



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 40 OF 2018**

**MUSA YEGON CHOKOR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against the conviction and sentence by Hon. S.O. Temu (PM) in Kapsabet Principal Magistrates Court Criminal Case No. 267 of 2013 on 22<sup>nd</sup> October, 2013)*

**JUDGEMENT**

1. The appellant was convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. He appeals against the same on grounds that:

- a) He was convicted on inconsistent and uncorroborated single witness evidence.***
- b) That the manner in which the exhibit was recovered was dubious.***
- c) That a key witness, Pastor Kepha Machuka was not called.***
- d) That no identification parade was conducted to identify him.***

2. This is a first appeal and this court has warned itself of its duties to reconsider and re-evaluate the evidence afresh with a view to arriving at its own independent conclusion bearing in mind that it did not have the benefit of seeing the witnesses' demeanor.

3. Peter Losire (PW1) recounted that he was with Pastor Kepha Machuka at his shop in Cheseremion Centre at around 7.00 pm when he saw torchlight from a distance, the person approached and stated that he wanted to buy 2kgs flour for KShs. 100/-. He opened the door and the appellant whom he had known before as a former assistant chief's son ordered Pastor Kepha to enter the shop while holding a gun. He then ordered him to give him money which he did to the tune of KShs. 1,650/- and phones and he took away three phones which he was charging for customers and one of his. He shot at the roof and asked PW1 whom he was with and he informed him that he was with Pastor Kepha. PW1 then asked the appellant to leave them alone and he went away. PW1 made a report at Nginyany police station and recorded a statement. He was later informed that stolen mobile phones had been recovered. On 10<sup>th</sup> May, 2013 he went to the police station and was given his Techno mobile phone which he had identified as belonging to his customers. He stated that the phone was found to have the appellant's photographs taken while with guns. He stated that the appellant was at the material time wearing a cap backwards as it appeared on one of the photos. He stated that Pastor Kepha receives threats that he would be killed if he testified in the case.

4. Michael Kiplagat (PW2) stated that he had taken his phone to PW1's shop for charging on the material day and was to collect the same the next day. At around 7.45 pm he heard gunshots but did not know where the same were coming from. At about 8.00 pm he was informed that PW1 had been attacked. He went to PW1's shop and saw a bullet hole. He received word from PW1 on 9/5/2013 that his phone Techno had been recovered. He went to the police station and identified the same. That the phone had his photos and he also found the appellant's photos.

5. Inspector Allan Theuri (PW3) stated that he was at Nginyang Police station when PW1 made a report. He assigned one officer to record his statement then mounted a search. He stated that it was established that a robbery had taken place and a gun fired since there was a hole on the roof. That on 8<sup>th</sup> May, 2013 at about 5.00 pm he remanded the appellant after re-arresting him from a good Samaritan who informed him that one person had been shot at Cheseremion area. He stated that he found the appellant lying down and bleeding profusely and that as the Appellant was being helped to stand, a Techno mobile phone dropped from his pocket. That an officer looked at the phone and found the appellant's photographs with him holding an AK 47 rifle. He was taken to Nginyang health centre for treatment and later to the police station. The said photographs were downloaded and taken to scene of crime officer for certification. He then sought PW1 who identified and produced the receipts. He stated that the appellant was well known to PW1 and he positively identified him at the police station.

6. The appellant was put on his defence and he gave evidence as follows. That he was on the material day at Kwicenalisi home which is far from Cheseromion. That on 8<sup>th</sup> May, 2013, he went to Cheseromion with his brother with whom he asked to go and collect medicine for cows. That later while grazing he heard gun shots and escaped but after a while he heard gunshots and fell down and some people went to where he was. That PW1's son came from the forest armed with a gun. That he had differed with him over a girl but did not expect him to shoot him. That PW1's son had on the material day emerged from the forest with 5 other people and had an AK 47 and a mobile phone. That PW1's son intended to kill him but one person stopped him. That he talked to some people on phone and thereafter at around 3.00 pm a police vehicle came and he was arrested. That PW1's son gave the police money and the police gave him a gun and he informed the police that the mobile phone be used as an exhibit.

7. I have given due consideration to the appeal herein and the submissions tendered. The issues that fall for this court's determination are as follows:

**a) Whether or not the appellant was convicted on inconsistent and uncorroborated single witness evidence.**

**b) Whether or not the manner in which the exhibit was recovered was dubious.**

**c) The effect of failure to call a key witness, Pastor Kepha Machuka.**

**d) The effect of failure to conduct an identification parade.**

8. For a conviction for the offence of robbery with violence to stand, the prosecution has to prove beyond reasonable doubt that the offender was armed with any dangerous or offensive weapon or instrument, that the offender was in company with one or more other person or persons or that at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person. It is further noteworthy that proof of any of one of the ingredients suffices to base a conviction under section 296 (2) of the Penal Code.

9. It emerged from PW1's evidence that the appellant was a person well known to him. It further emerged from PW3's evidence as well. It is further worth noting the time frame within which the robbery took place. The appellant was said to have ordered PW1 to give him money and to give him mobile phones. PW1 in fact at some point told the appellant to pick some coins which had fallen. In my view the time spent therein was sufficient for positive identification of a person well known to a complainant. Further, the appellant was said to have a torch light which illuminated. In the circumstances, an inference is made that PW1 recognized the appellant having reported so to the police. See: **Maitanyi v. Republic [1986] KLR 198:**

***“The strange fact is that many witnesses do not properly identify another person even in broad daylight. It is at least essential to ascertain the nature of light available, what sort of light and its size and its position relative to the suspect ... to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into... There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his assailants, to those who came to the complainant's aid or to the police...”***

10. The phone alleged to have been retrieved from the appellant had photographs of the appellant holding an AK 47 rifle. The said phone which was stolen from the material day incident was positively identified by PW2. The appellant failed to explain away how his photographs found their way into PW3's phone. The appellant's evidence in this regard does not in any manner cast any doubt to the prosecution case. I therefore find that PW1's evidence was corroborated by PW2 and PW3 and the evidence was consistent and places the appellant at the scene of crime. Having so said, I find that the appellant's version of the story does not in any manner add up and his contention that the recovery of the exhibit, being the mobile phone was dubious does not hold water. Ground one and two therefore fails.

11. On the issue of key witness, it is noteworthy that the prosecution is not under obligation to call a particular number of witnesses. What matters is that the witnesses called give evidence sufficient to prove the prosecution case as was done in this case. In the circumstances therefore, the failure to call Pastor Kepha did not prejudice the appellant or weaken the prosecution case. That ground fails. On the last issue, it is to be noted that identification parade was unnecessary since this was a case of identification by recognition. That ground too fails. In the end, I find no merit in this appeal and is hereby dismissed. The trial court's conviction and sentenced are upheld.

Orders accordingly.

**D. K. KEMEI**

**JUDGE**

Delivered at Eldoret this 22<sup>nd</sup> day of November, 2018.

**STEPHEN GITHINJI**

**JUDGE**