



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 70 OF 2013**

*(From the original Conviction and Sentence in the Criminal Case No. 533/2013*

*of the Principal Magistrate's Court at Kwale: E.K. Usui Macharia – PM)*

**FRANCIS MUSEE OMURWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant **FRANCIS MUSEE OMURWA** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at the Kwale Court. The appellant was first arraigned in court on 13<sup>th</sup> April, 2012 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(1) OF THE PENAL CODE**. The particulars of the charge were that

**“On the 10<sup>th</sup> day of April, 2012 at Diani Location in Kwale County while armed with dangerous weapons namely knife robbed PETER MWALIMU CHARO one mobile phone make Nokia 1616 valued at Kshs. 2,800/= and cash KShs. 400/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said PETER MWALIMU CHARO.”**

The appellant entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced on 27<sup>th</sup> July, 2014. The prosecution led by **CHIEF INSPECTOR MUIRURI** called a total of three (3) witnesses in support of its case.

**PW1 PETER MWALIMU CHARO** told the court that he works as a chef in a bakery in Ukunda. On 10<sup>th</sup> April, 2012 at 10.30 p.m. **PW1** was on duty when he heard a knock at the door. He opened to find appellant who was his colleague dressed in shades and a coat. **PW1** let him in. The appellant suddenly ordered **PW1** to lie down and produced a knife. **PW1** complied. The appellant began to pack bread in a bag and took cash 400/= from the cash box. He covered the head of **PW1** with a packet of flour and placed a jerrican on his back. **PW1** managed to pull the paper off his head. He caught hold of the appellant and shouted ‘*Thief*’. The appellant took off with the mobile phone and cash. **PW1** went to alert his employer **PW2 JOHN SHIVANGA MBENGI** about the theft. The matter was reported to police. The following day police arrested the appellant inside his house. The phone of **PW1** was recovered there.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto

his defence. He gave an unsworn defence in which he denied having robbed **PW1**. On 26<sup>th</sup> April, 2011 the learned trial magistrate delivered her judgment in which she convicted the appellant and thereafter sentenced him to death. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

Being a court of first appeal our obligation is to re-consider and re-evaluate the evidence adduced during the trial and to draw our own conclusions on the same. The appellant raises the question of identification as one of his grounds of appeal. **PW1** told the court that the appellant was well known to him as they worked together in the bakery. **PW1** states at page 4 line 27:

**“I knew accused very well as we were employed at the same time last year. I reported in January accused came later in the middle of the year. I have worked with him for 3 months that was on and off. I knew him well. I even worked at night with him. I had no grudge with him. I saw accused well as I was still working baking and the lights were sufficient to see him well.....”**

Here **PW1** explains that he knew the appellant very well as a co-worker and he was well able to identify him because the lights were still on in the bakery. There is reliance on evidence of recognition which was held by the Court of Appeal in the case of **ANJONONI & OTHERS VS. REPUBLIC [1980] KLR** to be

**“more satisfactory, more assuring and more reliable than identification of a stranger.”**

The witness is quite sure of whom he saw. It is true and we note (as did the learned trial magistrate) that this is identification by a single witness. In his defence the appellant claims that **PW1** has fabricated evidence against him due to the fact that he [**PW1**] owes the appellant Kshs. 9,000/=. However this issue was never raised by the appellant in cross-examination. He is only raising it during his defence. It is clearly an afterthought. We concur with the learned trial magistrate in her finding in her judgment at page J2 line 23 as follows:

**“I find that the circumstances favoured proper and accurate identification which was free from possible error. The attacker had also got close to the complainant as he tied his hands offering the complainant a further chance to see him well.”**

We too are satisfied that there has been a clear, positive and reliable identification of the appellant.

In addition to the evidence on identification there is evidence that the phone stolen from **PW1** during the incident was recovered in the house of the appellant. The witness positively identified his phone **Pexb1** in court. He did not as the trial court found produce verifying documents e.g. receipt, etc. but in our view this does not negate his evidence on identification. It is rare that purchasers retain receipts for their mobile phones. The witness had in his evidence in chief mentioned the theft of his mobile phone.

In perpetrating the robbery the appellant threatened **PW1** with a knife, tied a bag over his head and tied him with a rope. The elements of robbery with violence i.e. – being armed with a dangerous weapon and – use of physical force are both shown to have been present. The incident squarely falls within the ambit of a robbery with violence. As such we uphold the conviction of the appellant by the trial court and confirm the death penalty imposed on him. This appeal therefore fails in its entirety.

**Dated and Delivered in Mombasa this 13<sup>th</sup> day of November, 2014.**

**M. ODERO**

**M. MUYA**

**JUDGE**

**JUDGE**