



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 54 OF 2016

ALEX NADOSOITO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment (conviction and sentence) of Hon. T. Sitati, SRM,

delivered on 19/07/2013, in the Chief Magistrate Court at Narok,

in Criminal Case No. 359 of 2013, Republic v Alex Nadosoito)

J U D G M E N T

1. The Appellant has appealed against his conviction and sentence of death in respect of the offence of robbery contrary to section 296 (2) of Penal Code (Cap 63) Laws of Kenya.

2. The state has supported the conviction and sentence.

3. In this court the appellant through his counsel (Mr. A. Meing'ati) has raised six (6) grounds of appeal in his amended petition of appeal.

4. I will for convenience first consider and determine ground 3 of the petition of appeal, followed by grounds 1,2,4,5 and 6.

5. In ground 3 the appellant has faulted the trial court in convicting him when no proper recognized of himself was positive given the difficult circumstances surrounding the case. Counsel for the appellant has submitted that the recognition of the appellant was not free from mistaken identity. In this regard, counsel submitted that the complainant (Pw 1), namely Solitei Ole Lasiti did not in his evidence tell the investigating officer (PW 4) any credible description of his assailants. He also did not tell the investigating officer, the clothes worn by the assailants, their physical appearance, their height and their skin colour. He cited many authorities including *Mwaura v. R [1987] e-KLR in which the Court of Appeal citing Wangombe v R [1980] KLR at 150, letter I, stated that:*

“...in this case guilt turned upon visual identification by one or more witnesses... a reference to the circumstances usually requires the judge to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of the light.”

6. In response to the issue of recognition the prosecution submitted that the recognition of the appellant was positive. This was based on the following. The complainant was quite close to the appellant and the appellant had bent over near the bed of the complainant. The complainant was enabled in his recognition of the appellant due to light emanating from the torch of the appellant. The complainant knew the appellant as a person from the neighbourhood. The complainant told the villagers that the appellant was one of the robbers.

7. The complainant was found to have sustained injuries. He was medically examined by Kiprotich (Pw 3), who was a clinical officer at Narok district hospital on 2/4/2013. His findings were as follows. He looked sickly and was elderly. He was aged 60 years old. His clothes were not torn and had no blood stains. He had facial bruises. His left ear drum was injured. Pw 4 also found that: *“Pain on 2 areas, left swollen also.”* The complainant told Pw 3 that he was assaulted on 1/3/2013. He was examined one month later after the assault. He produced the P3 form as exhibit Pexh. 1. He told Pw 3 that he was assaulted severally.

8. The original court file was not traceable. With the consent of the appellant the court agreed to use a copy of the: *“CERTIFIED TRUE COPY OF THE ORIGINAL.”* The original P3 form was missing from a copy of this file. This is the danger of relying on a copy of the original file in the absence of the original file.

9. As a first appeal court, I have independently re-assessed the evidence of recognition of the appellant by the complainant (Pw 1) and the sworn evidence of the bare denial of the appellant that he did not commit the offence.

10. I find as incredible the evidence of the complainant that he positively recognized the appellant at the scene of the robbery. His evidence was that he was awoken up by the noise of a raid at his home. When he got up he found the appellant in his room as the appellant had bent over near his bed. The appellant had pulled a wooden box containing an inverter. At that time the appellant was shining the spotlight on the inverter as he bent over to pick it up. He saw his face from the spotlight but he did not identify the two men who entered the house. He peeped through the blanket when he saw the appellant. As at that time the complainant was slapped, which slap sent him back to his bed. He was forced to cover his head with a blanket.

11. Later the complainant was called to an elders' meeting, where he named the appellant. The appellant was called to that meeting but became hostile.

12. The only source of light was from the spotlight of the appellant. The circumstances, which the prosecution contends favored the recognition of the appellant were as follows. First, the complainant knew the appellant before this incident as a villager from the neighbourhood. Second, the complainant was close to the appellant. Third, the incident took some time as the appellant pulled a wooden box containing the inverter.

13. I find that the circumstances favouring recognition were difficult. The offence was committed during a dark night, hence the usage of the spotlight by the appellant and his accomplices. I also find that the house of the complainant did not have any source of light. The spotlight as a source of light was not sufficient for positive recognition.

14. I further find that the complainant was slapped so hard that he was sent back to his bed. This is borne out by the evidence of the clinical officer who examined the complainant and found that his ear drum was injured. I find that the complainant was not in a position to recognize his robbers in that state of injury, which must have instilled fear in him. He was also forced to cover himself with a blanket.

15. I find that in the circumstances, the complainant did not positively recognize the appellant as one of the two robbers. I therefore find that ground 3 succeeds and I uphold it.

16. I now turn to ground 2, in which the appellant has faulted trial court for convicting him on insufficient, contradictory and uncorroborated evidence. In this regard, I find that the complainant testified that only two men including the appellant entered his house. But in his report to the authorities namely to the assistant chief (Ratita Keeu- Pw 2) on 5/3/2013 he told him that the appellant was one of the 5 to 6 robbers who had attacked him at his home.

17. Furthermore, on 1/4/2013 the complainant reported to the investigating police officer namely No. 67045 PC Charles Obade (Pw 4) that on 2/3/2013, he had been attacked by robbers. He did not tell Pw 4 the number of robbers that had attacked him. The evidence of Pw 1 and that of Pw 2 is materially contradictory and is incapable of explanation on the evidence adduced in court. I find from this evidence that the complainant was not a reliable witness.

18. Furthermore, I find that the unreliability of the complainant is clear from his own conduct. He reported this incident three day after the commission of the offence to the assistant chief. He also did not report to the police until after about one month. This lack of prompt reporting to the authorities' casts doubt on the veracity of his evidence.

19. A court may act on the evidence of a single identifying witness if it is satisfied that it is free from a possibility of error. See *Abdalla bin Wendo & Another v R [1953] 20 EACA 166*. As a matter of judicial practice the court will look for corroboration of such witness.

20. In the instant appeal, I find that the evidence of the complainant is not corroborated by any evidence. It was necessary for the trial court to warn itself of the danger of convicting on the evidence of a single witness in the circumstances of this case.

21. In view of the foregoing findings, I find on the totality of the evidence that the prosecution did not prove their case beyond reasonable doubt.

22. I therefore find that it is unnecessary to make determinations in respect of grounds 4, 5 and 6 of the amended petition of appeal: see *Attorney General V. Ally Kleist Sykes (1957) EA 257*.

23. In the premises, I find that the appellant's appeal succeeds with the result that the conviction and sentence are hereby quashed.

24. The appellant is hereby ordered set free unless he is held on other lawful warrants.

Judgment signed, dated and delivered at Narok this 6th day of October, 2020 in open court in the presence of Mr. A. Meing'ati for the appellant, Ms. Torosi for the Respondent and in the absence of the appellant.

J. M. BWONWONG'A.

J U D G E

6/10/2020