



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: F. AZANGALALA & J.R. KARANJA JJ.

HC. CRIMINAL APPEAL NO. 22 OF 2008

BETWEEN

EDWARD CHESEREK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

[Being an appeal from the Judgment of the Senior Resident Magistrate – G.A. Mmasi, dated 19th May, 2008

at Eldoret Chief Magistrate's Court in CRC. No. 8669 of 2007]

RULING

Edward Cheserek, the appellant, was charged in Eldoret Chief Magistrate's Court, with six (6) counts of robbery with violence contrary to section 296 (2) of the Penal Code. At the end of a full trial, he was found guilty on counts 1, 4, and 6 and sentenced to death. The appellant has appealed to this court against both conviction and sentence.

The particulars of the counts upon which the appellant was convicted were that on the night of 7th and 8th April, 2007, at Chesoi Trading Centre, in Marakwet District of the Rift Valley Province, the appellant

jointly with others not before the court, while armed with a gun, robbed **Richard Kipkech** of Kshs 4,000/=, one radio cassette – make Visia, valued at Kshs 8,000/= and five bottles of Tusker beer valued at Kshs 300/= all valued at Kshs 12,300/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Richard Kipkech**. The fourth count carried the following particulars; That on the same date and place, while similarly armed, the appellant jointly with others not before the court, robbed **William Kanda** of one National Identity Card, one Voter’s Card and one KCB Bank plate and at or immediately before or immediately after the time of such robbery, used actual violence to the said **William Kanda**. In count six, it was alleged that on the same date and place, while so armed, the appellant jointly with others not before the court, robbed **Henry Tanui** of one mobile phone – make Nokia 1110, valued at Kshs 4,000/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said **Henry Tanui**.

In his grounds of appeal, the appellant has challenged the trial court’s findings on identification, the failure to call essential witnesses and inadequacy of and conflict in evidence.

On 19th May, 2011, the appellant lodged a Notice of Motion under section 358(1) of the Criminal Procedure Code seeking one order of the court namely, that he be allowed to adduce additional evidence viz: the Occurrence Book (O.B.). The application is supported by an affidavit sworn by the appellant. It is deponed in the affidavit, *inter alia*, that the relevant O.B. sought to be produced is that of 7th April, 2007.

In his oral submissions before us, the appellant argued that the additional evidence was applied for at the trial but was never produced. He contended that the said O.B., if produced, will show that the complainant did not mention him in his first report of the robbery.

Mr. Oluoch, the learned Senior Deputy prosecution Counsel, opposed the application. In his view, the application was incompetent as the appellant had not demonstrated that the proposed additional evidence could not be obtained at the time of the trial without due diligence. According to counsel, the said O.B. was always available but was never applied for.

We have considered the application, the supporting affidavit and submissions made before us. We have also given due consideration to the record of the trial court. Having done so, we take the following view of the matter. The record shows that the prosecution called a total of four (4) witnesses who were all extensively cross-examined by the appellant. At no time did the appellant put to any of the witnesses the issue of the O.B. When he testified in his defence, he did not apply to have the O.B. produced. Indeed, he never mentioned it at all. It is only as he concluded his testimony, which was unsworn, that he stated **“P.W. 1 did not report to police after the alleged robbery.”** He could have gone further and applied that the relevant O.B. be produced. He did not. He infact told the trial court that he had no witnesses to call.

The appellant now alleges that he applied for the said O.B but the same was not produced. There is nowhere in the record which shows that the appellant made such an application. The record does not also suggest that the appellant was, at the trial, not given an opportunity to rely on the O.B. The principles upon which an appellate court, in a criminal case, may exercise its discretion whether to allow additional evidence to be adduced were crystallized in the case of **Elgood -Vs- Regina (1968) EA 274**. They are as follows:-

- (i) **The evidence which is sought to be called must be evidence which was not available at the trial,**
- (ii) **It must be relevant,**
- (iii) **It must be credible,**

(iv) The court will consider the evidence together with the evidence on record to determine whether it would create reasonable doubt,

(v) It is only in very exceptional cases that the evidence will be permitted.

In our view the appellant has not satisfied the above conditions in this case. The occurrence book sought to be called was available at the time the appellant was tried. Yet he made no application for it to be produced then. There are in any event no exceptional or special circumstances demonstrated by the appellant. We appreciate that the appellant was unrepresented at the trial as he is at this appeal. But this court applies the law on the basis that every person is equal before the law and has the right to equal protection and benefit of the law. There is no basis to treat the appellant differently. In the premises, we find the appellant's motion on notice without merit. Accordingly, it is dismissed.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JUNE, 2011.

F. AZANGALALA

JUDGE

J. R. KARANJA

JUDGE

Read in the presence of:-

F. AZANGALALA

JUDGE