



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CRIMINAL APPEAL NO. 13 OF 2018**

***(from original conviction and sentence in Senior Principal Magistrate Court Kapenguria Criminal Case No. 313 of 2009 delivered by G.M.A. Ong'ondo Principal Magistrate on 24/8/2010).***

**BENJAMIN KEMBOI KIPKORE .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

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 17<sup>th</sup> day of March 2009 at 17.30 hours at Kamelei Trading Centre, Tapach Division West Pokot District within Rift Valley Province jointly with others not before court robbed David Chemelil of cash Kenya Shillings 250,000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said David Chemelil.**

2. The 2<sup>nd</sup> count was equally **Robbery with Violence contrary to Section 296(2) of the penal code**. The particulars were that **on the 17<sup>th</sup> day of March 2009 at 17.30 hours at Kamelei Trading Center, Tapach Division in West Pokot District within Rift Valley province, being armed with dangerous weapons namely AK 47 rifle, jointly with others not before court robbed Stephen Kuloba of a mobile phone make Motorola C168 valued at Kenya Shillings 7000/- and at or immediately after the time of such robbery used personal violence to the said Stephen Kuloba.**

3. The appellant and his co-accused were convicted and sentenced to suffer death. They filed an appeal which was heard by Karanja J and Obaga J on 18/10/2013. The same when it went before the Court of Appeal was sent back for hearing of the same afresh.

4. The facts and evidence can be summarised as hereunder.

5. **PW1 David Chemelil** testified that he was a salesman at Nafuu Super stores at Kapcherop. On 17/3/2009 they were travelling vide motor vehicle Registration No. KAR 980X driven by one Stephen Kuloba his co-complainant. As they returned to Makutano, they were attacked by some three robbers nears Kemelei trading centre. They were armed with AK 47 rifle and other crude weapons. They stole from him Kshs 250,000/-. he managed to identify them as it was around 5.30 pm. They disappeared into the bush after firing in the air.

6. They reported at Kapsangor GSU Camp as well as Kapcherop police station. The following day he received a phone call that the robbers had been arrested at Kapenguria. He went and identified them

together with the goods they were found in possession.

7. **PW2 Stephen Kuloba Ondiek** was the driver of the lorry Registration No KAR 980X in which he was travelling with PW1 on the fateful day. He recognised the robbers who according to him were 3. They stole from him his mobile phone make Motorola. Later he heard that they had been arrested at Kapenguria. He went and identified them at the police station. He also identified his mobile phone. He identified the appellant herein who was armed with the afore stated gun. Apparently during cross-examination he said that he had known him for 3 years.

8. **PW3 Charles ToroItich** operates a wholesale shop at Kapenguria trading centre – Nafuu stores. PW1 and PW2 are his salesmen. They called him on the material day and told him that they had been robbed. Some goods worth 9,600/- had remained and were in the lorry. He advised them to report to the Kapcherop police station. The following day he received a phone call from Kapenguria police station that the suspects had been arrested.

9. **PW4 Mathew Mwangi Wangugu** was the District officer Tapach Division Pokot Central. He testified that he was called by one Benjamin, the Assistant Chief Kemelei sub location and informed of the incident. He held baraza the following day and he was informed by members of the public that the appellant was the ring leader. He called the OCPD and notified him that the suspects had been spotted at Makutano via Kitale.

10. They later arrested them at Shrek bar within Makutano. They searched the lodging they had booked and recovered assorted items which included PW2 Mobile phone and a sum of kshs 14,000/- beside other clothings which were all produced .

11. **PW5 Corporal Collins Opiyo** testified that he received information concerning the robbery on 18/3/2009. Together with others they went to Makutano town where they carried out their investigations. They were told that the suspects had gone to Kitale. They later at around 7pm converged at Shrek bar where he arrested them and did search room 5 where they had booked for the night and recovered the assorted items. They escorted them to Kapenguria police station.

12. **PW6 P.C. Benedict Mwendwa** carried out the investigations after receiving report from an informer and just like PW5 they managed to arrest the appellant at Makutano and recovered the items.

13. When put on his defence the appellant gave unsworn evidence denying the offence. He said that the recovered items belonged to him as he was able to buy them from his potato farming. He said that he was arrested for a traffic offence on 18/3/2009 for failing to have a driving licence and insurance cover.

### **Analysis and Determination**

14. I have perused the evidence as presented by both sides at the trial court. I have equally perused the homegrown grounds of appeal as well as submissions herein.

15. It is apparently clear that for the offence of robbery to be established one ought to prove that the offender was armed with any dangerous or offensive weapon or instrument, be in a company of one or more other person or persons and at or immediately before or immediately after the time of such robbery, he wounds, beats, strikes or used any other violence to any person.

16. In this case the appellant has contented that there were varied contradictions in the evidence as led by the prosecution. Having analysed what was presented on record it is apparent that the incident occurred at around 5.30 pm. It was therefore day time and thus the question of mistaken identity could be minimal. PW2 infact confirmed that he had known the appellant for the last 3 years. It seemed that the appellant who was holding the gun (AK 47) and was in front of the lorry did not bother to cover himself.

17. This is informed further by the fact that the police after arresting them did not bother to conduct any identification parade as the witnesses readily identified them.

18. More fundamentally, the mobile phone belonging to PW2 was recovered the following day in the room which the appellant and his accomplice had booked at Shrek bar. As much as the other assorted goods may have belonged to them, whether they purchased from the stolen money, I am satisfied that the mobile phone aforesaid was clearly proved by PW2 that it was his.

19. The defence offered by the appellant holds no water. I do not find any reason to link him with a traffic offence with how and where he was arrested. In any case the evidence by the prosecution witnesses including the District officer and other security personnel clearly did not portray any malice. The items recovered were done so within 24 hours after the incident.

20. The upshot of this is that this appeal ought and must fail. The next issue which really is a new jurisprudence is to do with sentencing. In the **Supreme Court case of Francis Karioko Muruatetu & Another Vs Republic, Petition No. 15/2015** the apex court held at paragraph 69 that;

***“ Consequently, we find that section 203 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory deaths sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty”.***

21. The court went on to state that;

***“ It is prudent for the same court that heard this matter to consider and evaluate mitigation submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence reheaving we have allowed applies only to the two petitioners herein -----”***

22. In **William Okungu Kittony Vs Republic, the court of Appeal NO. 56 of 2013** held that;

***“ From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in Paragraph 69 applies Mutatis Mutantis to Section 296(2) and 297 (2) of the Penal Code. Thus the Sentence of death Under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment.”***

23. In **Wycliffe Wangusi Mafura Vs Republic (2018) eKLR**, the Court stated as follows;-

***“ We also said in William Okungu Kittony's case (Supra) that the decision of the Supreme Court in Muruatetus case has immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence rehearing in any matter pending before those courts. Accordingly since this appeal had not been finalised, this court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed.”***

24. ***Although the Supreme Court did not outlaw the death sentence we are of the view that in the circumstances of this case, the death sentence was not warranted. The appellant gave mitigating circumstances but the trial Magistrate considered that the hands of he court were tied. It is not necessary to order a sentence re-hearing. The appellant has been in custody for 9 years. The complainant did not sustain serious injuries. However the robbers were armed with a pistol. In the circumstances a sentence of imprisonment would serve the interest of Justice.”***

25. The court proceeded to set aside the death sentence and ordered him to serve 20 years imprisonment from the date of sentence.

26. Borrowing from the above decision which I think it is in all fours with this appeal, I am satisfied that the appellant and his accomplices participated in the robbery. The prosecution evidence was cogent, clear and consistent. The appellant was clearly identified by PW1 and PW2. He was rightfully convicted.

27. However based on the above cited authorities, I do find that the death penalty meted against him was not appropriate given circumstances of the case.

28. Consequently I shall dismiss the appeal but nevertheless substitute the death sentence with a sentence of imprisonment for a period of 20 years from the 24/3/2009 when he was first arraigned in court. I take judicial notice that he has been in custody ever since he was arrested and charged.

Orders accordingly.

**Delivered, signed and dated at Kitale this 12<sup>th</sup> day of April 2018.**

---

**H.K. CHEMITEI**

**JUDGE**

**12/4/18**

**In the presence of:**

**Mr Kakoi for the State**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**