**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 98 OF 2018**

**WESLEY KIPRONO SIELE.....ACCUSED**

**VERSUS**

**REPUBLIC..….....PROSECUTOR**

***(An appeal from conviction and sentence in Kapsabet SPMCCR NO. 2503 of 2016 delivered on 20th October, 2018 by D. A. ALEGO (Senior Principal Magistrate)***

**JUDGMENT**

**1.** The appellant **(WESLEY KIPRONO** Alias **(CHERUNYI)** was convicted on a charge of robbery with violence Contrary to Section **296 (2)** of the Penal Code and sentenced to death. The particulars being that on 15th July 2016 at about 2230 hours at **KABENYURIA** village in **TINDERET** sub-County within NANDI County, jointly with another not before court, robbed **SIMEON KIMUTAI KOSGEI** of cash Kshs.8000/-, a pair of shoes worth Ksh.150/-, a Techno mobile phone worth Kshs.2500/- and a National Identify Card, - all to the total value of Ksh.12,050/-. He denied the charge.

**2.** Simeon Kimutai Kosgei (PW1) had closed the bar while he worked with his wife, at about 10.30pm, and had begun walking with his wife **JAQUELINE CHEPKEMEI,** when they met accused in the company, of a friend and they started beating the couple.

The accused who has known to PW1 punched the latter on the face and body, resulting in PW1 falling down. He then took away PW1's black shoes, phone and cash Kshs.8000/- which was in his pocket. The money was the sales proceeds from the bar for that day. He was able to see and identify the appellant as there was a bright moon.

He stated:

> **"…I knew them prior to this day. They live in the neighbourhood. The moon was high up. …..positively identified him on that day."**

**3.** PW2 **(JAQUELINE)** confirmed that she was in the company of her husband PW1, having closed their bar at 10:30pm, and were walking homewards when they met the appellant. She had never known him before but according to her, the appellant went into the bar just before they closed and bought a bottle of Guinness which he drank. As they were walking home, the appellant, in the company of another confronted them, grabbed PW1, and took away Kshs.8000/-, phone and shoes, plus PW1's student identity card and National identity card after beating him up.

On cross examination she stated:

> ***"I saw you because I had a torch from my phone…"***

**4.** PW1 attended hospital for his injuries and **JAVULAS KOECH** (a clinical officer at Nandi hills hospital) confirmed that on examination he noted that he complainant had a fracture of the 2nd incisor tooth which was also tender. The degree of injury was assessed as grievous harm.

**5. PC RICHARD OWUOR** received a report from the complainant about the incident and he commenced investigations, eventually leading to the appellant's arrest after the event. The appellant in his evidence said he knew nothing about the case. He only learnt from his brother Robert Kipkeino, that police were looking for him, so he was arrested and was eventually charged.

**6.** The trial magistrate upon considering the evidence held as follows while analyzing the key ingredients of the offence and found that;

**a) The attack was executed by more than one person**

**b) and the appellant was positively identified by the victim, infact for PW2 the identification was by recognition she knew the appellant even before,**

**c) They lost some property and**

**d) PW1 lost a tooth during the attack.**

The trial court found that PW1 was truthful.

**7.** The appellant's defence was considered, and rejected as sham.

**8.** The appellant contests these findings on amended ground that

a) The conditions for identification were not favourable,

b) No exhibits were recovered linking the appellant to case,

c) There are discrepancies in the value of the property,

d) Circumstances leading to his arrest were not clear and there was dock identification,

e) In light of the S.C decision in **Muruatetu & i V R.** The death sentence was illegal,

f) Court did not consider alibi defense.

**9.** In arguing his appeal the appellant filed written submissions which his counsel Mr. Rotich relied on. It is submitted that the value of the stolen property was so low as to make it unfair to met a death penalty and warrants this court's interference. The death sentence is described as violating his life under the constitution. This court is urged to interfere with the death sentence.

**10.** Counsel doubted the opportunity available for identification saying at one time the evidence was about a full moon which enabled PW1 to see yet pw2 claimed that she was using the light from her phone, so if there was a bright moon why would it be necessary to use a torch. It was also contended that the nature of injury PW1 was exaggerated.

It was also contended that the nature of injury PW1 was suspect.

**11.** Ms Oduor on behalf of the State opposed the appeal saying

a) That discrepancies on value of the mobile phone was insignificant and not material enough to demolish the prosecution's case. It was her submission that the evidence of prosecution witnesses clearly pointed to the appellant and was inconsistent with his innocence.

b) On the issue of identification, counsel for the State argues that this was proved beyond reasonable doubt as PW2 had earlier said the appellant was inside her pub when he bought a bottle of beer, and a few minutes after closing the bar, she met him and saw him with the aid of light from her mobile phone.

**12.** Further, that PW1 also saw him and even remembered appellant was daring him to take him wherever he wanted, and that the complainant recognized his voice and face.

**13.** As regards the P3 form, it is submitted that the same was filed on 16.07.2016 after the date of the attack and confirmed that the victim had sustained injuries.

**14.** Counsel urged court to find that the alibi defence did not dislodge the evidence tendered by prosecution which she described as water-tight.

**15. Value of Property:-** Whereas the charge sheet gives the total value of the property stole as Kshs.12,050/- the record refers to cash Kshs.8000/- and counsel draws from the decision of **SIKILANI V R [2004]** to argue that the court in that case held that where the evidence is at variance with the charge sheet then the charge cannot sustain. With the greatest of respect, that is not the correct position here the charge sheet gave a breakdown of the property and mentioned cash the witness (PW1) had. There is no contradiction or variance whatsoever, and this is saying splitting hairs. As regards identification – whereasPW1 claimed there was a bright moon which enabled him to see and identify his attacker, PW2 claimed she used light from her phone to illuminate the attacker (who she had never seen before that night when she saw him in the bar). Like the appellant's counsel says, if indeed the moon was so bright as to enable easy identification, then why did PW2 find it necessary to use a torch.

**16.** Indeed on the issue of identification, the presence and nature of the light and the light's intensity; are critical.

**17.** PW1 refereed to a bright moon without describing the size of the moon, and its intensity, or even the time he had the attackers under his observation, bearing in mind that both stated the attackers emerged from the side of the road and immediately began beating PW1. Was the opportunity for identification conclusive? In the case of **R V TURNBULL AND OTHERS (1976) 3 AU ER 54, Lord Widgery C J** stated;

> ***"First, wherever the case against the accused depends wholly on substantially on the corrections of one or more identification of the accused which the defence alleges to be mistaken…. The need for caution before convicting the accused in reliance to the corrections of the identification….the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.***
>
> ***Secondly, the judge should….examine closely the circumstances in which the identification by each witness care to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in way, as for example by passing traffic or a press of people. Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to police."***

**18.** PW1 described the appellant as a neighbour at home, yet his wife had never seen the appellant before the night he purportedly went into the bar.

It is significant that neither PW1 nor PW2 described the appellant's manner of dress, or what stood out for PW2 regarding the physical appearance of the appellant so that when she next saw him under cover of darkness except with the aid of light from her phone.

She recognized him. The size and intensity of that phone light was not disclosed. She did not say what part the attacker's body she beamed her light on to recognize him as the person who had been in the bar.

The other issues that stand out are;

> **a) nothing stolen form PW1 was recovered from the appellant,**
>
> **b) The appellant was not arrested on the spot.**

Infact there is no evidence as to how he was arrested, or who pointed him out to police to arrest him.

I find that the opportunity for identification was not safe at all.

Consequently the conviction is quashed and the sentence as is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at ELDORET this 5$^{TH}$ day of JULY 2019.

**H. A. OMONDI**

**JUDGE**