

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 248 OF 1994

JOHN JUMA KIBOSAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted for a charge of robbery with violence contrary to section 296 (2) of the Penal Code and was upon conviction sentenced to the penalty of death as by law provided.

It is against this conviction and sentence that the Appellant has lodged his petition on and has submitted his grounds of appeal against the conviction. Against the conviction the appellant has submitted to us an elaborate set of the submissions comprised of 6 pages. This we have perused and fully considered when arriving at our judgment. The learned principal state counsel Mr. Okumu supports the conviction and sentence and submits his reasons for so doing.

We note that the conviction is based on the evidence tendered by PW1 and PW2. This evidence relates to the identification of the Accused. The learned state counsel Mr. Okumu terms this identification as recognition. Whatever terms used in this aspect, it is of vital importance to critically examine and scrutinize this particular testimony with a view to determine whether or not the identification was devoid of any doubt. The prosecution evidence establishes the use of force and the unfortunate loss of the complainant's husband.

The thrust of the prosecution evidence is that the assailants were many in number. As soon as the door was opened one of the assailants shot the husband the other gained entry. There was one torch. The Accused recognition is said to have been made by the torch light. What was the extent of this light is not clear.

There is no suggestion that the identification/recognition was based on the voice or physical appearance of the Accused. It was a glance of his face by the torch light. Witness gave a name Mzee but full names were not given.

The robbery took place on 27/3/93 and the arrest of the appellant took place on the 31st. Why did it take three days to arrest the appellant who was a neighbour and whose whereabouts it is said were well known to the prosecution witness? No explanation for this delay is given and we cannot find any cause for this delay from the lower court's record.

The Appellant was arrested from his own house when the police officer visited it without any resistance. Is this conduct in keeping with the behaviour of a person who a couple of days earlier is said to have been a member of a gang, which killed his neighbour and committed robbery.

This aspect of the entire evidence is in own view of the utmost importance to scrutinize and assess in the circumstances where the light was limited and the witnesses were scared innocent victims trying to hide. No stolen property was found with the appellant.

On consideration of the entire evidence in its totality there remains a lingering doubt in our minds as to the recognition of the Appellant as a member of the gang and if such an identification lacks positive

proof. The benefit of this doubt must be given to the appellant who is facing a trial for his life.

As the conviction is unsafe we quash it and the sentence is set aside. It is ordered that the Appellant be released from prison forthwith unless he be held for any other lawful excuse.

Orders accordingly

Dated and delivered at Nairobi this 30th day of May, 1995

A.M. AMIN

V.V. PATEL

JUDGE

JUDGE