



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HIGH COURT CRIMINAL APPEAL NO. 159 OF 2017

MOSES KILONZO MWASYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of Hon. C. M. Maundu, Senior Principal Magistrate delivered on 1st April 2016 in Kwale Senior Principal Magistrate's Court Criminal Case No.150 of 2014).

JUDGMENT

1. The appellant, Moses Kilonzo Mwasya, was on 10th February, 2014 charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 8th day of February, 2014 at Kidomaya B village in Msambweni District of Kwale County jointly with another not before the court robbed Joshua Muthia Kyengo of a Motor Cycle Registration No. KMDE 489L Boxer red in colour valued at Ksh.106,000/= and at or immediately before or immediately after the time of such robbery beat the said Joshua Muthia Kyengo.

2. The appellant was found guilty as charged and he was sentenced to suffer death. On 3rd April, 2018 he filed his petition of appeal and grounds of the appeal. On 18th December, 2018, the appellant filed amended grounds of appeal with leave of the court. They are to the effect that:-

(i) The appellant was not accorded a fair trial;

(ii) That the particulars of the charge were not in tandem with the Occurrence Book (OB) report and it led to a total injustice to the appellant;

(iii) That the prosecution failed to prove its case beyond reasonable doubt against the appellant as there was no exhibit corroborative evidence adduced during the trial, and

(iv) That the source of the appellant's arrest was not proved and therefore the evidence of the appellant remained unshaken and intact.

3. In his written submissions filed on 18th December, 2018 the appellant herein indicated that the Hon. Trial Magistrate failed to comply with the provisions of section 200(3) of the Criminal Procedure Code after he took over the case in the lower court from another Magistrate. The appellant submitted that he was not informed of the said right and witnesses were not re-summoned and re-heard and/or that the case was not heard *denovo*. The appellant referred this court to the lower court proceedings where he applied for the case to start *denovo* which was supported by the prosecution. The appellant stated that the Trial Magistrate failed to order for the case to start *denovo* and by so doing denied him the right to a fair hearing.

4. The appellant's submissions as to the defect in the charge is that the name of the complainant was not properly indicated on the charge sheet as compared to the first report. The appellant submitted that there was a contradiction as to whether the offence took place at Kidomanya B in Msambweni District or the first report was that the robbery report was made at Lungalunga, Kibaoni where the incident took place.

5. He further testified that there was a contradiction as to the make of the motor cycle which was stolen. It was not clear if it was registration No. KMDE 489L make Bajaj or KMDE 489H make Boxes red in colour. The appellant submitted that he was not found in possession of any exhibit and that the motor cycle, black bag and rope that were produced in evidence were not recovered from him. He further stated that the black bag produced in court was not positively proved as having been PW1's property.

6. The appellant stated that the complainant (PW1) contradicted his evidence by saying that he identified his attackers by voice yet, he at the same time said that he did not know the people who attacked him as it was the first time to see them. The appellant further submitted that PW1 said that there was moonlight and one of his attackers was Daniel Mutua and the other one Mwasya. He therefore stated there was mistaken identity and his conviction was not safe. He prayed for the appeal to be allowed.

7. Ms Ogweni, Principal Prosecution Counsel filed written submissions on 28th January, 2019 on behalf of the respondent. It was her submission that Section 200 of the Criminal Procedure Code (CPC) was complied with, when the case in the lower court was taken over by another Magistrate. It was stated that the succeeding Magistrate explained to the appellant the said provisions and he requested for the case to be heard *denovo*.

8. It was submitted that the prosecution called the Investigating Officer to shed light on the availability of witnesses and explained that PW1 had relocated to Machakos County and that 2 other witnesses could not be traced. The appellant opted to recall PW1 and PW3 for further cross-examination. The court made a ruling that it would be difficult to secure the attendance of PW1 who had relocated to another jurisdiction but ordered for the recall of PW3. The appellant withdrew his application to recall PW3 on 24th September, 2015.

9. Ms Ogweni therefore submitted that the appellant's right under Section 200 of the CPC were not violated. With regard to the claim that the charge was defective, the Prosecution Counsel submitted that it was not in variance with the report captured on Occurrence Book (OB) No. 22/8/2014 of Lungalunga Police Station where PW1 reported that he was attacked by 2 men who had posed as passengers and robbed him of a motor cycle registration No. KMDE 489L Boxer red in colour.

10. It was further stated that PW3 heard screams and found PW1 struggling with the appellant who was strangling him with a piece of wire. He assisted PW1 in tying up the appellant with a rope. PW1 told PW3 that he had been robbed of his motor cycle. The said motor cycle was recovered by PW2 close to a River near the scene of the robbery. Ms Ogweni therefore submitted that the appellant's defence that he was a passerby and a victim of mistaken identity could not hold in light of the evidence adduced against him. She prayed for the appeal to be dismissed.

11. The appellant filed a response to the respondent's submissions on 4th March, 2019. The issues that he has however addressed are covered in his submissions of 18th December, 2018.

ANALYSIS AND DETERMINATION

12. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court bearing in mind that it has neither seen nor heard the witnesses testify. In the case of **Soki vs Republic** [2004] eKLR, the Court of Appeal cited the case of **Gabriel Kamau Njoroge vs Republic** (1982 – 1988) 1 KAR 134 where it was held as follows:-

“It is the duty of a first appellate court to remember that parties are entitled to demand of it a decision on both questions of fact and of law, and the court is required to weigh conflicting evidence and draw its own inference and conclusions bearing in mind that it has neither seen nor heard the witnesses and make due allowance for this.”

13. In **Attorney General and 2 Others vs IPOA and 2 Others**, CA No. 324 of 2014, the Court of Appeal explained what re-evaluation of evidence entails, in the following terms:-

“Re-evaluation is not merely a rehashing of the evidence or findings of the trial court. It entails reconsidering the evidence afresh with a clear mind devoid of any influence from the findings of the trial court.”

14. PW1 was Joshua Kyengo Muthai. He was the complainant in the court below and a boda boda operator. He testified in the said court that on 8th February, 2014 at 9.00 p.m., he was at Lungalunga lower stage when he was approached by two people who asked him to drop them at the Pastor's place. PW1 indicated that he knew the Pastor as Daniel Mutua. After negotiating for 10 minutes, he offered to drop the two people for Ksh 170/= . He stated that there was no sufficient light at the scene but he identified the voices very well and confirmed the body sizes of his prospective customers. One of them was the appellant Mwasya who negotiated with him. He said that the appellant informed him that the person he was with was his brother, whom PW1 said he had not seen before. PW1 testified that the appellant sat right behind him on the motor cycle.

15. It was PW1's evidence as they got near the Pastor's place, the appellant alerted him that that a bag had fallen. He asked PW1 to stop and when he did, the appellant put a metallic wire around his neck and started tightening it, as he strangled him. PW1 stated that the one who was seated behind the appellant said they had to leave with the motor cycle. PW1 hit the appellant with his elbow and he let the wire loose. It fell down. PW1 jumped from the motor cycle and ran backwards. The appellant started chasing PW1. him. PW1 testified that while on the motor cycle, the other passenger had placed a sharp knife his hip. The Trial Magistrate was shown a dark scar on PW1's hip and on his neck.

16. PW1 stated that he ran for a short distance and decided not to leave the motor cycle which one Korir had bought 10 days before the incident. He recounted that the 3 started fighting but the appellant's colleague took the motor cycle. PW1 was left struggling with the appellant. While at it, a person emerged and PW1 told him his motor cycle had been stolen and that the appellant was one of the thieves and the other one had left. The man held the appellant and many people went to the scene. They started beating him. They then handed him over to Lungalunga Police Station.

17. PW1 further testified that while at the Police Station, the Village Chairman called and said a man had abandoned a motor cycle after meeting a group of people. The Police collected it and took it to the Police Station. He identified the black bag, metallic wire with wooden handles on both ends and photographs of the motor cycle registration No. KMDE 489L Bajaj in court. PW1 was treated at Msambweni District Hospital and he identified his P3 form in court. He stated that he got well after 2 weeks.

18. PW2, Mutani Thomas Kitaka testified of how on 8th February, 2014 at 10.00 p.m., someone with a motor cycle passed fast outside his home and went towards the River. PW2 then heard the person reversing. The motor cycle went off and the person started pushing it. PW2 called out to him and told him to identify himself but the person dropped the motor cycle and ran. PW2 screamed and called neighbours. They called the head of Ngombakoni where the motor cycle was taken. The Police went for it after a theft report was made. He identified the motor cycle in the photograph in court.

19. Katonga Jom Petrol was a mechanic from Kidomaya B village. It was his evidence that on 8th February, 2014 at 9.30 p.m., while at his home he heard someone shouting "thief", "I am being killed". He went out and found a person strangling another with a wire. He knew the person who was being attacked as a boda boda rider, PW1. He asked him what was happening and he said his motor cycle had been stolen. PW3 assisted in tying up the appellant with a rope. He took him to the Police Station. He said there was moonlight at the scene. While at the Police Station, a Police Officer was called on phone and they found PW1's motor cycle abandoned in the neighborhood of the attack.

20. PW4 was No. 74658 Corporal Benjamin Otieno who was attached to Lungalunga Police Station as at the time he testified in court. It was his evidence that on 8th February, 2014 while at his house, he was called by the Report Officer who told him that he was required at the said Police Station because a suspect who had been injured by members of the public had been taken to there. He went to the Police Station and saw a suspect who had serious injuries. PW1 reported to him about the robbery which had occurred. PW4 went and retrieved the stolen motor cycle registration No. KMDE 489H (sic) Boxes (sic) red in colour from the Village Chairman's place. PW4 produced a black bag and ownership documents for the motorcycle. He stated that it was positively identified by PW1. He also produced the wire which had been used to strangle PW1. Photographs of the motor cycle as well as the sale agreement were also produced.

21. Philip Kibet Chebii, a Clinical Officer at Msambweni District Hospital is shown in the lower court proceedings to have testified as PW4, instead of PW5. It was his evidence that on 18th February, 2014, he filled a P3 form for Joshua Muthai Kyengo (correct spelling of the last name verified from the lower court handwritten proceedings). The Clinical Officer found that PW1 had a healing bruise which was circumferential in nature on the neck. He indicated that the age of the injuries was 10 days and they were caused by a blunt object. He assessed the degree of injury as harm. He produced the P3 form as an exhibit.

22. In his defence, the appellant stated that on the date in issue at 6.30 p.m., he received a call from his cousin Alice who told him that her mother had fainted and she needed help to take her to Hospital. He assisted to take her to the stage and they boarded a vehicle to Hospital. As he was walking to his home through a shortcut, at Kidomayo B village he saw 3 men who stopped him and one of them said he was one of the robbers who had robbed him of his motor cycle. They stated beating him and members of the public went to the scene. He was taken to Lungalunga Police Station, where he claims he was beaten by the Police in order for him to admit having committed the offence. He denied having done so.

23. The issues for determination are:

- (i) If the appellant was positively identified at the scene of crime;**
- (ii) If the ingredients of robbery with violence were satisfied;**
- (iii) If the provisions of Section 200 of the Criminal Procedure Code were complied with.**
- (iv) If the evidence adduced proved the prosecution's case beyond reasonable doubt; and**

If the appellant was positively identified

24. PW1 in cross-examination said that he did not know the appellant and his so-called brother before the night of the robbery. He did not also disclose the lighting conditions at the scene of crime which happened at 9.00 p.m., at night. In his examination-in-chief, he said that there was no sufficient light. PW3 on the other hand said there was moonlight but he failed to describe the intensity of the light from the moon. The circumstances were in my view not favorable positive identification.

25. The event that followed after PW1 was attacked however indicates that when one of the assailants was strangling PW1 with a metallic wire, he hit the said assailant with his elbow joint which made him loosen the wire around PW1's neck. It then fell down. The foregoing gave PW1 an opportunity to defend himself and he also tried to protect the motor cycle which had been bought 10 days before the said date, from being taken away from him. One of the assailants made away with it. PW1 was left struggling and fighting with one of them.

26. The evidence on record indicates that PW3 was attracted to shouts from someone who was saying that he was being killed. He went to the scene and PW1 informed him that he had been robbed of a motor cycle and that the man he was struggling with was one of the robbers. PW3 assisted to tie up the said man who happened to be the appellant. He was beaten by members of the public before being handed over to Lungalunga Police Station.

27. The evidence adduced shows that during the robbery and afterwards, PW1 never lost sight of the appellant who was left behind fighting with him as his accomplice made away with the motor cycle. In light of the said facts, it is my finding that the issue of mistaken identity does not arise and that the appellant was identified by PW1 as one of the robbers. The fact that PW1 struggled and fought with the appellant after he was robbed of his motor cycle in corroborated by the evidence of PW3 who found the appellant strangling PW1 with a wire. He assisted PW1 to subdue the appellant by tying him with a rope.

If the offence of robbery with violence was proved.

28. Sections 295 of the Penal Code provides as follows:-

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery".

29. Section 296 of the *Penal Code* states as follows:-

"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death". (emphasis added)

30. In the present case, PW1 was approached by two men, who lured him to drop them at the Pastor's place. In the course of the journey the appellant's accomplice dropped a suitcase he had prompting PW1 to stop to enable the retrieval of the same. It was then that the appellant herein started strangling PW1 with a metal wire. The injury occasioned by the said wire was visible at the time PW1 testified before the lower court. The P3 form bore evidence of PW1 having been attacked. In addition, the appellant's accomplice took off with the motorcycle PW1 was riding. All the said facts prove that the ingredients under Section 296(2) of the *Penal Code* were proved beyond reasonable doubt.

If the provisions of Section 200 of the Criminal Procedure Code were complied with.

31. On 23rd July, 2015 the appellant was informed of his rights under the provisions of Section 200 of the *Criminal Procedure Code* when he appeared before Hon. Maundu, Senior Principal Magistrate (SPM) who had taken over the hearing of the case from Hon. E.K. Usui, Ag. SPM. The appellant requested for the case to start *denovo*. The Investigating Officer attended court on 4th August, 2015 and explained that PW1 had relocated to Matuu in Machakos County, PW2 was available whereas PW3 had moved to Malindi where he was engaged in fishing. On the said date, the appellant requested for PW1 and PW3 to be recalled for further cross-examination.

32. The Hon. Magistrate considered the explanation made by the Investigating Officer and ordered for PW3, Katonga John to be recalled for further cross-examination. He was of the view that it would be difficult to secure the attendance of PW1 who had relocated from the jurisdiction of the court. On 24th September, 2015, the appellant indicated that he did not wish to have PW3 recalled. In the said circumstances, the appellant can therefore not claim that he was not accorded a fair trial.

If the prosecution proved its case beyond reasonable doubt

33. The fact that the name of the complainant in the charge sheet was not in tandem with the name which was written on the Occurrence Book at Lungalunga Police Station is a non-issue. The name of the complainant in the OB report of 8th February, 2014 was given as Joshua Chengo and in the charge sheet as Joshua Muthia Kyengo. It is this court's view that a variation in the spelling of the complainant's surname on the two documents referred to is a matter of phonetics and as such it does not entitle the appellant to an acquittal. If the appellant thought that the spelling variation of PW1's name was crucial, he should have cross-examined the said witness on the same. There is nothing in the lower court proceedings to show the complainant who testified in court was a different person from the person who lodged the report of robbery with violence at Lungalunga Police Station.

34. On the issue of whether the offence took place at Kidomoya B village in Msambweni District of Kwale County or Kibaoni area in Lungalunga was a matter that the appellant should have cross-examined PW1 on. The layout of the place where the offence occurred was best known by PW1. This court has no knowhow to determine where Kidomoya B or Kibaoni are situated save for relying on the evidence adduced before the lower court.

35. On the issue the appellant raised with regard to the make of the motor cycle, on whether it was Boxer or Bajaj, a look at the photograph which was produced in the lower court as P. exhibit 3 shows that it is red in colour. The word "Boxer" is inscribed at the back of it. There are some other words written on the front left side but which are not legible on the photograph. The sales invoice produced as P. exhibit 5, from Pikipiki Limited in the description column states that the motorcycle was "Bajaj BM 150 Boxer". There is therefore no valid argument as to the make of the motor cycle. The names "Bajaj" and "Boxer" can be used to describe the motor cycle.

36. With regard to the registration No. of the motor cycle, PW1 testified that he was robbed of motor cycle registration No. KMDE 489L, the said registration No. is indicated on the charge sheet. This court perused the handwritten proceedings of the lower court and could not establish if the registration number that was written down by the Hon. Magistrate when PW4 was testifying was KMDE 489L or KMDE 489H. It is however evident that the motor cycle PW1 was robbed of was KMDE 489L and a photograph of the same was produced in court as an exhibit.

37. The evidence on record shows that the prosecution proved its case beyond reasonable doubt. The defence raised by the appellant could not have been true in light of the overwhelming evidence against him. PW1 never lost sight of the appellant during the struggle and fight that ensued between them after he was robbed of his motor cycle. The issue of mistaken identity does not arise. I therefore uphold the conviction.

Sentence

38. On 1st April, 2016 the appellant was sentenced to suffer death as by law prescribed. Since then, jurisprudence has evolved. The Supreme Court of Kenya in **Francis Karioko Muruatetu & Another vs Republic** [2017] eKLR held, *inter alia*:

"The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared

unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence contemplated under Article 26(3) of the Constitution.

39. *The Supreme Court further held that in a murder trial the mitigating submissions of an accused person must be taken into consideration before sentence is pronounced.*

40. *In William Okungu Kittiny vs Republic* [2018] eKLR the Court Appeal applied the holding in the **Muruatetu** case in an appeal where an appellant had been charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The said Court stated as follows:-

".....we hold that the findings and the holding of the Supreme Court particularly in paragraph 69 applies Mutatis Mutandis to section 296(2) and 297(2) of the Penal Code. Thus the sentence of death under section 296(2) and 297(2) of the Penal Code is a discretionary maximum sentence."

41. It is imperative therefore for courts when dealing with offences that carry the death sentence to look at the circumstances of a particular case before deciding on a suitable sentence, unless convinced that the death sentence should be imposed against an accused person. In this case violence was used against PW1 when the appellant strangled him. Had it not been for PW1's quick action of acting in self defence by hitting the appellant with his elbow, he could have been suffocated to death. Although I do not think that the appellant is deserving of the death sentence, a severe sentence is called for.

42. I hereby set aside the death sentence imposed against the appellant and substitute it with a sentence of 15 years imprisonment. The sentence shall run from the 1st of April, 2016 being the date he was sentenced by the Trial Court.

DELIVERED, DATED and SIGNED at MOMBASA on this 26th day of April, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Ogwen, Prosecution Counsel for the respondent

Court Assistant – Oliver Musundi