



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 83 OF 2019

PETER BUCHACHA MUHEYO.....1ST APPELLANT

PATRICK WANYAMA WATUNDU..... 2ND APPELLANT

BENSON KUNUHA KHAMASI alias CULTURE.....3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable H.O Barasa in Eldoret Chief Magistrate's court Criminal Case No. 3768 of 2017 dated 29th April, 2019)

JUDGMENT

Benson Kunuha Khamasi alias Culture, Patrick Wanyama Wetundu, Rasto Wanyama Makokha, Sylvester Kasaya Makokha alias Mwarabu and Peter Buchacha Muyeho were charged in the lower court with the offence of robbery with violence, contrary to Section 296(2) of the Penal Code.

The particulars of this offence are that on the night of 21st day of September 2017 at Edmos village, Mwamba sub location in Lugari Sub County within Kakamega County, the accused while armed with dangerous and offensive weapons namely metallic rods and wooden sticks, jointly robbed Joseph Wepukhulu of one motor cycle, Registration number KMEC 498H, Chasis Number MD 625 GF59H1A30766, Engine number F5AH1229423, MAKE TVS Star, red in colour, one mobile phone make Nokia 130, and cash money Kshs.250/-, all valued at Kshs. 93,050/-, and at the time of the said robbery used actual violence against the said Joseph Wepukhulu.

In the alternative, the said accused persons, save for the 4th accused (Sylvester Kasaya Makokha), were charged with the offence of handling stolen goods, contrary to Section 322 (1) (2) of the Penal Code.

The particulars hereof are that on the night of 21st and 22nd September 2017 at Murram village, Lwandeti sub location in Lugari Sub County, within Kakamega County, the said accused persons otherwise than in the course of stealing, jointly and dishonestly retained one motor cycle registration number KMEC 494H, Chasis number MD 625GF59H1A307666, Engine number OF5HA229423, make TCS Star, red in colour, knowing or having reasons to believe it to be a stolen property.

The prosecution case is that PW-1 in this case was operating a shop at Mwamba Market, and also had Bodabodas business. One of the motorbike she was using in her Bodaboda business was registration number KMEC 494 H, make TVS- Star, red in colour. She had bought it for 90,000/- at Neem collection, in Eldoret Town. The rider she had assigned the motor cycle was PW-5.

On 21/9/2017 PW-5 started work in the morning using the said motor cycle. At about 10.00 a.m he felt unwell and gave the motor cycle to his cousin, the PW-2 in this case. PW-2, using the said motor cycle, went to Sipande Milimani. The motor cycle developed a mechanical problem. He called PW-5 and they had it repaired. PW-2 proceeded to Pan Paper and thereafter returned to Turbo where he met PW-5. They wanted to go home. They however passed at a shop to buy Royco and cooking fat. After they bought they met a man called Chili who said he was looking for PW-5 as he had a customer. PW-5 told PW-2 to take the said customer. PW-5 proceeded home alone as PW-2 ferried the said customer to Matauro. On his way back alone, he was hit on the hand and back, prompting him to fall down. After he fell down the assailants hit him on the legs. He was then strangled. They took the motor bike, his phone, a Nokia 130 and Kshs. 250/-. It was dark and he never saw the faces of the three assailants.

However, as they were leaving he noted one was in brown boots and a jeans trouser. He made effort to follow them while screaming but could not go far given that he had injuries. He went back to the tarmac and met a Bodaboda rider to whom he explained his ordeal. They went to Mwamba stage and informed some other men. A search began for the robbed motorcycle. The robbers were allegedly armed with a club which had a metallic handle and a wooden head which had nails.

PW-1 was informed of the robbery by some motorcycle operators. She proceeded to the stage and with the help of some other motorcycle operators commenced search for the motorcycle and the robbers. They searched at Majengo, Mountain and Forest area, but in vain. She called an AP, Inspector of Mwamba, who sent officers to assist in the search. On this very same night, at about 11.00 p.m, PW-7 who is the Investigating officer in this case, was called by Chief Inspector Sylvester Olelo and informed of a report of theft of a motorcycle, at Mwamba AP's Post. PW-7 together with the said officer went to Mwamba AP's post. They got some members of the public gathered at the place and were given a brief by Inspector Gabriel Mweke, the in charge of the post. PW-2 and PW-5 who were present were held as initial suspects, for interrogation.

On 22/9/2017 PW-3 and PW-4, both officers attached to Chimoi AP's Post, received a list of suspected Highway robbers from the OCS Matete Police station. They were to arrest the said suspects. They together with other officers proceeded to Lugogo area, Luandeti. They started by tracing Sylvester Kasaya alias Mwarabu, the 4th accused person. They went to his house and found him asleep. They woke him up and arrested him. Next was Erastus Wanyama Makokha, the 3rd accused person. They went to his house. They pushed the door and it opened. They found the said suspect with two other men. He was asked who the other two were and said were Patrick Wanyama Khisa, the 2nd accused person and Peter Buchacha, the 5th accused person. The house was two roomed and in the sitting room was a new motor cycle registration No. KMEC 494H. They asked who was the owner of the motor cycle and was told it was for Culture, the first accused person. Culture was allegedly asleep in the other room. They got to the other room and found that he had escaped. They were arrested and the motor cycle picked. They were taken to Matete police station. They were later taken to Lumakanda police station.

PW-7 got the report of the arrest of the suspects at 3.00 p.m. He was informed they had been seen entering the house of the 3rd accused past midnight with the said motorbike. PW-7 took the suspects to Turbo police station. PW-2 and PW-5 were released. PW-1 produced a receipt for purchase of the said motorbike. On 24/9/2017 the officers from Matete police station took the 1st accused to Turbo police station as a suspect in the case.

PW-2 who had been injured was issued with a P3 form. It was filled at Turbo hospital. The neck was tender and has restricted movement. Lower limbs had swelling and bruises. They were also tender.

After completion of investigations the suspects were charged with the offences carried in the charge sheet.

The 1st accused's defence is that he is a mechanic at Kipkaren. On 24/9/2017 of which was on a Sunday, at about 10.30 p.m he was at Dominica Bar taking Napoleon Beer. Four people entered and arrested him. It was alleged he was drinking past allowed hours. He was taken to the AP's Camp. Police demanded for money of which he did not have. After one hour police officers arrived from Eldoret police station. They picked him and took him to Turbo police station. The following morning, he was charged with some strangers with an offence of robbery with violence.

The 2nd accused in his defence stated that he loads sugarcane at Butali Sugar Company. On 22/9/2017 at about 4.00 a.m he was heading to his place of work. A police vehicle appeared. He was stopped and asked where he was going. He told them and was told to board the vehicle. He boarded and saw a motorbike and some other arrested persons. Police asked them for money. Those who had money gave and were released. Accused had no money and was taken to Lumatete police station. At the place he was accused of stealing the motorbike. He denied the allegation. He was charged and denied the allegation.

The 3rd accused in his sworn defence stated that he lives at Lukhokho area, Lugari Sub County. He is a mechanic and also owns a posho mill. On 21/9/2017 during the day he worked in his maize farm and at the posho mill. In the evening he had supper at 8.30 p.m and slept. While asleep he was woken up by people who knocked at his door. They called his name out. One was Peter Buchacha (5th accused). It was at 11.00 p.m. He knew 5th accused as he was riding a bike of 3rd accused's sister. 3rd accused opened the door and saw 5th accused person. He was with others. He said he was from Chwele at a funeral and the motorbike had run out of fuel. He alleged there was no fuel at the Petro station. He sought shelter. He was welcomed as well as others. He slept on the couch. He was with accused 1 and 2. He showed them where to sleep. The 5th accused said the motorbike was his. The 3rd accused trusted him. They slept. Later the door was knocked at by police officers who had torches. 3rd accused was tired and hesitated to open the door. 5th accused hid under the chair. 1st and 2nd accused entered into the bedroom. The officers entered and saw 1st and 2nd accused get into the bedroom. 1st accused got out. The police asked if there was rice in the house. They alleged there was a vehicle which had rice which was carjacked at Luandeti. They searched for rice but in vain. They then asked what the three men were doing there. As the 3rd accused explained, 2nd accused tried to escape but was held. They were arrested and taken to the police vehicle. 4th accused was in the said vehicle. They got to Matete police station. The motorbike was removed. The OCS asked who was its owner. The 5th accused said it was for 1st accused who had escaped. 5th accused was interrogated and said it is him together with the 1st and 2nd accused persons who stole the motorbike. Later a woman and a man interrogated the 2nd and 5th accused persons and they admitted to having stolen the motorbike. They were taken to Turbo police station. On 24/9/2017 at 10.00 a.m the 1st accused was availed. The 3rd accused alleged he has never stolen. He did not commit the offence and was connected with it for assisting 5th accused with a place to sleep.

The 4th accused person stated that on 22/9/2017 at around 4.00 a.m, someone knocked at his house door. Those who knocked said were police officers. He opened the door and was arrested. He was taken to Matete police station. The officers said they were searching for rice which had been stolen along Eldoret-Webuye road. His house had been searched and no rice was recovered. He was as well told that the OCS had a list of suspects and he was one of them. Along the way to Matete police station, 2nd, 3rd and 5th accused were availed in handcuffs. They were placed in the vehicle. They were taken to Matete police station and later to Turbo Police station. They were interrogated by the OCS and then charged. The co-accused were strangers to him.

The 5th accused's defence is that he lives at Chekalini and was working in a hotel. On 22/9/2017 at around 4.00 a.m he woke up as usual. He was to travel to Webuye. At the stage a police vehicle appeared and the police officers alighted from it. They asked him what he was doing there. He told them he was waiting for a vehicle to travel to Webuye. He was arrested and taken to Matete police station. At about

11.00 p.m he was picked and taken to Turbo police station where he was charged with an offence he did not commit.

The trial court evaluated the evidence on record and in brief established that the offence was committed and though the three assailants were not recognized or identified at the scene, the motor cycle which was robbed was recovered the very same day in the house of the 3rd accused, who was able to explain in his defence that it was taken there by the 1st, 2nd and 5th accused persons. Invoking the doctrine of “recent possession” as expounded in the case of ***David Mugo Kimunge vs Republic (2015)eKLR***, the court concluded the three accused persons, who are the appellants herein, committed the alleged offence. They were accordingly convicted of the same, as accused 3 and 4 were acquitted. Each was consequently sentenced to serve 20 years imprisonment.

The three convicts, dissatisfied with the said finding and sentence, appealed separately to this court. Their appeals were consolidated in file No. 83 of 2019 and were listed as Peter Buchacha Muheyo as the first appellant, Patrick Wanyama Wetundu as second appellant and Benson Kunuha Kamasi as the 3rd appellant.

The grounds of their appeals are the same, that:-

- (1) They were not identified at the scene of the alleged crime.
- (2) The court relied on the evidence of a co-accused person which is worthless.
- (3) The prosecution case was contradictory and could not appropriately invoke the doctrine of “recent possession.”
- (4) There is no reliable evidence that they were in possession of the said motor cycle.
- (5) Some other relevant witnesses were summoned to adduce evidence.
- (6) Prosecution case was not established beyond reasonable doubt.
- (7) Investigation was not proper; It was shoddy.
- (8) The defence were not properly evaluated

The state prosecutor opposed the appeal, arguing that the conviction and the sentence are proper, and in accordance to the law.

I have evaluated the entire evidence on record, weighed the judgment passed and the sentence meted. I have as well considered the grounds of appeal and submissions by both sides.

In this case the issues for determination are whether the offence of robbery with violence was committed and if committed, whether it was by the appellants herein. On the first issue there is no much of dispute that the offence was committed by three assailants who were not identified at the scene. They were armed with a club, defined to have a metallic handle and wooden head which had some nails. PW-2 was attacked by the assailants, and the motor cycle registration Number KMEC 494H, make TVS-Star, Red in colour was taken, as well his Nokia phone and Kshs. 250. He was injured as was alluded by PW-6. These set of facts of which are not in dispute, gives rise to a case of robbery with violence.

On the second issue five suspects were arrested. The evidence of PW-3 and 4 who arrested the initially 2nd, 3rd, 4th and 5th accused persons shows that the robbed motor cycle was recovered from the house of the 3rd accused, in which house the 2nd and 5th accused persons were in. 1st accused was also allegedly therein but escaped as he was in a different room. The 4th accused had been arrested before, on the same night from his house. Of importance to consider is the circumstances under which the suspects were arrested and more so the appellants herein. PW-3, PW-4 and other officers who were in their company had allegedly been given a list of suspected highway robbers whom they were to trace and arrest. Though the said list was not presented to court. PW-3 stated they started by tracing and arresting 4th accused from his house. The other was the 3rd accused herein. They went to his house where they found 2nd and 5th accused; and were told 1st accused had escaped. The robbed motorbike was in the said house. What can be noted at this point is that the said arresting officers were not investigating the case herein but a different one of highway robberies. Also to be noted is that there is no evidence that the appellants herein were in that list. Those in that list were the 3rd and 4th accused persons who were acquitted of this offence. The assailants were allegedly three and given that five persons were charged with the offence of robbery with violence, shows that the investigators were not able to establish who among the five committed the actual robbery with violence. The prosecution case as well did not establish who between the five suspects committed the actually robbery with violence.

The trial magistrate faced with the very same problem, after rightly invoking the doctrine of recent possession, clung on the defence of the 3rd accused as salvage. Whether the court was right in relying on the defence of the 3rd accused person, in finding against the appellants herein who were his co-accused, such evidence need be weighed in accordance to the holding in the case of ***Waringa vs Republic (1984) KLR, 619*** where the Court of Appeal stated that:-

- (1) When considering the evidence of an accomplice, the first duty of the court is to decide whether the accomplice is a credible witness.
- (2) The corroboration which should be looked for when considering the evidence of an accomplice is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.

(3) The corroboration must be independent evidence which affects the accused by connecting him or tending to connect him with the crime.

One thing that must be strongly considered is that the 3rd accused never advanced his “very good” defence prior to being placed on his defence. In his cross examination of all the prosecution witnesses and more so PW-3 and PW-4 who are the officers who arrested him, he never suggested anywhere that the motor cycle in question was taken to his house by the appellants herein. His defence indicates clearly that he was aware the presence of the said motorcycle in his house was the only evidence that connected him to the offence. It is then questionable why he never advanced the said defence if it was actually true.

The 3rd accused in his defence also alleged the said motorcycle, as he was told, was for 5th accused, the suspect he knew before as he used to ride the motorcycle for the 3rd accused’s sister. However, the evidence of PW-3 of which he did not challenge on the issue, indicates he is the one who introduced 2nd accused as Patrick Wanyama Khisa and 5th accused as Peter Buchacha. At that point he never mentioned of the 1st accused who was allegedly in another room. When asked who the owner of the motorbike was, he said it was for Culture, who is the first accused. This evidence which he never challenged, contradicts his evidence that it was for the 5th accused person. In his evidence on this issue he stated when they were arrested and taken to Lumatete police station the OCS asked who the owner of the motorcycle was, and the 5th accused said it was for the 1st accused. If 3rd accused knew it was for 5th accused, he should then have protested and set the facts right, or even sought clarification from the 5th accused on ownership as he had told him it was his. The 3rd accused from the point of his arrest till the time he was placed on his defence, had more than enough opportunities to set the facts right but he did not even attempt to do so, irrespective of the serious offence he was charged with. This strongly shows that the said defence though a well thought line, was an afterthought and a lie. The said defence is not corroborated by any other evidence. The corroboration indicated by the trial court does not amount to corroboration at all for the “three robbers” could have been inclusive of the 3rd accused himself and in exclusion of any other of the 5 suspects. The doctrine of “recent possession” laid heavily on the 3rd accused who was the owner of the house in which the motor cycle was recovered, than any other of the suspects who were all visitors.

The 3rd accused’s defence does not therefore meet the threshold required in law to warrant its safe invocation against the co-accused persons. It was wrongly weighed and invoked.

The only suspect who was not connected at all with the offences carried in the charge sheet is the 4th. He was rightly acquitted. The court had therefore 4 suspects who were in possession of the alleged motorcycle. 1st accused was not arrested in the house of 3rd accused and PW-3 and PW-4 never witnessed his alleged escape. If the court was to accord benefit of doubt to any of the other 4, it would have been to the 1st accused and not 3rd accused person.

Having observed the foregoing its clear the police and the court did not conclude safely as to the real culprits amongst those arrested and charged. Some of the suspects did not take part in commission of the offence, and we do not for certain know which ones, amongst the five charged suspects. Given the scenario the appellants herein are accorded the benefit of doubt. The appeal therefore succeeds. The conviction and sentences are quashed. The appellants are set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED VIRTUALLY at ELDORET this 29th day of April, 2020.

In the presence of:-

- (1) Present in persons
- (2) Mrs. Hellen Githaiga for State
- (3) Mr. Gregory - Court assistant