 said it is PW1 who led them to those houses. The Appellant in his defence testified that he was arrested by police officers and vigilantes from his house on 26/4/2008 at 11.00 p.m who were asking for liquor made by his mother. He was remanded in police custody for eight (8) days and then charged with robbery. The complainant was Appellant's schoolmate in 1996.

It is our finding that identification evidence is riddled with major contradictions especially between the two key witnesses who were in the same house at the material time. PW3 and PW4 were not reliable witnesses in that they said at one time they were given names of the assailants when the report was made, yet their statements stated the opposite. The history in the P.3 forms bring out the truth that at the time of reporting the matter and at the time the P.3 forms were issued, the key witnesses did not know who attacked them. The naming of the Appellant as a suspect was an afterthought. The purported identification by recognition is a sham and cannot be relied on.

For the foregoing reasons, this appeal is allowed. The conviction of the lower court is quashed and sentence set aside. The Appellant is hereby set at liberty unless otherwise lawfully held.

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F. N. MUCHEMI

SAID CHITEMBWE

JUDGE

JUDGE

Dated, Delivered and Signed at Bungoma

This 16th day of July 2009 in the presence the appellant and the state counsel.