



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 3 of 1995

JOSEPH KIPNGENO ROTICH
.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kericho (Lady J

ustice R. N. Nambuye) dated 10th December, 1995,

IN

H. C. CR. C. NO. 2 OF 1993)

JUDGMENT OF THE COURT

The appellant was convicted in the High Court of Kenya at Kericho (Nambuye, J.) of the murder of Maricus Apiyo Kisia on 18th February, 1991 and sentenced to death.

The facts relied upon by the prosecution were that at about 5.00a. m. on the fateful day the Boma of Raphael Magawi (P. W. 3) at Onyuongo, Kisumu District, was raided by cattle thieves and 14 head of cattle were stolen. An alarm was raised and about 30 villagers assembled within a very short time. Among the villagers was the deceased. They tracked the cattle towards Kaplelartet village of Kericho district where they located the stolen cattle. The person who was herding them fled and disappeared into the nearby forest on seeing the search party. The villagers drove back the cattle towards their Kisumu Village but on the way they were ambushed and attacked by any armed gang of about 100 people carrying pangas, spears, bows and arrows. The villagers ran in different directions and it is now common ground that the deceased never reached home but his body was discovered the next day at the scene of the attack. A post mortem examination of his body revealed that the deceased has sustained a stab wound on the right anterior chest, a large laceration through the right lung and a rupture of the liver. The cause of death was certified as cardio-pulmonary arrest due to serve haemorrhage.

The appellant was arrested and subsequently arraigned on a charge of murder of the deceased. He was convicted after a full trial before Nambuye, J. sitting at Kericho on 10th December, 1995 who agreed with two of the assessors and sentenced him to death. The appellant now appeals to this court from his

conviction and sentence.

Mr. Mitei for the appellant argued as his main ground of appeal the question of identification. He submitted that the witnesses for the prosecution were at variance as to whether the appellant was at the scene of the murder or not.

This was, however, a case of recognition, not identification, of the assailant because the main witness for the prosecution Benjamin Peter Owino testified that he knew the appellant very well and had been to the appellant's home several times. During the trial the witness testified to have seen the appellant at the scene but was quite certain another person known as Coronel speared the deceased felling him down. While on the ground, Coronel continued beating him until he died. Two other witnesses John Odhiambo (P. W. 6) and Samwel Ajuang (P. W. 16) testified that they were not sure whether the appellant was at the scene or not and did not remember whether the appellant was armed with any weapon or not. In his defence which he gave on oath and was cross-examined at length, the appellant set up an alibi to account for the time of the commission of the crime in question as to render it impossible that he could have committed the imputed act or could have been at the scene.

With regard to the defence of alibi, this in the circumstances, was available to the appellant, and had in fact not been displaced by the prosecution. It is regrettable that the learned judge did not in her judgment fully deal with the issue of alibi but only glossed over it by holding that the appellant "never dissociated himself from the group" and must be deemed to have been part of it.

From her judgment, we are of the opinion that the learned judge did not apply her mind fully to the necessity to be satisfied beyond doubt on the identification issue.

For these reasons we find the conviction of the appellant cannot safely be supported and therefore the appeal is allowed. The conviction is quashed, the sentence of death set aside and the appellant is ordered to be set at liberty forthwith unless held for any other lawful cause.

Dated and delivered at Nakuru this 1st day of March, 1996.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR