



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

**CRIMINAL APPEAL NO. 15/2017**

**JOSEPH NYAKUNDI .....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

**(From the original conviction and sentence in the Senior Principal Magistrate's court at Narok, in Criminal case No. 1107 of 2013, R. v. Joseph Nyakundi)**

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of death contrary to Section 296 (2) of Penal Code (Cap 63 Laws of Kenya), which was imposed upon him by the court of the Acting Senior Resident Magistrate on 7/8/2014 at Narok. The state has supported both the conviction and the sentence.

2. The conviction of the appellant is based on the evidence of a single witness namely Lusina Nyaboke Osindi (PW1), who was the complainant. She testified that the appellant was her neighbour. She further testified that two robbers, one of whom she recognized as the appellant smashed their door with a huge boulder. The two robbers switched on their spotlights. It is through the light of the spotlights that she was able to recognize one of the robbers as the appellant, whom she recognized instantly. She screamed but she was hit on the mouth with a piece of wood. The robbers then demanded both cash money and mobile phones. She quickly jumped out of her bed and gave them Sh.8,500/=. They then left and ordered her to keep silent. She raised an alarm and neighbours came. Thereafter, she reported to the police. Her husband Enock Nyabuto Masengo (PW2) did not recognize any of the two robbers, because he was ordered to lie face downwards. His evidence is that the two robbers had big spotlights that beamed very brightly.

3. The defence of the appellant was that of an alibi. He made an unsworn statement and testified that on 23/8/2013 he woke up and went to his workplace. He attended to a customer who had a government motor vehicle, which he repaired. Thereafter, he went to his home at Mukuru in Narok town. Upon arrival at his place, he found people taking chang'aa and joined them. He was arrested while taking chang'aa and detained for 3 days after which he was charged with this offence.

4. The appellant has raised 11 grounds in his petition of appeal.

In Ground 1, he has stated the unchallengeable fact that he pleaded not guilty to the offence. In ground 2 he has faulted the trial court both in law and fact by failing to consider that the prosecution witnesses gave contradictory evidence, which was incredible. I have considered the evidence of the complainant (PW1) and that of her husband (PW2) and I have not found any contradiction in their evidence. I find their evidence to be cogent and credible. I also find that the trial court rightly believed them. I therefore find this ground of appeal is without merit and is hereby dismissed. In ground 3, the appellant has faulted the

trial court for overlooking the fact that the evidence was not water tight to support the conviction. I find that the complainant recognized the appellant as her neighbour.

5. The following circumstances favoured her identification of the appellant. First, there was bright light from the spotlights, which the appellant and his accomplice had during the robbery.

6. Secondly, the complainant recognized the voice of the appellant as he issued a command to her husband to lie face downwards. The appellant also issued another command that the complainant gives them the cash money and the mobile phones. Thirdly, the complainant moved closer to the appellant when she was handing over the Sh.8,500/= to him. In the circumstances, I find that the recognition of the complainant by the appellant was clear. In other words, the recognition of the appellant was free from any error or mistake. I therefore find that this ground of appeal is without merit and is hereby dismissed.

7. In ground 5, 6 and 10, the appellant has challenged his conviction by faulting the trial court in failing to find that the evidence against him was a fabrication. He has also faulted that trial court for failing to consider his defence as required by law. Additionally, he has also faulted the trial court for failing to find that the evidence of the complainant was not corroborated. I have considered these grounds together and I find that the defence was considered and rightly rejected by the trial court. I also find that the recognition of the appellant by the complainant was positive and the trial court rightly came to the conclusion that the appellant was positively recognized. I further find that the evidence of the complainant did not need any corroboration in view of the fact that her recognition of the appellant was positive and was equally free from any mistaken identity.

8. Under section 143 of the Evidence Act, (Cap. 80) Laws of Kenya a fact in issue may be proved by the one witness subject to it being found to be credible. In the circumstances, these grounds of appeal are without merit and are hereby dismissed. In ground 11, the appellant has faulted the trial court for delivering a judgment that was full of misdirections and errors which resulted in a miscarriage of justice. I have considered the judgement and I find that there are no misdirections and therefore no miscarriage of justice has been occasioned.

9. Finally in ground 4, the appellant has faulted the trial court for imposing a heavy and excessive sentence. I find that the appellant used violence on the complainant (PW1) by hitting her with a piece of wood on her mouth. There is evidence of the clinical officer, Edwin Kiprotich (PW3) who examined the complainant. PW3 found that the complainant had pain on one side of her mouth, which was swollen and painful. In his opinion, a blunt object was used in inflicting these injuries.

10. In his mitigation, the appellant described himself as a mechanic and as a family person and being a single parent. He went further to say that he had one child who depended on him. Thereafter the court sentenced him to death as authorized by law. In the circumstances, that sentence cannot be said to be heavy and excessive, because it is authorized by law.

11. The upshot of the foregoing is that the appeal of the appellant is dismissed in its entirety.

Judgement delivered in open court this 23<sup>rd</sup> day of February 2017.

In the presence of the Appellant and Mr. Mukofu for the Respondent.

**J. M. BWONWONG'A**

**JUDGE**

**23/2/2017**