



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)**

**CRIMINAL APPEAL NO. 56 OF 2014 (R)**

**BETWEEN**

**AYUB ASHIR UKADI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the Judgment of the High Court of Kenya at Kakamega, (Onyancha & Lenaola, JJ.)  
dated 25<sup>th</sup> January, 2012***

**in**

**HCCRA NO. 149 OF 2009**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. The appellant was convicted of robbery with violence and sentenced to death by the trial court. His first appeal to the High Court was unsuccessful, hence this second appeal.
2. The robbery was alleged to have been committed on 12<sup>th</sup> October, 2008 at Shiamboko village, Butso South Location in the then Kakamega Central District. The appellant, jointly with others not before court, while armed with offensive weapons namely knives, hammer and metal rods, were reported to have robbed one Richard Abwalaba of a suitcase containing clothes, a mobile phone, identity card, a voter's card and Kshs.3,000/=.
3. The complainant testified that on the material day at about 6.00a.m., while cycling from his home carrying a suitcase full of clothes, he was confronted by two young men, who robbed him of the aforesaid items. The robbers fled into nearby bushes.
4. In the course of the robbery, the complainant screamed and his screams attracted a crowd of people who came to his rescue. The people followed some footprints that led them to a certain house where they found the appellant. The appellant was roughed up and upon being interrogated about the robbery, he offered to show the people where the stolen items were. He led them to a place where the suit case containing the clothes had been hidden. The complainant positively identified the suitcase and its contents as being among the items that he had been robbed of. The complainant also identified the appellant as one

of the robbers, saying that at the time of the robbery there was sufficient light that enabled him to see his assailants properly.

5. Both the trial court as well as the High Court held that the complainant's identification of the appellant as well as the appellant's act of pointing out the place where the stolen suitcase and clothes had been hidden was sufficient evidence that he was one of the robbers.

6. In his memorandum of appeal through K'Opot & Company Advocates, the appellant faulted the High Court judges for relying on inadmissible evidence of an alleged confession by the appellant; for failing to carefully analyse the evidence tendered before the trial court; and for upholding a conviction that was based on weak evidence of identification.

7. **Mr. K'Opot**, learned counsel for the appellant, submitted that there were only two eye witnesses, the complainant and one **Julius Mukati, PW 3**, whose evidence was not consistent. The complainant testified that after the robbery the robbers ran to some bushes; that when PW 3 and some youths responded to his screams they followed footprints that led them to the house where the appellant was hiding; and that the appellant led them to a valley where they recovered the suitcase.

8. On the other hand, PW 3 testified that as they followed the footprints, they saw a person running as others screamed, "*he is the one, he is the one*". The person who was running entered a certain house. They entered the house and flushed out the appellant, who then led them to the bushes where the suitcase had been hidden.

9. Mr. K'Opot further submitted that the appellant's act of pointing out the place where the suit was recovered was tantamount to a confession that had been illegally obtained as a result of the heavy beatings that the appellant was subjected to. That the evidence so obtained was not admissible, counsel added.

10. **Ms Khaemba**, Senior Prosecution Counsel, opposing the appeal, submitted that the appellant had been found in possession of the stolen suitcase shortly after the robbery. That was sufficient evidence that he was one of the robbers. She added that there was no material inconsistency between the evidence of the complainant and that of PW 3.

11. We have carefully perused the records of appeal. We are satisfied that the High Court judges re-evaluated the evidence tendered before the trial court as required of them before arriving at their independent conclusion.

12. Secondly, we agree that the complainant and PW 3 were the only eye witnesses. Their evidence, though not exactly identical, which is not expected, does not contain any material contradictions. PW 3 responded to screams for help by the complainant. Together with some youths, they followed some footsteps that originated from the scene upto the house where the appellant was found hiding. That was within minutes from the time of the robbery.

13. Admittedly, the angry pursuers roughed up the appellant, as they demanded to know where he had hidden the stolen item. The appellant led them to the place where the stolen suitcase was hidden.

14. The robbery was committed early in the morning when there was sufficient light to enable the complainant positively identify his assailants. The complainant's positive identification of the appellant, having been done shortly after the robbery, cannot be faulted. That, coupled with the recovery of the stolen suitcase so soon after the robbery, was sufficient evidence that the appellant was one of the robbers. The fact that the appellant knew the exact spot where the suitcase was hidden left no doubt that he must have been the one who had dropped it or was with the person who had hidden it there after the robbery.

15. We find no merit in this appeal. Consequently, we dismiss it in its entirety.

**DATED and Delivered at Kisumu this 23<sup>rd</sup> day of September, 2016.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR.**