



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 44 OF 2010**

**WILLIAM KUKAT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No.5238 of 2010 Republic vs William Kukatin the Resident Magistrate's Court at Kabarnet by H. M. Nyaga, Senior Resident Magistrate on 19<sup>th</sup> March 2010)***

**JUDGMENT**

1. The appellant was convicted on a count of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to death. The appellant has appealed against his conviction.
2. The particulars of the charge were as follows: That on the 3<sup>rd</sup> May 2009 at Kipnai Sub-location in East Pokot District within the Rift Valley Province, the appellant, jointly with others not before the court, and while armed with AK 47 rifles, robbed Doris Cheptui of Kshs2,000 and two mobile phones all valued at Kshs 6,000.
3. The petition of appeal raises six grounds. The primary grounds of appeal are two-pronged: that the learned trial magistrate erred in relying on unsound testimony of one identifying witness; and, that the elements of the charge were not proved beyond reasonable doubt. The appellant filed detailed handwritten submissions on 9<sup>th</sup> May 2013. When he appeared before us, he said he wished to rely wholly on those submissions and had nothing to add.
4. The State has contested the appeal. The case for the State is that the evidence tendered at the trial was inconsistent with the innocence of the appellant. Regarding identification of the appellant, the State submitted that there was sufficient light on the material night from a fire and the moonlight. Furthermore, the appellant was known to PW1 who identified him. In the circumstances, it was submitted that this was a case of recognition. In any event, the learned trial Magistrate had warned himself of the dangers of relying on a single identifying witness. As the appellant had a gun during the robbery which he fired at the complainant, it was submitted that in all the circumstances of this case, the defence put forth by the appellant could not stand. In a nutshell, the State submitted that all the key ingredients of the charge were proved beyond reasonable doubt.
5. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Njoroje v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported).
6. The facts as narrated by the complainant (PW1) were straightforward. The appellant was well known to her. They are relatives and neighbours. On 3<sup>rd</sup> May 2009, he went to her homestead to pick a mobile phone that was charging. The complainant was away in church. The appellant

- collected some stones and arranged them into a pile. PW1 said that in Pokot culture, that was a sign that someone had died or was about to die. PW2 also witnessed the appellant piling up the stones. She testified that she heard the appellant say in Kiswahili that “the rubbish [sic] will die”.
7. The next day, at about 7.00p.m, the complainant was preparing some food. There was moonlight. The appellant accompanied by another person called Mutelle entered her compound. The appellant was wearing some jungle or military outfit. She identified him from the flames of a fire in her compound and the moonlight. He was armed with an AK 47 rifle. He shot at her but missed. She took off for dear life. She went to the home of PW4. PW2 also heard a gunshot at about 7.00pm coming from the direction of the complainant’s house. On the same evening at about 8.00p.m, PW3 and PW4 said they also heard the gunshot.
  8. PW4, a local pastor, mobilized some people and they went to the complainant’s homestead the same night. They were accompanied by the complainant. They found the complainant's house had been “raided” and that Kshs 2000 and two mobile phones were missing. PW1 testified that the appellant and his accomplice stole the property. PW4 and the public arrested the appellant the next day and took him to the police. He was charged with the offence.
  9. The appellant's defence was as follows: he had disagreed with the complainant over a piece of land. He refused to vacate the land as it had been given to him by his father. The appellant believed the complainant framed him to ensure he vacated the land. He testified that if it is true he had a gun, he could not have missed the complainant from that distance. He denied committing the offence.
  10. We shall turn first to the identification. The complainant was the sole identifying witness. It was at night. The complainant said there was moonlight. There was a fire in the compound. Had the appellant and the complainant been *strangers*, those conditions would have been less than favourable. But the complainant knew the appellant well. They were relatives and neighbours. But from what we have said, it was doubtful the complainant identified the gun or more particularly that it was an AK 47. The trial court properly warned itself at page 23 of the record of the dangers of that evidence. The learned trial Magistrate stated-

*“The accused has been identified. I have duly warned myself of the dangers of relying on her evidence of identification but I still come to the conclusion that the accused has been identified as the assailant.”*

11. We agree with the trial Magistrate. Since the appellant was well known to the complainant, this was a case of *recognition*. Although the conditions of identification were poor, we are satisfied the appellant was properly identified. We have not seen the possibility of error. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In Wamunga v Republic [1989] KLR 424, the Court of Appeal held as follows-

*“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”*

See also Abdalla Bin Wendo v Republic [1953] EACA 166, Joseph Ngumbao Nzalo v Republic [1991] 2 KAR 212, Obwana and others v. Uganda [2009] 2 EA 333 at 337, Richard Kinyuru and another v Republic Nairobi, High Court Criminal Appeal 290 of 2009 [2012] eKLR, Salim Swaleh Mapinga v Republic [2013] eKLR.

12. What is not in doubt is that a shot was fired. The complainant first testified on 25th June 2009. The appellant applied that she be recalled to the stand. When the complainant was recalled on 22<sup>nd</sup> October 2009, she testified that spent cartridges were collected from her compound. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides as follows-

*“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company*

*with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.*

13. The following key elements of the offence were thus established: appellant was accompanied by another person; he had an offensive weapon, a gun, which he fired at the complainant. From the evidence of PW1, PW2, PW3 and PW4, the offence occurred on 4<sup>th</sup> May 2009. The charge sheet, whose particulars we set out at beginning, stated that the offence occurred on 3<sup>rd</sup> May 2009. The charge sheet was never amended. The judgment of the lower court at page 22 of the record states the appellant committed the offence on 3<sup>rd</sup> May 2009. That is a material discrepancy. What PW1 and PW2 stated in evidence is that on 3<sup>rd</sup> May 2009, the appellant had brought his phone to the complainant's house to charge. He then piled the heap of stones signifying death in Pokot customs. He then left. PW1, PW2, PW3 and PW4 all said that the robbery took place the following day at 7.00p.m. That clearly would be the 4<sup>th</sup> of May 2009.
14. An important component of the offence is theft or robbery of property. That is why the offence is robbery *with* violence. They are *twin* components. See Benson Simiyu Busaka v Republic, Eldoret High Court Criminal appeal 169 of 2010 (unreported). The learned trial Magistrate found as follows-
- “It is thus clear that after the complainant fled, the assailants, in this case the accused and his accomplice, proceeded to search the house for items and took the same. They stole them. A second ingredient of the offence has been brought out”.*
15. With great respect to the learned trial Magistrate, there was no direct evidence of robbery. The complainant who was the *sole* eye witness fled after the gunshot. She returned several hours later to the compound to find the items missing. No one saw the appellant or his accomplice search the house or take away the money and phones. The items were never recovered. There is thus no evidential *nexus* between the robbery, the violence and the appellant or his accomplice. It may be presumed from the circumstances. But the circumstantial evidence would need to be strong. It is missing. The conduct of the appellant may have founded another offence but *not* the charge of robbery *with* violence. We have stated there were discrepancies between the dates of the offence in the charge sheet, judgment and the evidence. In criminal proceedings there is no room for Assumptions. The State must prove its case beyond reasonable doubt. See Kaingu Kasomo v Republic, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). We remain alive that the burden of proof, subject to section 111 of the Evidence Act, rests entirely with the prosecution.
16. From our reconsideration of the evidence we have found that there was no proof of theft by the appellant or his accomplice of the two mobile phones, Kshs 2,000 or any other such sum or property. Fundamentally, there is no evidential *nexus* between the alleged theft and the attack on the complainant connecting the appellant to the offence. It then follows as a corollary that the key ingredients of the offence of robbery *with* violence were not proved *beyond* reasonable doubt.
17. In the end, this appeal is allowed. The conviction and sentence against the appellant are hereby quashed and set aside. The appellant shall be set free forthwith unless held for some other lawful cause. It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 29<sup>th</sup> day of November 2013**

**FRED A. OCHIENG**

**G.K. KIMONDO**

**JUDGE**

**JUDGE**

**Judgment read in open court in the presence of**

Mr.....for the appellant.

Mr.....for the State.

Mr..... Court Clerk.