REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 47 OF 2016

JOSHUA KIPROP CHUMBA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable G. Adhiambo in Kapsabet Principal Magistrate's court Criminal Case No. 2533 of 2015 dated 16th March, 2016)

JUDGMENT

Joshua Kiprop Chumba the appellant herein, was charged in the lower court with one offence of robbery with violence, contrary to *Section 295* as read with *Section 296 (2)* of the *Penal Code.*

The particulars of the offence are that on the 22nd day of August 2015 at about 10.00 p.m, Kapsabet Township location, within Nandi County, the appellant jointly with another not before court, while armed with dangerous or offensive weapon, namely knife, robbed *Nicholas Mutai* of one mobile phone make X-B0 V3t IMEI -355554613394383, ¾ kg of meat and Kshs.200/- all totaling to Kshs. 6,360 and at or immediately before of immediately after the time of such robbery used actual violence to the said *Nicholas Mutai.*

To the foregoing main count, there is a preferred alternative count of handling stolen property, contrary to *Section 322 (1) (2)* of the *Penal Code.*

The particulars of this offence being that on the 27th day of August 2015 at about 1800 hours at Kapsabet township, within Nandi County, the appellant otherwise than in the cause of stealing, dishonestly received or retained one mobile phone make X-BO V3t IMEI 355554613394383, knowing or having reason to believe it to be stolen property.

The prosecution case is that the complainant in this case, who gave evidence as PW-1, was on 22/8/2015 working at Naivas and living at Kokwet. At about 10.00 p.m he left his place of work and walked towards his house. He had with him 3/4kg of meat, and a cell phone make X-BO V3t IMEI – 355554613394383. When he got to Kokwet, next to Redeemed church, he was suddenly stopped by two men who were on a motor cycle. One was the rider and the other a passenger. There were security lights at Redeemed church and the motor cycle had it headlamp on. There was enough light that enabled him to see. The passenger who is the appellant in this case, asked the complainant:-

> **"young man, where are you coming from?"**

The complainant told him that he was going to the house from his place of work. The appellant held his hand and told the rider:-

"Afande, let us arrest this one". The appellant immediately slapped him and held his hands on the back tightly. The appellant told the rider to alight of which he did and held the complainant hands. The appellant moved infront and slipped his hand into the right trouser pocket of the complainant. From therein he got the cell phone the complainant had. The complainant immediately realized the two were not police officers but thugs. He grappled with the appellant and gave the rider a rear kick. The appellant held his neck and tried to strangle him. He as well instructed the rider to draw out the knife. The rider drew out the knife and tried to stab the complainant. Fortunately, the knife just slit open the rear right pocket of his trouser. The complainant sensed danger and pleaded with them, telling them;

> **"If you are Kalenjins please take my phone and spare my life".**

They pushed him to the ditch, jumped into the motor cycle and left. The complainant checked around for his meat but in vain. He went home.

The following morning he reported for work and told his manager about the incident. The manager advised him to report the incident to the

police. He reported it at Kapsabet police station. Four days thereafter he spotted the appellant outside Emgwen pool place. He had in hand the complainant's phone. The complainant identified the phone by a scratch on its side, occasioned by a previous fall.

The complainant called PW3, a police officer and informed him about the finding. PW3 went to Naivas and met the complainant. He was led to Emgwen Hotel where they found the appellant with the said phone trying to sell it. He was arrested and questioned about it. He said it was given to him by another person whose name he did not disclose. He was taken to Kapsabet Police station. The complainant produced the receipt given when he purchased it. Both were handed at the police station as exhibits.

PW-4 investigated the case. The complainant was issued with a P-3 form of which was filled on 29th August 2015 by *Josephat Embeko*, a clinical officer at Kapsabet County Referral Hospital (PW-2). He noted that he had a tender right shoulder and tender right gluteal muscles. The injury could have been caused by a blunt object. He classified the degree of injury as harm.

At the police station, Officer in charge of crime, Inspector *Olao* (PW-5) conducted an identification parade. The appellant was picked in the parade by the complainant. He was then charged with the offences.

The appellant in his defence said that he was working at Emgwen pool joint. On 27th August, 2015 he reported on duty at the place. At about 5.00 p.m a customer went and requested to charge his phone at the place. He allowed him. The said customer played pool. At about 6.00 p.m the Aps got to the place. Customers escaped thinking the police were there to arrest idlers. The police asked for the pool attendant and the appellant said he was the one. They said someone had told them he had seen a phone being charged. He told them a customer had requested to charge it. One officer removed the phone and went outside with it. One person had remained outside and said the phone was his. One of the Aps called *Kirui*, called the appellant outside and requested that he accompanies them to the police station to record a statement and to help tracing the customer who had the phone. At the police station he was locked in cells. He was later charged.

The trial court evaluated the evidence and found the offence in the main count proved by the prosecution beyond reasonable doubt. The appellant was convicted of it and sentenced to serve life imprisonment.

The appellant, dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:

1. There was no reliable evidence in support of the charge

2. The defence was unfairly disregarded.

3. The investigations were shoddy.

4. There was no direct and nor circumstantial evidence in support of the charge.

5. Mitigation was disregarded and the sentence imposed is severe.

I have considered the charge, the evidence adduced by both sides in the lower court, the judgement, sentence, grounds of appeal and submissions by both sides.

The prosecution case had only one eye witness to the alleged robbery with violence incident, who is the complainant in this case. The incident took part at about 10.00 p.m which is at night. The complainant said he was able to see as the Redeemed church security lights were on. The incident took place at a distance of about 7 metres from the said church. The motorbike headlamp of which the assailants had was also on. However, it is noticeable that the complainant had not known the assailants before then. He saw them then for the very first time. He did not describe them to the police when he made his first report to an extent where one can say he would have been able to identify them. He as well did not describe them in his statement to the police or rather if he did so that did not come out during the trial. After four days is when he allegedly spotted the appellant at Emgwen pool station while carrying the phone which had been robbed from him. It would appear that it is not the appellant he identified or recognized, but his phone. He is the one who led to arrest of the appellant and recovery of the said phone. Given the foregoing circumstances there was no need of an identification parade. The complainant led to arrest of the appellant and together with the police took him to the police station. What then was the identification parade for? It served no purpose. The trial court consequently should not have weighed it positively in the judgement.

What is of paramount consideration in this matter is whether the doctrine of recent possession applies in this case. The evidence is explicit as day light that the incident or robbery in which the complainant lost his phone took place on 22nd day of August 2015. The appellant was seen with the said phone and arrested on 27th day of August 2015. This was only 5 days after the said robbery incident. It is not in doubt that the robbery with violence took place. The assailants were two, they were armed with a knife, they attacked and injured the complainant and took his valuables of which are an X-BO V3t mobile phone, IMEi No. 355554613394383 and ¾ kg of meat. The complainant was able to identify his phone through a scratch on its side and the said IMEI number of which is indicated on the purchase receipt he presented to the police, and of which was produced as an exhibit. There is therefore no doubt that the phone the appellant had belongs to the complainant and was taken from him during the robbery. Five days considering how fast a mobile phone can change hands is recent. A second hand mobile phone does not change hands very fast as reasonable Kenyans (the law have it that all Kenyans are reasonable) are wary of purchasing such without evidence of how it had been obtained or possessed by the seller, for fear that it could have been acquired illegally. The appellant gave no reasonable explanation on how he got into possession of the said phone. His allegation that it was for a customer who was charging it at the place was an afterthought. PW3 arrested him while trying to sell it and he said then that it was given to him by another person whom he did not disclose. He never adequately challenged the evidence during cross examination. He also did not advance his defence during cross examination. He did not disclose the customer who had the phone. There is also no evidence that the phone was recovered with its charger or had a charger. The defence is just a crafted lie. It was properly dismissed by the trial magistrate. As I had earlier on expressed, the doctrine of recent possession applies in this case. The court is called upon, given the circumstances, to deduce that the appellant was one

of the two assailants who took part in the robbery of 22nd day of August against the complainant. Though the trial court did not convict him mainly on this consideration, the conviction decision was and is correct. At this point I declare the appeal against conviction unmerited and is hereby dismissed.

On sentence, the appellant is a first offender. He said he is a family man and the family depends on him. He prayed for a non-custodial sentence.

Considering the circumstances of the offence which are that the items robbed are of minimal value of 6,360/- according to the charge sheet, the injuries inflicted on the complainant were not grievous and that the phone was recovered; an abit more lenient sentence would have been favourable. I hereby therefore vary the sentence of life imprisonment for 20 years imprisonment. This court so orders.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 6th Day of November**,** 2018

In the presence of:-

Appellant

Ms Mumu for state

Mr. Mwelem- Court Assistant