REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
Criminal Appeal 23 of 2003
(Appeal against both conviction and sentence of the Busia Senior Resident Magistrate's court
in Criminal Case No. 776 of 2000 (S. N. RIECHI ESQ. PM)

YASSIN AWIYE LWANGURA …….. APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

J U D G E M E N T

The Appellant, Yassin Awiye Lwangura, was the first accused in Busia SRM Criminal Case No. 776 of 2000 in which he was charged with one Godfrey Onyango (second accused) with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that:

"on the nigh of 14th/15th May 2000 at about 1.15 a.m. at Malaba town in Teso District within Western Province, jointly with others not before court, while armed with a dangerous weapon namely an AK 46 Rifle robbed off JACKLINE ODHIAMBO one T.V. Set and one Radio cassette all valued at Kshs.25,000/= and immediately before or immediately after such robbery caused the death of STEPHEN ODHIAMBO by shooting him in order to obtain or retain the property stolen."

The second accused, was reported on 11.2.02 by I.P. Muiya to the SRM, Mr. Omwega to have absconded from police custody when he was being escorted to court at Busia. By the time he absconded, the prosecution had closed its case. The case was heard by S. N. Riechi Esq., Principal Magistrate but on 11.2.2002, the case went before Mr. S. O. Omwenga, Senior Resident Magistrate who asked the Appellant (who was the remaining accused) whether he wished his case to be heard denovo or whether he wished the hearing of his case to continue before another magistrate. Apparently S. N. Riechi SPM had moved away from the station.

The Appellant confirmed that he did not want the case to be heard afresh and that he wished the hearing of the case to continue before another magistrate.

On 21.1.2003, the prosecution closed its case and on 29-1-2003 the court ruled that a prima facie case had been made out and put the Appellant on his defence.

The evidence adduced by PW1, PW2, and PW3 showed that on 14-5-2000 at 1.00 a.m. PW1, Jackline Odhiambo, was sleeping in her bed-sitter with her husband, Stephen Odhiambo, in Malaba town of Teso District where both carried on business "of selling general shop goods." Her house-help, Eunice Amoit, and PW1's children slept in another room outside their bed-sitter which also served as a kitchen. Living in the neighbourhood was the nephew of PW1's husband, one Fredrick Juma Oduori, (PW2), who was a clearing and forwarding Agent.

At 1.00 a.m. on 14/5/00 PW1 and her husband heard the door to their sitting room being broken and they woke up. It was dark in their bedroom as well as in the sitting room. PW1's husband, Stephen Odhiambo, opened the door of their bedroom that led to the sitting room as PW1 followed him. He was gunned down. PW1 did not know where the gun shot had come from. She looked around and saw two people standing near the outer door of the sitting room that had been broken. There was security light outside. She did not recognize these two people. One had a gun. When she screamed they ran away.

On 8.6.2000, she attended two identification parades at Malaba police station in which she claimed she picked out the appellant in the first parade and his co-accused in the second.

She claimed he was one of the two men she had seen standing near the door in her sitting room at 1.00 a.m. on 14-5-2000 who gunned down her husband and who stole her TV and radiocassette with speaker. No Identification parade Form was produced in evidence. Her evidence as a single identifying witness without the Identification Parade Form was far too unsatisfactory. The law is now well settled that before evidence of a single identifying witness in unfavourable circumstances, can be relied on to found a conviction, it must be treated with the greatest care and must be absolutely watertight. This was the holding in **R v ERIA v. SEBWATO (1960) EA 174** and **in KAMAU v REPUBLIC (1975) EA 139, as well as in KIARIE v REPUBLIC (1984) KLR 739.**

Neither PW2 **(FREDRICK JUMA ODUOR**) nor PW3, **(EUNICE AMOIT)** saw the robbers. They came out from their houses after the robbers had left. There was no other evidence against the Appellant except that of PW1. No safe conviction could be founded on it. The trial magistrate misdirected his mind in shifting the burden of proof when he said that the Appellant had not **"raised any doubt"** to enable the court to give him the benefit of doubt and acquit him. This is a case in which the prosecution did a very shoddy job. For reasons that are not discernible from the record and are difficult to fathom, the police officers themselves including the investigating officer did not even testify, yet this was a robbery case where an innocent person had been gunned down and life was lost.

We do not find it necessary to examine other aspects of the case as we are satisfied that the trial magistrate misdirected his mind in his finding of guilty as there was no evidence to sustain a conviction.

We quash the conviction and set aside the sentence. Under Section 354(2) of the Criminal Procedure Code we order that the appellant be tried by a court of competent jurisdiction of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. We direct that the attention of the Attorney General be drawn to this case and a copy of the proceedings be sent to him.

Dated at Bungoma this 25th day of May 2005.

J. K. SERGON

J U D G E

G. B. M. KARIUKI

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