



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 182 OF 2015

YUSUF HAMISI LEKISIMA APPELLANT

VERSUS

REPUBLICSTATE

*(Appeal from the Sentence of the Principal Magistrate's Court at Maralal Hon. C. N Ndegwa –
Principal Magistrate delivered on the 21st July, 2015 in CMCR Case No. 925 of 2014)*

JUDGEMENT

The appellant **YUSUF HAMISI LEKISIMA** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at Maralal Law Courts. The appellant was arraigned before the trial court on 31/12/2014 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that

*“On the 25th day of December, 2014 at about 8.00 am at Lporos village in Maralal town in Samburu Central Sub-County within Samburu County being armed with an offensive weapon namely a knife robbed **LIZZ NARUMO** one mobile phone make Nokia 107 valued at Ksh 2,500/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said **LIZZ NARUMO**.”*

The appellant pleaded ‘Not Guilty’ to the charge and his trial commenced on 22/10/2015. The prosecution led by **INSPECTOR MUGO** called a total of three (3) witnesses in support of their case.

The complainant **Lizz Narumo** told the court that on 25/12/2014 at 8.00am she was on her way to town. Near the ACK Church the accused accosted her. He was armed with a knife which he held to her stomach and demanded for the mobile phone. The complainant released to him her Nokia 107 mobile phone blue in colour and the appellant ran away.

Later on 29/12/2014 the complainant and **PW2 CONSOLATA NAKII** were on their way to Alamano. As they stood chatting with their pastor the appellant passed by. The complainant grabbed him and demanded back her phone. The appellant gave her phone he was holding and promised to return hers later.

The complainant later reported the matter to police and handed over the phone which the appellant had given her.

On 30/12/2014 the complainant spotted the appellant and took him to the chief's office. He was later handed over to the police. The complainant's mobile phone was later recovered and she was able to positively identify the same. The appellant was then taken to court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave an unsworn defence in which he denied having robbed the complainant. On 21/7/2015 the learned trial magistrate delivered his judgment. He convicted the appellant of the offence of Robbery with Violence and thereafter sentenced him to death. Being aggrieved the appellant filed this appeal.

The appellant who was not represented during the hearing of this appeal opted to rely entirely upon his written submissions which had been duly filed in court. **MS OUNDO** learned State Counsel opposed the appeal.

Given that this is a first appeal, this court is obliged to review the evidence afresh and draw its own conclusions on the same In **MWANGI Vs REPUBLIC [2004] 2 KLR** it was held

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts own decision on the evidence”

The key issues arising in this appeal are

- Identification
- Recovery of the exhibit

The complainant told the court that she was on her way to town when the incident occurred. It was 8.00am. Thus there was broad daylight and visibility was good. The complainant in her evidence at Page 2 line 15 stated

“I turned and checked who had grabbed me and saw that it was the accused person”

Therefore the complainant had a good look at the appellant. She further had more opportunity to see the accused well because the two conversed. The complainant requested the appellant to give her the sim card from her phone and he obliged.

It is clear that the incident took place several minutes giving the complainant an opportunity to see the appellant well.

The complainant was able to recognise the appellant two days later and grabbed him as he passed her and **PW2** in town. **PW2** corroborated the testimony of the complainant. **PW2** confirms that she was with the complainant chatting with their pastor when the appellant passed by. The complainant demanded back from the appellant the phone he had stolen from her. **PW2** positively identified the appellant in court.

The complainant and **PW2** remained unshaken under cross examination. They both state that the appellant handed to the complainant the mobile phone which he had and promised to return her mobile phone later. I am satisfied that the two witnesses were being truthful. I find that the complainant had ample time and opportunity to see the appellant well and she did positively identify him. Finally when the appellant failed to return her mobile phone the complainant took him to the chief's camp. On all occasions the complainant was seeing the appellant in broad daylight. Conditions favoured a positive identification.

Further evidence is led to the complainant's identification of the appellant by the circumstances leading to the recovery of her stolen mobile phone. **PW3 PC PAUL NJENGA** told the court that after his arrest the appellant communicated with one of his friends and caused the stolen phone to be brought to the police station. The said phone was produced in court as an exhibit **P.exb 1**. The complainant was able to

positively identify the said phone due to its make and colour and the fact that it had an aerial. **PW2** a friend to the complainant was also able to identify the phone **PW2** in her evidence at page 4 line 9 stated

“I knew Liz’s phone before it was stolen. It is a Nokia blue in colour with an aerial...”

I am mindful of the fact that this person who the appellant called to bring the phone to the police station was not called as a witness. However I do not find this omission to have been fatal to the prosecution case. The fact remains that it was the appellant who caused the stolen phone to be recovered. This means that he knew where the stolen phone was. The complainant positively identified it as the phone which appellant had stolen from her a few days earlier. The fact that the appellant knew the whereabouts of the stolen phone is further evidence that he had a hand in its theft.

The incident as described by the complainant amounted to a Robbery with Violence as envisaged by Section 296(2) of the Penal Code. The appellant was armed with an offensive weapon, a knife he used the same to threaten the complainant by placing it on her stomach thereby threatening to stab her if she did not comply.

I have considered the appellants defence and I do agree with the trial court that the same amounts to a mere denial.

On the basis of the evidence on record I am satisfied that the charge of Robbery with Violence was proved beyond reasonable doubt. The appellant’s conviction was sound and I do confirm the same. The death sentence being the mandatory sentence for this offence is also upheld. This appeal fails and is dismissed in its entirety.

Dated and delivered in Nakuru this 10th day of February, 2017.

Appellant in person

Mr. Chigiti for State

Maureen A. Odero

Judge