



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 300 OF 2009

GODWIN NAKHAIMA APPELLANT

AND

REPUBLICRESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Bungoma
(Muchemi & Chitembwe, JJ.) dated 18th June, 2009
in**

H.C.CR.A. NO. 53 OF 2006)

JUDGMENT OF THE COURT

The appellant was convicted by the Senior Resident Magistrate, Bungoma of the offence of attempted robbery contrary to **Section 297 (2)** of the Penal Code and sentenced to death.

The particulars of the offence stated that the appellant on 14th October, 2003 jointly with others not before the court attempted to rob **Bernard Ijaa Ojuma** of Kshs.17,000/= and at or immediately before or immediately after the time of such robbery used actual violence on him.

The complainant **Bernard Ijaa Ojuma** (PW1) gave short evidence at the trial. On the material night he was asleep in his house and at about 11 p.m. he heard a bang on the door and suddenly a person entered into the house holding a panga. The person held the complainant by the throat and told the complainant to give him something. There was space between the wall of his house and the roof through which moonlight filtered into the house and through the moon light he recognized the person holding him as "*Nakhaimathe*" appellant. Two more people entered into the house. The complainant struggled with the appellant as the appellant's accomplices hit him with a piece of metal. The complainant was cut with a panga as he was struggling with the appellant but he managed to run away. The complainant testified that his father had sold land and had given him Shs.80,000/=. The complainant reported to Malaba Police Station and later on the same day led **Cpl. Walter Obum** to the home of the appellant where he was arrested. The appellant made unsworn statement at the trial denying the offence.

The trial magistrate in a terse judgment stated:

"I have considered that this was a single identifying witness and it was late in the night and given the circumstances the complainant must have been quite scared. However, I still believe that the identification was proper".

The superior court on its part held:

"Given the above circumstances and the fact that the complainant was struggling with one of the attackers who had held him by the throat whom he identified to be the appellant, we are satisfied that the appellant was positively identified. Even though the case is based on the identification of one witness, we hold that, the

identification was proper and free from error. The complainant even called the appellant by name”.

The main ground of appeal relates to the identification of the appellant. The appellant complains that the superior court erred in fact and law in failing to analyze the evidence afresh and reach its independent conclusion, and in failing to warn itself of the dangers of relying on the evidence of a single identifying witness at night. The alleged attempted robbery occurred at 11 p.m. The complainant was awakened from sleep and grabbed on the throat by a person who was holding a panga. There was no light in the house but according to the complainant, there was moonlight filtering in through the space between the wall and the roof of the house. The complainant did not describe the width of that space or the intensity of the moonlight. This was no doubt a typical case of identification by a single witness at night under unfavourable conditions. It is trite law that such evidence should be tested with the greatest care, (see **Maitanyi vs. Republic** [1986] KLR 198) and that the evidence must be water tight to justify a conviction. (See **Kiarie vs. Republic** [1984] KLR 739. Again, as was held in **Kiarie’s** case (supra), it is possible for a witness to be honest but mistaken.

In this case, the two courts below did not test the evidence of identification with the greatest care. Indeed, they did not inquire into the prevailing circumstances particularly the probability or not of moonlight filtering into the house through the space between the wall and the roof and the intensity of such light. The two courts below did not also inquire whether indeed the complainant knew the appellant before and if so, for how long.

The fact that the complainant led police to the house of the appellant on the following day is not conclusive evidence on the correct identification, for there was a possibility of mistaken identity. Had the superior court appraised the evidence as required in law, it could have found that the evidence of identification was not water tight.

In the result, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Eldoret this 16th day of April, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR