REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 75 OF 2009.

RASHID EKULAN.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

**(*Being an appeal from the conviction and sentence of T. Nzioki – SRM in Criminal Case No. 177 of 2009*

delivered on 26th November, 2009 at Lodwar.)**

J U D G M E N T.

1. The appellant **Rashid Ekulan** was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the charge stated that on the 20th day of December, 2008 at Lodwar township in Turkana Central district of the Rift Valley province jointly with others not before court while armed with a dangerous weapon namely knife robbed David Ouma Othiambo of one cell phone make Nokia 3110 C S/N. 353081024410873 valued at 13,500/=, cash 8,800/= and a wallet valued at 100/= all valued at Ksh. 22,400/= and immediately before the time of such robbery threatened to use personal violence on the said **DAVID OUMA OTHIAMBO**.

2. The appellant was tried, convicted and sentenced to suffer death. Being aggrieved with the conviction and sentence, he has appealed on grounds that the quality and quantity of the evidence adduced before the trial magistrate was insufficient to support a conviction. There was no prove but the appellant is the one who sold a mobile telephone which was recovered from PW2. The learned trial magistrate was also faulted for relying on the evidence of PW1 and for failure to call PW1's companion who was a crucial witness. The appellant also filed written submissions in support of the above grounds of appeal.

3. This appeal was opposed; the learned Snr. State Counsel **Mr. Onderi** supported both the conviction and sentence. He submitted that the evidence of PW1 was clear that he identified the appellant who was mono eyed as the one who attempted to stab him while they robbed him money and the Nokia telephone. The evidence of identification was further corroborated by PW3 who bought the mobile

telephone from the appellant. The mobile telephone was positively identified by the complainant who produced the purchase receipt. It is the appellant who led PW5 to the shop where he had sold the mobile phone which was stolen from the complainant. Thus, according to Mr. Onderi, the conviction against the appellant is safe from any error.

4. This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to allow the appeal. In so doing the court must always caution itself that it never saw or heard the witnesses and give due allowance for that. The appellant was convicted based on the evidence of a total of five prosecution witnesses. The appellant also gave unsworn statement of defence and did not call any witness.

5. Briefly stated, **Sergeant David Ouma, PW1**, who is also the complainant in this matter testified that on 19th December, 2008 he had been paid his traveling allowances by the Lodwar District treasury of Ksh. 12,400/=. He purchased several items for his family and proceeded to Green Leaf Bar where they had drinks with friends until about 1.00 a.m. When he left the bar to take a taxi across the road. As he was walking, he was waylaid by an attacker who pulled a knife and tried to stab him but he held the knife with his hand and knife fell down. Two other attackers emerged and pulled PW1 next to the wall of the premises and ordered him to give them money. PW1 surrendered by raising his hands and the two men removed the wallet from his trouser pocket which was containing Ksh. 8,800/= and a Nokia mobile phone. PW1 testified that before the attackers ran away he saw the face of the appellant who had held the knife at him and identified by his features as he was mono-eyed, was black and big hair.

6. PW1 went back to the bar and found his friend **Aukot Loturia** who said that he had seen the appellant who is also known by the name *macho*. PW1 wet back and collected the knife which the appellant had tried to use and was produced as an exhibit. PW1 reported the incident to the police and gave the names of his friend Aukot Loturia to the investigating officer **PC Wycliffe Maasi**, PW5 as he was traveling. According to PW5, the complainant had identified the assailant who is mono eyed. The matter was recorded in the occurrence book. The appellant was arrested after he was spotted by **PC. Pius Ochieng** within Lodwar Town, he had perused the report in the OB and he knew the appellant through the description, moreover the appellant was also known as macho. PW5 investigated the matter and said that when the appellant was arrested he cooperated and told the police where he had sold the mobile telephone to PW3.

7. James Ekatorot Kangaloi, PW3, testified that on 16th February, 2009, he and his brother Lukas Ekaru, PW2, were approached by the appellant who wanted to sell a mobile telephone at Ksh. 4,000/=. After negotiating PW3 bought for Ksh. 2,000/=. This telephone was recovered from PW3. It was positively identified by PW1 who had the purchase receipt with the same serial number. Put on his defence, the appellant gave unsworn statement of defence. He claimed that on 23rd February, 2009 he had transported his father who had been shot by cattle rustlers to Karemngorok centre but the father passed away at Lodwar District Hospital. On 27th February, 2009, the appellant went to look for a vehicle to travel home and was arrested by police officers who escorted him to Lodwar police station. The CID officers interrogated the appellant and charged him with the offence of robbery with violence. The appellant claimed that he was implicated with the offence because of his physical looks.

8. The learned trial magistrate evaluated the above evidence and was satisfied that the prosecution proved their case to the required standard. The trial magistrate also found the ingredients of the offence of robbery with violence was proved because the appellant was armed with a knife which was recovered at the scene and was produced as an exhibit. There was use of violence when the complainant was robbed of the mobile telephone and cash.

9. We have subjected the above evidence to a fresh analysis. The conviction is based on the evidence of identification which was corroborated by the fact that the mobile telephone that was stolen from the complainant was recovered from PW3 who purchased the telephone from the appellant. The complainant was categorical that he identified the appellant as one of the assailants because there were electricity

lights from Green Leaf Bar. He said he noticed the physical features of the appellant who was mono eyed, black and had big hair. According to PW4, this was noted in the occurrence book which he perused and was able to identify the appellant who was known to him as macho. The appellant raised the issue of identification particularly because immediately PW1 reported to his friend **Geoffrey Aukot Loturia** with whom they were having a good time at the Green Leaf Bar, the said Geoffrey said he had seen the appellant who was known as macho. We are concerned about the correctness of this evidence because the description that was noted in the OB was not produced in court as exhibit. Moreover, this person called **Geoffrey Aukot** was not called as a witness.

10. This is compounded by the fact that no identification parade was held to enable the investigating officer test the correctness of PW1's report that he had identified the appellant during the attack so as to rule out the possibility of the fact that the appellant was merely suspected. We are alive to the fact that the evidence of identification was taken together with the evidence of PW2 and PW3 who confirmed that they purchased the mobile phone from the appellant. The appellant has challenged this evidence on the grounds that there was no written agreement that was produced to link him with the sale of the mobile telephone to PW3. The only link between the appellant and the offence was the fact that he led PW5 to the recovery of the mobile telephone.

11. To our minds, the appellant should have been charged with the offence of handling stolen goods which was not the case. There is sufficient evidence by which the appellant should have been convicted of the alternative charge of handling stolen property. Since the appellant was not charged with the offence of handling and we entertain doubts in our minds as to the accuracy of the identification, we are of the firm view that the conviction of the offence of robbery is not safe from possible errors. Accordingly, we allow this appeal, quash the conviction and set aside the death sentence. Unless the appellant is otherwise lawfully held, he should be set at liberty forthwith.

Judgment read and signed this 8th day of April 2011.

M. KOOME.

JUDGE.

F. AZANGALALA.

JUDGE.