



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

(CORAM: MAJANJA J.)

CRIMINAL APPEAL NO. 183 OF 2014

BETWEEN

KEVIN LUMBASIO SHAMALLA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

of Hon. P.Achieng, PM delivered on 18th December, 2014

at the Kakamega Chief Magistrate's Court in

CriminalCase No. 2321 of 2012)

JUDGMENT

1. The appellant, **KEVIN LUMBASIO SHAMALLA**, was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 o the Laws of Kenya)**. The particulars were that on 29th October 2013 at Shiswa Sub-location, Murhanda Location within Kakamega County, while armed with a dangerous weapon namely a panga, he robbed Gayle Lucia of her mobile phone make alcatel valued at Kshs. 1,200/= and immediately after the time of such robbery struck the said Gayle Lucia. The appellant was convicted and sentenced to death and has now lodged this appeal.

2. The thrust of the appellant's appeal is that the prosecution did not prove the case beyond reasonable doubt. He contends that there was no evidence of identification and that the prosecution failed to establish the ownership of the phone connecting him to the robbery. The State through Mr. Ngetich, supported the conviction and sentence.

3. As this is a first appeal, I am required to evaluate the entire evidence and reach an independent conclusion as to whether I should uphold the conviction. I must bear in mind that I neither heard or saw the witnesses testify.

4. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see **Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, Oluoch v Republic [1985] KLR 549** and **Ganzi & 2 Others v Republic [2005] 1 KLR 52**).

5. The prosecution case was that on the night of 29th October 2013, Gayle Lucia (PW 1) was asleep in her grandmother's, Fridah Andeka Muhehe (PW2), house. As she was sleeping, she heard PW 2 screaming, she lit the torch of her Alcatel Mobile phone and proceeded to her grandmother's bedroom. As she was at the door, she was able to identify the appellant who was a neighbour or whom she knew as **Lukume**. The appellant hit her with a panga and tried to push her but she held her while screaming. In the ensuing struggle, the appellant took her phone and ran away. She recalled that the appellant's face was not covered and he was wearing a marvin.

6. On her part, PW 2 recalled that as she was sleeping she heard some noise and when she went to check outside with the lantern, she saw a person with a panga and who then hit her. She recognized him as the appellant. She lost consciousness and when she recovered she found

PW 1 who told her that the appellant had hit her and had stolen her phone.

7. Both PW 1 and PW 2 were taken to Kakamega Provincial General Hospital for treatment. They were both issued with P3 forms which were produced by Dr Winston Ongalo (PW 4) confirmed that he examined both of them and noted that they were both injured. PW 1 had a cut wound on the head and bruises on her back and some scratches on her fingers. He assessed her injuries as maim. PW 2 had a cut on the left side of the head, a cut on the armpit area and leg. He assessed the injuries as grievous harm. In both cases, he opined that the injuries were caused by a sharp object.

8. Saulo Masinsa Muwanga (PW 3) recalled that as a member of community policing he received information that the appellant had assaulted PW 1 and PW2. He called PW 1 to confirm the information and she told him the assailant was the appellant. He started looking for the appellant and on 3rd November 2013, he found the appellant fishing. When he arrested him, he had an alcatel phone, a panga and marvin. He was taken to Kakamega Police Station. PC Abdallah Shariff (PW 5), the Investigating Officer confirmed that the incident of robbery was reported and after carrying out investigations he decided to charge the appellant. He produced the alcatel phone and the panga recovered by PW 4 as exhibits.

9. In his sworn defence, the appellant denied the offence but gave an account of his arrest while he was fishing on 3rd November 2013.

10. It is clear from the facts I have outlined that the offence of robbery with violence was committed. PW 2's phone was stolen and in the process PW 1 and PW 2 were subjected to violence using a sharp weapon. Their injuries were confirmed by the testimony of PW 3. The main issue in this case is whether the appellant was identified as the assailant.

11. It is true that the incident took place at night but PW 1 had an alcatel phone torch with which she was able to see the appellant. They were in close proximity and a struggle ensued between them before he took off. This was not a case of identification of a stranger but recognition as the appellant was well known to her. Further PW 2 also recognized the appellant as she had a lantern and they were in close proximity. I am satisfied that the obtaining circumstances were favourable for positive identification.

12. In addition, the appellant was found with PW 1's phone. The appellant argued that the prosecution did not prove that the phone belonged to her as it failed to produce receipts to show the IMEI number or the safaricom number or produce receipts showing that it was purchased by PW 1. In my view, the proof depends on the circumstances of the case and indeed a witness may establish ownership by familiarity and use of the object. PW 1 stated that her phone was black in colour and that she had put red markings on the keypad which she identified. PW 2 also identified the phone as PW 1's phone due to the red markings. I hold this was sufficient evidence of ownership. The appellant did not lay claim to the phone nor give an account of his possession of the phone recently stolen from PW 1. His defence, being a mere denial, was properly dismissed.

13. Based on the evidence of recognition and on the doctrine of recent possession of PW 1's stolen phone, the totality of the evidence is that the appellant is the one who robbed PW 1 of her phone and inflicted violence on them. The conviction is therefore affirmed.

14. In light of the Supreme Court decision in *Francis Karioko Muruateru & Another v Republic* SCK Pet. No. 15 OF 2015 [2017]eKLR, the mandatory death sentence for the offence of murder was declared unconstitutional. In the case of *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR, the Court of Appeal applied the *Muruatetu* decision mutatis mutandis to the provisions of section 296(2) of the *Penal Code*. I therefore quash the sentence of death imposed on the appellant. I now invite the appellant to make his mitigation before imposing the final sentence.

DATED and DELIVERED at KAKAMEGA this 4th day of April 2018.

D.S. MAJANJA

JUDGE

RULING ON SENTENCE

The robbery in this case was aggravated by the use of violence. The appellant assaulted two people in their home with a weapon. In assessing the sentence, I have considered that the appellant was a first offence and had no criminal record. I have taken into account the fact that the maximum sentence for simple robbery under section 296(1) of the *Penal Code* is 14 years' imprisonment. I therefore consider 15 years' imprisonment appropriate in the circumstances. I therefore sentence the appellant to 15 years' imprisonment.

Right of Appeal explained.

DATED and DELIVERED at KAKAMEGA this 4th day of April 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Senior Assistant Director, instructed by the Office of the Director of Public Prosecutions for the respondent.