



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 80 OF 2011

PETER LOKOL *alias* T. M. K. APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. T. Nzyoki, SRM in Lodwar Senior Resident Magistrate's Court in Criminal Case No. 7 of 2010)

J U D G M E N T

The appellant in this case was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars of the charge were that on the 1st day of January 2010 at Kakuma Town in Turkana West District within the Rift Valley Province, jointly with others not before Court while armed with dangerous weapons namely knife robbed Julius Muturi Mario two mobile phones make Nokia 1209 and Nokia N79 and cash Kshs. 6,000 and immediately before that robbery used actual violence to Julius Muturi Mario.

The appellant was dissatisfied with the decision of the Learned Trial Magistrate and preferred this appeal. The appellant raised grounds of appeal which can be summarized as follows; evidence adduced does not support the charge; identification by the complainant is doubtful; the person who allegedly gave the name of the appellant to the Police was not called as a witness; there was no identification parade carried out and that the evidence of the complainant was contradicted by the Investigating Officer.

The complainant Julius Muturi Mario testified that on 1st January 2010 at around 11.00pm, he was coming from White House Bar headed for his house. While he was at Pach Annex Building, he met Ekai Lokope who greeted him. Shortly thereafter the appellant came from behind and strangled him on the neck as he robbed him of his mobile phone Nokia 1209 and Nokia N79 and cash Kshs. 6,000. He fell down unconscious as the appellant ran away. The complainant testified that he recognized the appellant when the appellant touched him from behind and as he turned, he saw the face of the appellant. He said he was able to see the appellant through electricity light coming from a plot at Zam Zam which was 10 metres away. He testified that he had met the appellant once at Kakuma.

The appellant's appeal was opposed by Mr. Kimanzi for the State who argued that, the appellant was properly recognized by the complainant who had known him since 2009 and that conditions obtaining during the robbery were conducive to proper identification.

We have analyzed and evaluated afresh the entire evidence that was adduced before the lower Court as we are supposed to do as a first appellate Court.

In the case of **Okeno Vs Republic [1972] EA 32**, the role of a first appellate Court was given as

follows:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination [Pandya Vs Republic [1975] EA 366] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions [Shantilal M. Ruwala Vs Republic [1975] EA 570]. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had advantage of hearing and seeing the witnesses, (see Peters Vs Sunday Post,[1958] EA 424).

We have evaluated the evidence of the complainant and other witnesses. It is clear from the complainant's evidence that it is one Ekai Lokope who mentioned the appellant's name to the Police. This Ekai Lokope was not called to testify. The Trial Magistrate himself in his judgment stated that Ekai Lokope was a crucial witness but was not called. The Trial Magistrate had granted several adjournments to enable the prosecution to avail this witness but the case was finally closed without his evidence. The complainant had testified that he had only seen the appellant once at Kakuma. During cross-examination he reiterated his position in his examination in chief that he had only seen the appellant once. The Trial Magistrate misapprehended the complainant's evidence when he held in his judgment that the complainant had known the appellant since the previous year. The attack took place at 11.00pm. The complainant's evidence is that he was attacked from behind and strangled. It is not possible that he would have turned back and identified the appellant whom he had only seen once the previous year.

The evidence of the Investigating Officer P. C. Sammy Nyaisuti is that he received the appellant from Administration Police Officers attached to the DC for Turkana West. This was on 3rd January 2010. He went on to state that on the following day, he recorded statements from the complainant and Ekai Lokope who identified the appellant as the person who attacked the complainant while in the company of two other men. He testified that during the robbery, it was alleged that the appellant and his gang were armed with a knife. The evidence of the Investigating Officer is at variance with that of the complainant. The complainant was categorical that there was only one person present during the robbery and that the person whom he alleges is the appellant was not armed.

We have no doubt in our minds that the appellant did not identify and or recognize the appellant. He was only relying on what Ekai Lokope told him and that is why in his testimony, he said that Ekai Lokope was not with the appellant during the attack. The Trial Magistrate should not have convicted the appellant when the complainant had insisted that it was Ekai Lokope who informed the Police that the appellant was the one involved and when the said Ekai Lokope was not called to testify. We find that he conviction of the appellant was not safe. We quash the conviction and set aside the sentence. The appellant should be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kitale on this 6th day of November, 2013.

E. OBAGA

JUDGE

L. NDOLO

JUDGE

In the presence of:

Appellant:

Respondent: