

REPUBLIC OF KENYA

SALESIO NJERU NJOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Judgment and sentence in Criminal Case No.2149 of 2000 of the Senior Principal Magistrate’s Court at Embu by K. NG’ENO SRM.)

JUDGMENT

The appellant with others was charged tried and convicted on the offence of robbery contrary to Section 296 (2) of the Penal Code.

In this appeal he set out 8 grounds of appeal. He was found guilty of count one – robbery with violence. On the hearing date the State Counsel Mr. Omwega informed the court that he had instructions to concede the appeal. He gave his reasons that he the conviction was based on the evidence of one witness and the Trial Magistrate did not warn himself of dangers of relying on evidence of a single identifying witness. A perusal of the evidence offered by prosecution shows that the complainant PW1 was in his house when he heard a knock at the door at about 2.45 a.m. The voice was of a man speaking in Kiswahili. He saw a torch flash outside he did not get out of his house and the robber did not enter. It is not clear from the evidence of PW1 whether there were many persons or only the Appellant. PW1 then said he opened the window of his room switched on his torch and he recognized the person was the Appellant his neighbour. Later the following day while looking for a goat PW1 with others saw the Appellant and grabbed him.

PW2 his wife testified hearing one voice asking for money. Her husband PW1 was keeping quiet. Then the robbers moved to the goat boma and carried some goats. The man she recognized was the Appellant Njiru. This witness did not see any money being passed to robbers by her husband, PW1 yet they were in the same room and they alleged that the person each identified was the Appellant. This evidence is contradictory in material particulars. The other point is that the Trial Magistrate acquitted the Appellant of the other count making a finding that the circumstances of identification were not favourable. It is to be noted that both first and 2nd witnesses (PW1) and (PW2) were testifying on some transaction which was taking place at the same time in their room. Their evidence was contradictory. Therefore it is clear that circumstances of surrounding the identification for both offences were not satisfactory. We therefore agree with the State Counsel that the evidence available was not sufficient to prove the prosecution case beyond reasonable doubt.

We therefore quash conviction and set aside the sentence of death imposed upon the Appellant. We order the appellant to be set at liberty forthwith unless otherwise lawfully held.

Dated this 7th day of March 2008.

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J. N. KHAMINWA

JUDGE

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M.S.A MAKHANDIA

JUDGE