



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL APPEAL NO.306 OF 2000
(From original conviction and sentence in Criminal
Case No.594/2000 of Senior Resident Magistrate's
Court at MOLO - J. KIARIE (S.R.M.)

WILSON KERIO LEKOLOL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant in this appeal was aggrieved by the conviction and sentence in Molo SRM's Court Case No.594/2000. He had Been charged with the charge of ROBBERY contrary to Section 296(1) of the Penal Code. He was tried, convicted and sentenced to five years imprisonment, five strokes of the cane and thereafter be under Police supervision for five years after sentence.

The main ground argued by the Appellant in support of his appeal is that the court did not consider his defence. That he was home on the material day tending his children aged 11/2 years and 21/2 years and also repairing the fence near his home. That there were other people he had hired his land to who were near him and who saw him the whole day. He says that at 7 p.m. of said day he was arrested at his house.

The Learned Counsel for the State opposed the appeal and urged the court to find that the Appellant had been identified through recognition by PW1, PW2 and PW3. That PW1 identified the Appellant as one of three painted men who set logs on the forest road they were using to get home in a tractor and forced them to stop. That the Appellant also had a bow and arrow. That at time of arrest, same evening, the Appellant's face was still painted. The Counsel also submitted that the court weighed the evidence of alibi raised by the Appellant and found it displaced by the prosecution evidence.

On the identification of the Appellant, only PW1, the driver of the tractor and PW3 said they recognised him as one of the three robbers who attacked them. They did not say how they recognised him. They also said that his name was 'SIMON', a fact denied by the Appellant. He also did not go by that name in this case. PW1, and PW3 said they recognised the Appellant because he had not painted his face well while PW3 and PW4 who also knew the Appellant before said they never saw him at the scene and further that the robbers had painted their faces making recognition difficult. PW1 also said that the Appellant's face was still painted when they found him at home at 7 p.m. a fact PW5 the arresting officer expressly denied.

The evidence of identification is that of recognition. Dealing with that issue in the case of M'RIUNGU -V- REP 1983 KLR 455 the court stated that the case before them was that of recognition and not identification. The court set out issues to be considered before evidence of recognition can be accepted as:-

- (i) Whether the victim knew the Appellant before.
- (ii) The amount of light under which the victim saw the Appellant.
- (iii) Whether the victim had ample opportunity to recognise the Appellant.
- (iv) Whether circumstances under which Appellant was seen were good for positive recognition.

In the instant case the issue was recognition. The circumstances of identification were not good for positive recognition. Despite the incident having occurred during the daytime, the evidence is clear that the robbers had disguised their faces with paint. In addition only PW1 and PW3 said they recognised the Appellant despite the paint on his face. PW2 and PW4 who also said they knew him stated that they were unable to recognise him at the scene. PW1 had said that the Appellant was still painted at time he and others took the arresting officer, PW5, to arrest him. As stated earlier PW5 said the Appellant had no paint. All that put together casts some doubt on the credibility of PW1 and seems to suggest that his evidence had a measure of exaggeration. The doubt is cemented further by two factors.

(1) The fact that PW5 said he traveled 10 kms to the home of the Appellant. None of the witnesses said how far the home was from the place the incident occurred. If at all it was 10 kms and the Appellant was found at home 2 hours later, how likely is it that he was one and the same person seen during the incident.

(2) The issue of the painted face and fact that two of the witnesses said that even though they knew the Appellant before, they could not recognise him since the attackers had painted and therefore disguised their appearance. PW1 and PW3 did not show what about the Appellant they recognised despite the paint.

In addition to that evidence this court noted that PW1 insisted that the Appellant's name was SIMON. Yet the Appellant did not go by that name.

The other important factor that had to be considered is the Appellant's alibis. They were three. Each said that they had been with the Appellant the whole day and left him at his home between 5 p.m. and 7 p.m. That evidence seems to have been ignored. It could not have been ignore considering the flaws in the prosecution case.

I do find that the evidence before the court was insufficient to sustain a conviction. Nothing was recovered from the Appellant. Further the arrows and the bow recovered from him had no special marks on them that could identify them as those exclusively used in the robbery. The conviction was unsafe.

Accordingly I quash the conviction and set aside the sentence and order for the immediate release of the Appellant unless he is otherwise lawfully held.

Dated and delivered at Nakuru this 13th day of March, 2003.

JESSIE LESIIT

JUDGE