

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 174 of 2004

SAFARI RAMADHAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was upon trial on two counts for the offence of robbery with violence contrary to section 296 (2) of the Penal Code convicted and sentenced to death. He has appealed against both the conviction and sentence. When his appeal came up for hearing before us Mrs. Mwangi the Assistant Deputy Public Prosecutor conceded it on the ground that it is not founded on sound evidence.

Mrs. Mwangi said that the offences were committed at about 3.00 a.m. The robbers who covered their faces had torches which they shone on the witnesses. Though PW 1 and PW 2 claimed to have identified the Appellant neither of them said at what stage and how they managed to see the Appellant if his face was covered. In the circumstances she was uncomfortable with the evidence of those witnesses founding a conviction on such serious charges.

We have ourselves perused the lower court record and are in entire agreement with Mrs. Mwangi that the conviction of the Appellant cannot be sustained. Other than the torches the robbers had there was no other source of light. The torches were shone on the witnesses. It is therefore not clear how in those circumstances PW 1 managed to single out the Appellant from a gang of more than 10 robbers and note the Appellant's unique features particulars of which he did not give or how PW 2 managed to identify him.

We are satisfied that the conditions favourable for a positive identification were lacking and the purported identification of the Appellant by PW 1 and PW 2 cannot be relied upon. Consequently we allow this appeal quash the conviction and set aside the sentence. The Appellant is to be set free forthwith unless otherwise lawfully held.

DATED and delivered this 15th day of May 2006.

J. K. SERGON

JUDGE

D. K. MARAGA

JUDGE