



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KAKAMEGA**

**Criminal Appeal 173 of 2005**

**ABDULLAH OMAR IBRAHIM ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The appellant, **ABDULAH OMAR IBRAHIM**, was convicted for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. He was then sentenced to suffer death as by law prescribed.

When his appeal came up for hearing on 17<sup>th</sup> June 2008, the learned state counsel, Mr. Daniel Karuri, informed the court that the state was conceding the appeal.

He gave six reasons why the state felt unable to support the conviction handed down to the appellant.

First, on the issue of identification, the learned state counsel pointed out that the complainant had contradicted himself. The complainant, Francis Khainga, testified as PW1.

First he told the trial court that when the robbers attacked, it was about 1.30 a.m. By that time, PW1 was asleep, inside his bedroom. He was awoken from sleep, by some noises.

When PW1 stretched out his hand, with a view to getting his torch, he was hit on the hand.

In effect, by the time PW1 woke up, the robbers were right inside the bedroom.

The robbers demanded money from the sale of murrum. They said that the sum was KShs.60,000/=. However, PW1 said he did not have money.

The robbers then attacked PW1. And during the said attack, when the robbers cut PW1 using pangas, the said robbers were said to have had a torch whose light was as bright as the headlights of a vehicle. But the light was directed at PW1.

Therefore in the words of PW1, he;

***“could not see those people.”***

Later still, PW1 said that he was able to identify the appellant from the torch light emanating from the torch held by one of the other robbers. At that stage, PW1 had been forced to lie face down on the bed, but one of the other robbers, called Mustafa directed the torch in the direction of the appellant. It is then that the complainant said he was able to identify the appellant as the said appellant was a boyfriend to PW1's sister.

According to PW1, the appellant was wearing the uniform of an Administration Police Officer.

The evidence tendered on identification, as at that stage, does not appear to have any loopholes. If anything, the said evidence provides an answer to the appellant's contention regarding the alleged lack of clarity as to the light which they used to identify the robbers.

The fact that the robbers initially directed their bright light at PW1 is not, by itself, inconsistent with the fact that later, Mustafa, who was one of the robbers, directed the light at the appellant.

The second ground upon which the learned state counsel conceded the appeal was that the complainant had failed to give the appellant's name to the police, as he would have done if indeed the complainant had recognized the appellant.

In his evidence-in-chief, PW1 said that he gave to the police the names of all the 5 robbers who he had recognized. One of those five was said to have been the appellant.

It is interesting to note that the robbery took place on 10<sup>th</sup> November, 2004. Thereafter, on 28<sup>th</sup> February 2005, the complainant went to the appellant's home, in the company of policemen. However, even though the appellant was at home, he was not arrested.

During cross-examination by the court, PW1 said that the appellant had been arrested on 23<sup>rd</sup> January 2005.

Surely, if the appellant had been arrested as a suspect in a case of robbery with violence, there is no possibility that when PW1 visited the appellant's home just over one month later, the appellant would have been at home.

When the court drew the attention of the complainant to the fact that the appellant was arrested on 11<sup>th</sup> March 2005, PW1 said that that would imply that he (PW1) had misled the court.

On her part, PW2, Lilian Akwenna Khainga, who is the wife to PW1, said that she had seen only four robbers.

According to PW2, when she visited PW1 at the hospital where he had been admitted, PW1 told her that he had identified the same robbers as PW2 had.

That would be strange because, in the first instance, PW1 had seen five robbers whilst PW2 had seen only four.

PW2 went on to say that she gave to the police the names of the four robbers as,

- (i) Nelson,**
- (ii) Rama,**
- (iii) Babu G, and**
- (iv) Mustafa.**

During cross-examination, PW2 said that she did not see any other robbers save for the four named above.

As the appellant's names are Abdulahi Omar Ibrahim, the court is left puzzled as to which of the four named robbers he was supposed to have been, in the mind of PW2.

PW5, PC Patrick Mutua, was a police officer who was attached to the Kakamega Police Station at the material time.

On 11<sup>th</sup> November 2004, at 3.00 a.m., PW5 received a report through the 999 control, that thugs had been terrorizing people at Ikonyero. When PW5 and other police officers reached the scene, they were told that PW1's home had been attacked by six thugs.

Although the police did not find the thugs at the scene of crime, PW1 is reported to have told PW5 that he had identified four robbers, namely:

- (i) **Ramadhan;**
- (ii) **Mustafa;**
- (iii) **Mohamed; and**
- (iv) **Nelson, who was a brother to Mustafa.**

But then, during cross-examination, PW5 admitted that in

PW1's statement, the appellant's name was not amongst those of the suspects.

As the appellant's names do not also feature in the list of names which PW1 is said to have given to PW5, there is no explanation as to why the police linked the appellant to the crime or why they arrested him.

The third issue relates to the fact that the appellant was arrested about four (4) months after the incident.

The arrest did not even take place on the first occasion when PW5 and PW1 visited the appellant's home.

The questions that remain unanswered are why the appellant was not arrested shortly after the incident, if PW1 and PW2 had recognized him. Secondly, why did the police not arrest him when they first visited his home?

To our minds, that must imply that there were doubts about the identification of the appellant.

The three issues discussed above constitute a summary of the six points which the state raised.

It is noteworthy that in his judgment, the learned trial magistrate correctly stated that PW1 gave to PW5 the following names, as those of the robbers;

- (i) **Ramadhan;**
- (ii) **Mustafa;**

- (iii) Musa;
- (iv) Mohamed; and
- (v) Nelson.

As the appellant's names are Abdullahi Omar Ibrahim, we are unable to appreciate the reason why the trial court nonetheless proceeded to convict him.

Furthermore, the trial court was unconvinced by the reason given by the police for not arresting the appellant earlier, even though the police had found him at home.

Having come to that conclusion, the learned trial magistrate ought to have given to the appellant, the benefit of doubt.

In the result, the conviction herein rests on very shaky ground. It cannot be sustained. The learned state counsel was very right to have conceded the appeal.

The appeal is allowed. The conviction is quashed and the sentence is set aside.

It is ordered that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

**Dated, Signed and Delivered at Kakamega, this 18<sup>th</sup> day of June, 2008.**

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**MBOGHOLI-MSAGHA**

**J U D G E**

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**FRED A. OCHIENG**

**J U D G E**