



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 43 OF 1994

PIUS ONDIEK OMOLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of Senior Resident Magistrate's Court at Oyugis in Criminal Case No 607 of 1994 - S N Riech Esq, SRM)

JUDGMENT

The appellant was convicted in the court below on two counts of personating a public officer and theft c/s 105 (b) and 275 of the Penal Code and was sentenced to 12 months imprisonment on each count, the prison terms to run concurrently.

In his grounds of appeal the appellant complains that the evidence of identification was not good; that the learned trial magistrate erred in believing the evidence of prosecution witness number 2 when conditions for such identification were not good; that he erred in convicting the appellant on the basis of a single identifying witness; that he failed to consider and give weight to the appellant's sworn evidence; that the conviction was against the weight of evidence. Finally the appellant complains that the sentence was harsh and excessive.

The case for the prosecution was that on 28.11.1993 at about 3 am the complainant was asleep in her house when she was awakened by people who claimed they were policemen. She lit a lamp and opened the door for them. One of the people, whom the complainant said was that the accused entered. He was wearing a black berret, black boots and a brown coat. He pushed her to the bedroom and took her radio and Shs 110/- and then left after asking her to report at the office the following day. She was to take with her the permit for her radio.

After the people had left, the complainant went to her son's house, Otieno and woke him up. On being informed of the incident, Otieno followed the people and caught up with them. He asked them to stop. The appellant stopped near Otieno but the other two stood further away. Otieno noted that the appellant was wearing the clothes her mother described above. He told the court below that there was moonlight by which he was able to see the appellant. He realized that he had seen the appellant before. He did not however indicate to the Court whether or not he knew his name.

When they reported the matter to the police the following day, it does not appear that the suspect's name was given though both the complainant and her son claimed that she knew him. They were told, to look for the appellant and report back in the event of seeing him. Later on the same day, the complainant and

her son saw the appellant and he was arrested.

The appellant gave sworn evidence in which he denied the offence. He said there was a grudge between him and Otieno over a woman.

It will be clear from the above summary of the evidence that the appellant was connected with the offence by the identifying evidence of the complainant and her son Otieno. As to the complainant's evidence she said she saw the appellant because she lit a lamp before opening the door for him. He was in the house for about 10 minutes. On his part, Otieno said that he saw the appellant, whom he had seen and known before, by the aid of moonlight. That both the appellant and Otieno knew one another, prior to the incident of 28.11.1993, is confirmed by the evidence of the appellant himself. Mr Otieno said he was sufficiently near the appellant whom he talked to to be able to identify him.

The learned trial magistrate believed the evidence of the complainant and Otieno. He rejected that of the appellant as untrue. In proceeding to do so, the learned trial magistrate had the advantage, which I do not have, of seeing the witnesses give their evidence and of assessing their demeanour. He has not been shown to have proceeded on wrong principle. On my own assessment of the record I am satisfied that the appellant was sufficiently identified by the complainant and her son Otieno. In reaching this conclusion I am not unaware of what the Court of Appeal said in the case of *Roria v Republic* [1967] EA 583:

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Garnder LC said recently in the House of Lords in the course of a debate on s 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts:

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out to ten – if there are as many as ten – it is in a question of identity.”

“That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this Court to satisfy itself that in all circumstances it is safe to act on such identification. In *Abdala bin Wendo and another v R* (1) this Court reversed the finding of the trial judge on a question of identification and said this (20 EACA) at p 168:

“Subject to certain well-known exception it is trite law

that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”

In the present case I believe the evidence of the complainant and her son was correct and true. It was the appellant whom both saw on the material day. His conviction was proper. The appeal against conviction has no merit.

As to sentence 12 months can hardly be described as either harsh or excessive. There is no basis for interfering.

The appeal against conviction and sentence is dismissed.

Dated and Delivered at Kisii this 28th day of July 1994.

T.MBALUTO

JUDGE

