

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Appeal 42 of 2006

ZADOCK BARAZA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant, Zadock Baraza was convicted by Kakamega Senior Resident Magistrate of the offence of robbery with violence contrary to *section 269 (2)* of the Penal Code and sentenced to death.

The grounds of appeal mainly focus on lack of positive identification, failure to prove case beyond reasonable doubt and his defence not being taken into consideration by the court. The appellant contended that the issue of identification by moonlight was not evaluated by the court. The ingredients of the offence were not proved, more so, the act of being armed with a dangerous weapon.

The state through Mr. Karuri the Senior Principal State Counsel conceded to the appeal. He said identification of the appellant was not proved and that the court convicted on contradictory evidence even after admitting that the evidence was flawed. Neither was it proved that the appellant was armed with dangerous weapons.

The evidence of PW1 the complainant is that he was attacked by three men around 9.30 p.m., they had torches which they flashed at him. The men were clad in long coats. PW1 did not say which light assisted him to identify the appellant. Assuming it was the light from their torches, the intensity of the light was not described.

We agree with the State Counsel that such identification is unreliable. In his judgement the trial magistrate said that PW2 lied to the court on how the appellant was apprehended. He also contradicted other witnesses on the same issue. He acquitted the co-accused of the appellant and proceeded to convict the appellant. The evidence is indeed contradictory and the identification was not established. Such evidence cannot sustain a conviction. The standard of proof in a criminal case is beyond reasonable doubt. The prosecution did not attempt to satisfy this requirement. The trial magistrate therefore erred in convicting the appellant on insufficient evidence. The appeal is hereby allowed.

We accordingly quash the conviction and set aside the death sentence. The appellant is set at liberty unless otherwise lawfully held.

Delivered, Dated and Signed at Kakamega this 16th day of December, 2009

FLORENCE MUCHEMI

SAID J. CHITEMBWE

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