



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Criminal Appeal 12 & 10 of 2006

SOLOMON KIBURI APPELLANT

VERSUS

JOSEPH KITHINJI APPELLEANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against the judgment of M.S.G. Khadambi (Mrs) SRM in Meru Criminal Case No. 2720 of 2004 delivered on 7th March 2008)

JUDGMENT

The appellants were charged in the lower court with attempted robbery with violence contrary to section 296(2) of the Penal Code. They were convicted by the lower court after trial. They were sentenced to death. They have filed this appeal against both conviction and sentence.

The learned state counsel Mr. Kimathi conceded to the appeal by saying that the prosecution did not prove that the appellants attempted to rob the complainant or to enter into her house. He submitted that the prosecution failed to show what the appellants attempted to rob.

In our view, the learned state counsel was right in his concession. There was no evidence adduced by the

prosecution to prove that the appellants attempted to rob PWI. The only evidence adduced by PWI was that the 2nd appellant assaulted her by cutting her on the left arm with a simis. She recognized the 2nd appellant by aid of the moonlight. At one point, they were face to face in the door way. She also knew him prior to that incident since he had grown up in her neighbourhood. Further, and in particular, the 2nd appellant announced himself to her and said:-

“.....I am Joseph Kaunga. I can burn the house.”

PWI continued to state that the 2nd appellant father is called Kaunga. We are satisfied with the identification of the appellant although it was identification under difficult circumstances which was not conducive to positive identification. Having examined the evidence we find that there was sufficient moonlight to identify the 2nd appellant and at one time PWI was very close to him. Our finding is in taudem with the decision of **Maitanyi Vrs Republic** [1986] KLR 198. Having found that there was sufficient evidence of identification of the 2nd appellant, we find that there is also sufficient evidence showing that he did injure PWI. PW5, the clinical officer assessed the injuries of PWI to be harm. In terms of the wide discretion conferred upon this court by Section 354 of the Criminal Procedure Code, we shall proceed to convict him of assault occasioning bodily harm. There was sufficient medical evidence to support this. Accordingly, our judgment is as follows:-

- 1. We allow the appeal against conviction and sentence and order that the appellant's conviction in the lower court be quashed and is hereby set aside their sentence.**

- 2. We do hereby convict the 2nd appellant Joseph Kithinji of common assault contrary to section 250 of the penal Code. We do hereby sentence him to 6 months imprisonment which sentence will begin to run from 26th January 2006. That sentence has now been served.**

- 3. We hereby order that the appellants be released from custody unless otherwise lawfully held.**

Dated and delivered at Meru this 16th day of November 2009.

MARY KASANGO

JUDGE

M.J.A. EMUKULE

JUDGE