



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO.72 OF 2019**

**(Being an appeal from the decision of Hon. C.M. Kesse (Srm) dated 8th July 2019**

**in Criminal case No. 5525 of 2018)**

**EMMANUEL IGUNZA MBASSO.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with the offence of **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that on the **4<sup>th</sup> day of December 2018 at Kiminini area within Trans-Nzoia County robbed Joyce Osilo Omuka of mobile phone, ITEL, valued at Kshs. 3000, cash Kshs 250, National Identity Card and roast fish worth Kshs300 and at immediately before the time of robbery strangled the said Joyce Omuka.**
2. The Appellant was convicted and sentenced to 20 years’ imprisonment hence this appeal. The learned state counsel has on his part conceded to the appeal as he submitted that the evidence presented did not support the conviction.
3. The evidence at the trial court was that the Complainant was walking home at around 8.30 pm. As she arrived at their gate she met someone who greeted her and she responded. That person whom she had not seen pounced on her and strangled her till she lost consciousness. When she woke up she called for help and her family members opened the gate.
4. On 11<sup>th</sup> December 2018 about 7 days later she spotted the Appellant and together with her brother raised alarm and boda boda fellows assisted in arresting the appellant. At that time the Appellant wanted to be violent. She said that she identified the appellant from the clothes he wore.
5. The Appellant was thereafter arrested and taken to the police station and charged.
6. The Appellant denied the offence and in his un sworn evidence said that he was arrested without any cause as he travelled home.
7. The court has perused the proceedings including the presented exhibits. The court is inclined to allow the appeal for the same reasons advanced by the learned State Counsel.
8. The substantive issue is on identification. The Complainant conceded that the incident took place at night and the assailant was not known to her. To simply arrest the appellant seven days later and charging him without undertaking an identification parade was not prudent. How many people in Kiminini for instance wore the clothes like those worn by the Appellant?
9. The proper way was to have had the Appellant subjected to an identification parade after his arrest. To rely on his clothes alone was insufficient. In fact, there is no evidence that the Complainant made a report at the police station prior to the arrest and gave the police a proper description of the assailant.
10. The other ingredient is that the items which were stolen were not proved. No evidence was tendered to show that the items allegedly stolen including the phone belonged to PW1 or were in her custody.
11. The upshot is that the appeal succeeds, the Appellant is set free unless lawfully held.

**Date, Signed and Delivered at Kitale this 29<sup>th</sup> day of October 2020.**

---

**H. K. CHEMITEI**

**JUDGE**

**29/10/2020**