



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL APPEAL NO. 119 OF 2017**

**OLOSHOURA OLE NCHOE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the judgement, conviction and sentence of Hon T. Gesora (SPM) delivered on 18<sup>th</sup> August 2017 in the Chief Magistrate's Court in Criminal Case No. 149 of 2015, Republic v Oloshurua Ole Nchoe)

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of death in respect of the offence of robbery contrary to section 295 as read with section 296 (2) of the Penal Code (Cap 63) Laws of Kenya.
2. The state has supported both the conviction and sentence.
3. In this court the appellant has raised four grounds of appeal in his amended petition of appeal.
4. In ground 1 the appellant has faulted the trial court for convicting him on evidence of visual identification, which was not free from errors. In this regard, the evidence of Rhoda Koinati Koonyo (Pw 2) was that on 23<sup>rd</sup> January 2015 at 12.24 a.m. she was sleeping in her house. She was awoken by the barking of her dog. She awoke up and put on her lights. She then took her phone and tried to call a neighbour; but failed to get the neighbour. As a result, she then called her husband, who was away. By then the person, who was in the compound was on the roof. This person was trying to remove the solar panel. Pw 2 went to the sitting room with his children and raised an alarm by screaming.
5. Pw 2 then heard that person coming down. He then hit the window with a stone and told her to shut up or be shot with a gun. That person then broke the front security light and all the windows. Pw 2 then went to the kitchen side and continued to scream. Pw 2 then rushed to the children's room, woke them up and locked them in the bathroom. The person came and broke the kitchen door. That person told Pw 2 that she was stubborn and that he was going to enter and kill her and her children. When that person was about to succeed, Pw 2 told him to enter and take whatever he wanted and spare their lives.
6. After gaining entry, that person hit her on the left leg and she fell down. He demanded money. That person then took her cash money Kshs 5,300 and her phones. Pw 2 took that person to the sitting room where he checked for drawers and found nothing. He then pulled Pw 2 to the bedroom and demanded to have sex with PW 2. PW 2 pleaded with the appellant in that bedroom, since her children were in that room. As a result, he pulled her out of the bedroom through the kitchen door. He further, pulled her to the veranda and ordered her to strip. As he went to destroy the security light, Pw 2 ran and took the children into the bedroom and locked themselves there. The person tried to force the door open, but was unable to do so, since he did not have a tool.
7. Suddenly Pw 2 heard the sound of motor cycles. The person then jumped and ran off. They were four motor cycles with neighbours. Upon arrival, the police took the shuka (exhibit 3), the metal bar (exhibit 4), the torn T-shirt of Pw 2 (exhibit 5). Thereafter Pw 2 went to the police station and wrote a statement.
8. While under cross examination, Pw 2 testified that when the attacker entered, the electricity lights were on and that she was with the appellant for 30 to 45 minutes. Pw 2 also testified that the appellant looked the way he was during the robbery. He had a scar on his face. Pw 2 continued to testify that she saw the appellant well.
9. It is clear from the foregoing evidence that the appellant was with Pw 2 for between 30 to 45 minutes. There was electricity light that enabled her to identify the appellant. Pw 2 was in close proximity to the appellant for this long time. The appellant had the same mark on the face when Pw 2 identified him at a police identification parade, which was conducted by No. 233659 CIP Kipsang Mursoi (Pw 3).

10. In answer to the foregoing evidence, the appellant set up the defence of alibi. He made unsworn statement stating that he was arrested with one Nyangumi, while they were drinking changaa at a place called Popong.

11. I have re-assessed the prosecution and the defence evidence as a first appeal court. As a result, I find that the appellant was positively identified by Pw 2. Her identification was free from error.

12. I therefore reject ground 1 of the appellant that he was not positively identified.

13. In ground 2 the appellant has faulted the trial court for convicting him on the evidence of an identification parade that was flawed in that the parade was not conducted as required. In his written submissions the appellant has cited a number of authorities including *Ajode v Republic (2004) 2 KLR*, in which the court held that dock identification is generally worthless. He also cited *Rex v Mwongo s/o Mensa (1936) 3 EACA 29* in which that court held that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in the police force standing orders. The submission of the appellant is that Pw 2 saw him before the parade was conducted. Pw 3 CIP Kipsang Mursoi (Pw 3) conducted the parade on 30<sup>th</sup> January 2015. He followed the rules in conducting the parade. It was his evidence that the appellant only complained that he had been in cells for long. The appellant testified that the complainant had seen him on 1<sup>st</sup> February 2015 and on 2<sup>nd</sup> February 2015 (being the failed plea taking date), when the appellant was in and out of court. The parade was held on 30<sup>th</sup> January 2015 according to the evidence of Pw 3. It appears that there is no way Pw 2 could have seen him. The cases cited by the appellant are distinguishable. In the circumstances, I find no merit in this ground and I therefore dismiss it for lacking in merit.

14. In ground 3 the appellant has faulted the trial court for convicting him on flawed evidence of the government analyst (Pw 1). There was no evidence that blood was drawn from the body of the appellant and thereafter forwarded to the Government Chemist in Nairobi. The evidence of Pw 1 is that he received, among other exhibits, "*Blood in a small bottle marked "A" and the names Oleshoria Ole Nchoe-Accused....*" I find there is merit in this ground and I therefore uphold it.

15. In ground 4 the appellant has faulted the trial court for failing to give reasons for rejecting the defence evidence. In rejecting the defence evidence, the trial court expressed itself as follows: "*It is the fact that it is the accused who was the intruder at the complainant's house on 23/1/2015. He was seen by the complainant and properly identified.*" It is clear that the reason given by the trial court for rejecting the appellant's alibi defence is that the complainant positively identified him. After re-assessing the entire evidence as a first appeal court, I find that the appellant was positively identified as the person who robbed the complainant. I find no merit in this ground which I hereby dismiss for lacking in merit.

16. I find that the appellant was convicted on the evidence of a single witness, and after warning myself of the dangers inherent in the identification of a single witness, I find that the conviction is safe. I therefore uphold it.

17. The appellant was sentenced to death. Although, he appellant has not raised the issue of sentence. I have decided to raise it *suo motu* (on my own initiative), in view of the decision of the Supreme Court in *Francis Karioko Muruatetu and Another v Republic (2017) eKLR* in which that court held that the death sentence is not mandatory. The trial court erred in law in finding that the death penalty was mandatory and was therefore obliged to impose. The appellant hit the complainant in the left knee and as a result of which she fell down. She also sustained bruises. All the injuries suffered were classified as harm. I find that these were not life threatening injuries. Additionally, the appellant wantonly broke the windows of the complainant's house. This 30 to 45 minutes' attack upon the appellant were very traumatizing. The appellant did not offer any mitigation notwithstanding the fact that he was given an opportunity to do so. After taking into account all these matters, I find that the death penalty was not called for. I therefore set it aside and in its place I hereby sentence the appellant to life imprisonment.

**Judgement signed, dated and delivered in open court at Narok this 25<sup>th</sup> day of September, 2019 in the presence of the appellant and Mr. Mwangi for the Respondent.**

**J. M. Bwonwong'a**

**Judge**

**25/9/2019**