



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 98 OF 2013**

**VICTOR INYANGU VODONGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment, conviction and sentence of Hon. J.K. Ng'ang'ar – SPM in the Senior Principal Magistrate's Court at Hamisi in Criminal Case No. 215 of 2012, Republic vs Victor Inyangi Vodongo)*

**JUDGMENT**

1. The appellant has appealed against his conviction and sentence of death in respect of the offence of robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya.
2. The state has supported both the conviction and sentence.
3. The appellant has raised seven (7) grounds in his petition of appeal to this court.
4. In ground 1, the appellant has faulted the trial court both in law and fact in failing to find that the complainant did not identify her assailants. In this regard, the evidence of Rosaline Shuinga (PW1) was that they were going to a funeral, when they met the appellant and his accomplice. There was moonlight during that night. PW1 testified that it is the appellant who took his cellphone and a loaf of bread in the course of attacking them. She further testified that it is the appellant who cut her in the head with a panga. The appellant and his accomplice also took a cell phone of Christine Khavere (PW3). PW1 knew the appellant before this incident.
5. The evidence of PW1 is supported by that of PW3. PW3 recognized the appellant as her former boyfriend.
6. In the light of the foregoing identification evidence of PW1 and PW3, I find that the appellant was positively identified as one of the two robbers during that night. I also find that the appellant's defence to be a bare denial and was rightly rejected.
7. There is further evidence of Josephine Amunga (PW4). PW4 was the clinical officer who examined PW1. Upon examination, she found that PW1 had a cut wound in her head, which was caused by a sharp object.
8. In ground 2, the appellant has faulted the trial court for failing to find that no offensive weapon was recovered from him. He has also faulted the trial court in failing to find that none of the properties of the complainant were recovered from him. The evidence of PW1 is that after the appellant and his accomplice had robbed them, they escaped. They had opportunity to dispose of the stolen items and that explains why he was not found in possession of the stolen items. I find no merit in this ground and I hereby dismiss it.
9. In ground 3, the appellant has faulted the trial court in failing to find that No. 64394 PC Ali Kisizi, who was the investigating officer was the same officer who re-arrested the appellant from members of the public. There is nothing wrong in the arresting officer being the investigating officer in the same case. I therefore find no merit in this ground of appeal and I therefore dismiss it for lacking in merit.
10. In ground 4, the appellant has faulted the trial court for convicting him in the absence of an essential witness namely an unnamed woman, who was found in possession of the cell phone. I find that although it was desirable to call this woman, lack of her evidence does not prejudice the evidence on record. I therefore dismiss it for lacking in merit.
11. In ground 5, the appellant has faulted the trial court for allowing the prosecution to be conducted by a police officer, whose rank was below that of an inspector of police. The record of the proceedings shows that the prosecutor was conducted by Chief Inspector Ondiege. This ground lacks merit and is hereby dismissed.
12. This is a first appeal. As a first appeal court, I am required to independently re-assess the evidence and make my findings. I have done

so. As a result, I find that the appellant was convicted on sound evidence. His appeal against conviction fails and is hereby dismissed.

13. In ground 6, the appellant has faulted the trial court in failing to comply with section 329 of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, I find that there is merit in this ground of appeal. The trial court was bound to apply the law as pronounced by the Supreme Court in **Francis Kariokor Muruatetu & Another (2017) eKLR**, which allows the trial court discretion to impose an appropriate sentence. In the circumstances of this case, I find the injuries sustained by PW1 were not life threatening. I therefore find that the imposition of a death sentence was not warranted, which I hereby quash. In its place I hereby impose a sentence of ten (10) years imprisonment.

14. It therefore follows that the appellant's appeal fails and is hereby dismissed except that he will now have to serve a sentence of ten (10) years imprisonment.

**Judgment signed, dated and delivered in open court at Kakamega this 6<sup>th</sup> day of September, 2019.**

In the presence of the appellant and Ms. Rotich for the respondent.

**J.M. BWONWONG'A**

**JUDGE**