



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
APPELLATE SIDE
CRIMINAL APPEAL NO. 653 OF 1994

**(From Original Conviction and Sentence in Criminal Case No.5910 of 1993
of the Chief Magistrate's Court at Nairobi: J.W LESIIT (Mrs.))**

LAWRENCE IKENO LOWASI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

**Coram: Osiemo J.
Oguk J.
Appellant (Unrepresented)
Mr. Ondari for the State**

JUDGMENT

The appellant was charged and convicted with 3 offences under section 296 (2) of the Penal Code and 1 offence under section 384 of the Penal Code. For the counts 1 - 3 he was sentenced to death and for count 4 he was sentenced to one years imprisonment. His appeal to this court is against both convictions and sentence.

Briefly the facts of the prosecution case were that the three complainants in counts 1,2, and 3, PW1, PW2 and PW4 all brothers were travelling in PW1's vehicle registration number KRP 184. They were escorting PW2 to take a bus to Mombasa where he works. While driving along outer ring road heading towards town a person dressed in full police uniform and holding a rifle flashed a torch to indicate that they should stop. PW1 who was driving stopped the motor vehicle. That man told PW1 that his vehicle was the one they had been looking for. He commanded PW1 to raise his hands up and walk with him to a waiting pick up after taking his car keys. Soon thereafter PW4 and PW2 were all put to the back of the pick up and they were driven to the bush. They were tied and left there. PW1 was robbed of his vehicle which was later recovered as well as a watch, shoes, a driving licence and cash Sh.500/- PW2 was robbed of his brief case which contained his personal documents, certificate of appointment with the police force, a camera, photographs, clothes, shoes and cash Sh.200/- PW4 was robbed of keys and cash Sh.100/-. The evidence of the 3 prosecution witnesses does not agree as to the number of the thugs who robbed them. PW1 said they were 4 while PW2 said they were 5 and PW 4 said they were more than 3. PW1 and PW4 said they were not able to identify their attackers.

But PW2 said he was able to identify the appellant and two others. He said while PW1 and PW4 were being matched away from their car, he came out with a torch which he flashed straight on the faces of 3 of those robbers. But he was hit on the face by one of them while another put a knife on his neck. While the 3rd thug searched him, one of the 3 things he identified was the appellant.

The appellant was arrested on 27-8-1993 by PW3 a police officer who with another were patrolling along Korogocho village while he was taking alcohol with other 3 men and a woman. They arrested the appellant because he was drinking some alcoholic substance which they suspected to be changaa. PW3 in his evidence said that while they were escorting the appellant to the police station he told them that he was a police officer.

When he was asked to identify himself, he produced force employment card which bore the photograph of PW2 which was the subject matter of count 4.

The appellant in his defence denied any involvement in the alleged offences. He said he was arrested on the 27-8-93 while he was taking changaa. He tried to persuade the police to leave him but they demanded Sh.2,000/- bribe which money he did not have. He was taken to the police station believing that the charge facing him was being in possession of changaa but he was surprised when he appeared in court and the robbery charges were read to him.

The victims of the robbery were 3. PW1, PW2 and PW4. Both PW1 and PW4 were not able to identify the appellant. It was only PW2 who said he was able to identify the appellant.

This is how he said he was able to see and identify the appellant.

“While PW1 and PW4 were being led away I came out from the car and flashed a torch at those thugs and I was able to identify the appellant and two others.”

This was evidence of a single witness which ought to have been tested with greatest care if the thugs were leading PW1 and PW4 away from the car and PW2 came out and flashed a torch, he would have seen their backs and not their faces. We therefore find that the evidence of PW2 on identification of the appellant was not reliable as the circumstances were not favourable for positive identification.

It was the prosecution's case that since the force employment card had been found in possession of the appellant so soon after PW2 had been robbed from PW2, a presumption arose that the appellant was either the robber or a handler of stolen property in the absence of a satisfactory explanation of how he had obtained possession.

There is no doubt from the evidence, that the appellant was found in possession of PW2's force employment card which he knew or ought to have known had been stolen.

At the trial the appellant denied involvement in the robbery. The evidence of possession is, in our judgement watertight and in the absence of an explanation by the appellant how he gained possession, the law presumes that he either stole it or at the very least he was the handler of the stolen property.

Mr. Ondari for the Republic, submitted that the charges had been proved but, with respect, we do not agree. We have already said that the evidence of identification of the appellant by PW2 is inadmissible since the circumstances were not favourable for positive identification by a single witness. More over when he reported to the police he never gave any description of the features of the appellant which could have been useful in evaluating his consistency. The offence was committed on 27-7-1993 and the parade was conducted on 6.9.93 about two months later. He does not say what assisted him to identify the appellant when the identification parade was conducted.

The evidence against the appellant for count 4 was overwhelming. He was properly convicted. The appeal against count 4 is dismissed but the appellant has served.

The charges against the appellant counts 1,2, and 3 were not proved. We therefore allow the appeal in respect of count 1, 2 and 3.

We quash the convictions and set aside the sentences of death imposed by the trial magistrate. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 17th day of September, 1998.

J.L.A. OSIEMO

JUDGE

17.9.1998

S.O. OGUK

JUDGE

17.9.1998