



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.257 OF 2010

YUSUF GITAHI

THOMAS MBATHA MUSYOKA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from the original Criminal case No 2887 of 2008,

delivered on 5th May 2010 by Honourable T. Gesora S.R.M at Mombasa)

JUDGMENT

YUSUF GITAHI and THOMAS MBATHA (Appellants herein) were jointly with others not before court charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that;

“ On the 25th day of July, 2008 at Shanzu village in Mombasa District of The Coast Province, the appellants jointly with Others, while armed with dangerous and offensive weapons namely iron bar robbed DENNIS MUSYOKA MALOMBE of one motor cycle registration N. KBB 387 N make King Bird valued at Kshs 96,000/=and immediately before or immediately after the time of such robbery used actual violence to the said DENNIS MUSYOKA MALOMBE”.

The appellants were arraigned in court on 23rd September, 2008 whereby they pleaded not guilty to the charge and plea of guilty entered for each one of them. The case proceeded for having and the appellants were convicted and sentenced to serve death sentences after being found guilty of the offence of robbery with violence contrary to section 296 (2) of the Penal code.

They were aggrieved by the said conviction and sentence hence they each failed their appeal on the following grounds.

The 1st appellant's grounds of appeal are as follows;

- (a) That the learned Hon. trial magistrate erred in law and fact by convicting and sentencing him on reliance of the evidence of identification by recognition adduced by the complainant (Pw1) and his comrade without properly finding out the circumstances which prevailed at the said scene were not conducive to warrant positive identification.
- (2) That the sincere lawful loyalty by the complainant's open statement or evidence acquitted him from the false allegations were not taken home by the learned trial magistrate;
- (3) That the learned Hon. Trial magistrate erred in law and facts by failing to note that the doctor's report was not produced by the prosecution side.
- (4) That the learned Hon. Trial magistrate erred in law and fact by convicting and sentencing him without seeing that the prosecution did not prove its case beyond reasonable doubt.
- (5) That the learned Hon. Trial magistrate erred in law and fact by unreasonably rejecting any sworn defence evidence which was reasonable enough to cast doubt against the prosecution's case.

2nd appellant's grounds of appeal.

(1) That the learned Hon. Trial magistrate erred in law and fact by convicting and sentencing him to suffer death without considering that the prosecution charge was defective and this invariance for the evidence adduced before court by the prosecution witnesses i.e Pw1 does not support the particulars of the charge sheet.

(2) That learned trial magistrate erred in law and fact by convicting and sentencing him to death without considering that he was not awarded a fair trial as required by the law under Article 50 (j) of the constitution for he was not supplied with the witness statements of (pw4) during the trial contrary to what the law stipulates.

(3) That learned trial magistrate erred in law and fact by convicting and sentencing him to death by relying on the recognition evidence of single witness Pw1 without considering the same was not proved to the standards required by the law hence unsafe to be considered to sustain a proper conviction.

(4) That learned trial magistrate erred in law and fact by convicting and sentencing him to suffer death without considering that section 57 (1) (a) (b) (c) (d) of the Evidence Act was not considered.

(5) That the learned trial magistrate erred in law and fact by convicting and sentencing him to suffer death without considering that the source of his arrest was not established to have had any connection with this offence in question for the informer who alleged to have led the police officers to my arrest never testified to clear the doubt of his arrest.

(6) That learned trial magistrate erred in law and fact by convicting and sentencing him to suffer death without considering that the prosecution did not prove their case beyond any reasonable doubt hence section 109 of the Evidence Act, was violated.

(7) That learned trial magistrate erred in law and fact by not considering my reasonable defence statement which was challenged by the prosecution. The appeal proceeded for hearing on 20th July, 2017 and each appellants filed written submissions which they wholly relied on except for brief highlight. The stat through M/s Mutau, learned counsel, made oral submissions.

The 1st appellant urged the court to consider that he was not mentioned in the first report (the investigation diary) by the report. He also asked that his defence, where he stated he was arrested while at work be considered.

The 2nd Appellant submitted that in this case his name is Thomas Mbatha Musyoka and yet the complainant was referring to him as Tom. He stated that there is nowhere in the evidence where the complainant agreed with the owner of the vehicle that he engages him.

Ms Mutua, counsel for the state opposed the appeal and consolidated the grounds of appeal set out by both appellants into eight (8) grounds. On the issue of the circumstances of identification being unconvincing, she submitted that there was recognition and positive identification with no possibility of mistaken identity. She also pointed out that the evidence of Pw1 was corroborated of the evidence of Pw3 with regard to the area being well lit by the light from electricity bulbs at Utange Baptist School which enable one to see up to a distance of 5 metres. And on recognition, Pw1 stated that he knew the two appellants Tom and one called Mario before this as boda boda operators and his regular customers respectively. It was therefore not the first time for him to see the two. She submitted that the evidence pointed at the appellants' guilt and placed them at the scene of incident.

On the issue of the prosecution having failed to produce a doctor's report, M/s Mutua submitted that Pw1 only said that he was hit with a metal rod but did not say he visited any hospital for treatment. She said that the production of a doctor's report in such a case is not a required ingredient to be proved except to prove the stealing occurred and there was loss of a motor cycle which was never recovered, and this the prosecution did by producing a receipt for its purchase and log book as exhibits P 1 and 2 respectively. She also submitted that there was proof of them having been armed with metal rod which they used to hit the complainant and that they were two people.

M/s Mutua further submitted that the appellants' defence were well considered in view of their evidence and that, by the prosecution.

The duty of this court as a first appellate court is to re-evaluate the evidence that was adduced before the lower court and draw independent conclusion as was held in the case of OKENO VRS REPUBLIC 1972) E .A 32. And as the court does this, it should not be lost to it that it did not have the advantages of seeing and hearing the witnesses as enjoyed by the trial court (See SOKI VRS REPUBLIC (2004) e KLR.

THE SUMMARY OF EVIDENCE.

The prosecution adduced evidence of four (4) witnesses.

Pw1, DENNIS MUSYOKA, told the court that he operates a motor cycle (boda boda) taxi and that on 25.7.2008, he was waiting for passengers at the Shanzu stage. He said that the motor cycle he was riding was registration No KBB 387. He got a passenger who he took to Serena where he got another passenger he identified as Tom who was going to the place of blanket called Minanangi Pw 1 said that when they got there, the passenger asked him to proceed to Utange Baptist so he could meet someone. And when they got there, as Pw1 waited to be paid his fare, the passenger alighted and two men emerged from the bushes. He said that he knew Town and one of the men who he identified as Moijo. Pw1 said the men beat him with a metal which he blocked with his hand and it fell. He then said Tom took the motor cycle and drove it away while carrying the two men.

Pw1 then went and reported the incident to the owner of the motor cycle by the name Onyango who called the police and four police officers

came. That they looked for the people who had robbed him of the motor cycle. They managed to get Moiyo as he normally operates at Serena, and arrested him.

Pw1 told court that these people took his driver's identity card, driving, license and Ksh 1000/= cash. He identified the 1st and 2nd Appellants to court and said that he did not know the 3rd and 4th accused persons. He also said that the place where the motor cycle was taken had lighting from electric bulbs at the Utange Baptist school that one could see someone at a distance of about 5 metres away. He told court that Tom, the 2nd appellant was a boda boda operator while Moiyo was a regular customer.

In cross examination by the 1st appellant, Pw1 testified that he had not known him for long and though he could not describe his physique, he explained to the police who he was, how he appears and that he is known as Moiyo. He also said that the 1st Appellant was arrested within one (1) hour from the time of the incident. He also said that he had carried the 1st appellant on credit before and denied having ever told him that he would regret for not paying him.

When cross examined by the 2nd appellant, Pw1 also confirmed that he had known him as a "boda boda" operator for about one year and as a bad person as he had heard of his activities. He then told court that he carried him because he knew him and his parents and could not have left him. He said he had been with the motor cycle for two weeks and gave its registration number as KBB 387 N. He said that he was not there when the 1st appellant was arrested but the owner of the motor cycle was, though he was also not there when he was robbed. He also said that the owner of the motor cycle also knew the 1st appellant very well. He testified that the 1st appellant was arrested on 16.9.2008, after a month. He further said that he could not say who hit him with the metal as they were three of them. He said that the 2nd Appellant was involved in beating him and he was the first to hit him.

PW2, LUCAS ONYANGO JUAME told court that he was a business man and operates a motor cycle "bodaboda" taxi. It was his evidence that on 25.7.2008 at about 11.20 pm, he was asleep in his house when he was woken up by a knock at the window. He then heard the voice of his rider Denis Musyoki (Pw1). He looked and confirmed he was the one but was strip naked. He then opened to talk to him but Pw1 was in tears, was injured and incoherent that he only managed to tell him that the motorcycle was gone. Pw2 said that Pw1 was injured on the left wrist and he told him that he had carried someone he knew from Serena who wanted to go to a place called Ghorotahi but had changed and said that he needed to see someone at Baptist. That when they got to Baptist, the man alighted and as his rider waited for payment, other people came out of the dark and the passenger who had something like a metal, hit him. The man then took the motor cycle, sat on it as the others attacked Pw1 and beat him up. They took his money and stripped him naked. The passenger, who Pw2 said Pw1 identified to him as Tom, carried the rest and rode away. Pw2 said that Tom was well known to him as he was his neighbour. He identified the motor cycle make Tiagma Kinhan registration No KBB 387N as his. He identified the receipt for purchase issued to him by High Time Trading Limited on 10.3.2008 for Ksh 94,165/= (Exhibit P1) a copy of logbook since the original was held at Blue Shield insurance after the loss of the motorcycle (Exhibit P2). He said that Pw1 recognized only Tom, the said appellant and Morio the 1st Appellant. They looked for police on patrol and reported the matter. The police interrogated Pw1 and he had them to the scene of incident. When he explained that it was the Appellants. Pw2 said that Pw1 told him that it was the 1st Appellant who had stopped him at Serena so that the 2nd Appellant could get onto his motorcycle. That Pw1 also said he saw them at the scene where the motor cycle was stolen and explained who the assailants were. Pw2 said that they went to Serena where they did not find the 1st Appellant and so they left a number with someone. And so, Pw2 was called and told that the 1st Appellant had been seen. He went there with the police and found the 1st Appellant near Safari Inn from where they arrested and escorted him to Bamburi police station. And on 16.9.2008, he was called and told that the 2nd appellant had been seen at Kongowea. He called the police and they went and found him. He was also arrested and escorted to Bamburi police station where he mentioned 3rd and 4th accused persons as accomplices. The 3rd accused person was also arrested at Kongowea while 4th accused was arrested at Kenol as directed by the 2nd Appellant. He said that the motor cycle was never recovered.

Upon being cross examined by 1st Appellant, Pw2 said that he was present when they were arrested but was not present when the motor cycle was robbed. He also said that Pw1 had worked for him for 1 1/2 years and he did not know him before he employed him. He also said that Pw1 passed by his place first before going to the police to tell him what had happened.

When cross examined by 2nd Appellant, Pw2 told court that Pw1 had worked for him for 1 1/2 years, and he trusted him and this was not the first motorcycle he was riding from him. He confirmed that the motorcycle was his but it was not robbed from him. He also told him that after the 2nd Appellant was arrested, he lead to the arrest of the other two.

Pw3, No. 664998 P.C Wanjala Mayende of Bamburi police station who testified as the investigating officer told court that on 26.7.2008, he got a report in the occurrence book that there was a suspect who had been brought in by his colleagues for the offence of robbery with violence of a motor cycle. He went to the scene and returned to record statements from witnesses. He told court what Pw1, Denis Musyoka had narrate to him of the incident. He also narrated what Pw2, the owner of the motor cycle told him. He also testified as to how he arrested the appellants respectively and how they were identified by Pw1. He also said that the 2nd Appellant directed them to his accomplices and the police arrested the 3rd and 4th accused persons. According to Pw3, the 2nd Appellant was identified as the customer who hired Pw 1 to carry him and he struggled him. He then identified the 1st Appellant as one of the people Pw1 said emerged from the bush and recognized him as Morio.

When cross examined by the 2nd Appellant, Pw3 said that he was arrested by police on patrol while with the victim and owner of the motor cycle. He said that Pw1 told him that he was beaten by 3 people who he could recognize and that he saw them using the lights of bulbs for security at the church. He also said that the 1st Appellant was not arrested with anything belonging to the victim. He denied that the complainant told him that the 1st Appellant owed him money. He also said that he did not need descriptions of the persons as the victim knew him and where he worked and he believed him.

And on being cross examined by the 2nd Appellant, Pw3 told court that the victim would be in a better position to recognize the robbers than himself as he was not at the scene of incident at the time of happened.

Pw4, No 70987 P.C SAMMY GIHURA, of Likoni police station but he was previously based at Bamburi police station. He testified that on 26.7.2008, he was at work with PC Ouma at about 9.00 pm when the O.C.S, C.I.P Naundo instructed him to go and look for a motor cycle belonging to a person who had been abandoned at Majaoni as the robbers went away with the motor cycle. That at 1.00 am, the OCS again called and asked him to go to Serena area and get someone who had been caught by member of public and was alleged to have been among the robbers. They obliged and escorted the suspect to Bamburi police station where the report had been booked. He was later charged with the offence. Pw4 went on to state that a month later, the 2nd Appellant was arrested at Kongowea after the complainant identified him as the one who drove away the motor cycle. That he lead pw4 and Pw3 to the other accomplices, who they arrested.

Upon being cross examined by the 1st Appellant, Pw1 said that he was not aware that the complainant's employee had called the police before he was called and they came to Serena. He denied that the 1st Appellant had been beaten he said that the complainant saw the 1st Appellant and mobilized other boda boda operators to arrest him.

And when cross examined by the 2nd Appellant, he confirmed that he was arrested by the owner of the motor cycle, which is allowed. He said that the 2nd Appellant volunteered to show him their accomplices.

Upon the close of the prosecution case the trial magistrate found that the 1st and 2nd Appellants had a case to answer and placed them on their defence as per the provision of section 211 of the Criminal Procedure Code. The provisions of this section was explained to the Appellants and each one of them opted to give unsworn testimony without, calling any witnesses.

DW1, YUSUF GITAHU NJERI is the 1st Appellant and he testified that on 25.7.2008, he had a fractured leg and so he left late for his business of selling onions at Serena. He said that because of that, and the cold season he had to be collected on a motor bike on credit. He said that he would be collected at 9.00 pm to be taken home and on that particular day, the rider came for him at 9.00pm but he was not ready to go since he was expecting customers. Dw1 said that the rider forced him to close saying it was his last trip. And as he was closing, someone came to see necklaces and so he stopped closing. The customer required transport and so Dw1 asked the rider if he could take him first and come for him later. The rider agreed and carried the customer to Shanzu. And after waiting for the rider for 1 ½ hours, a K K vehicle came and he heard someone saying "where is he" and another said "he is the one" He wanted to know what it is going on and the police officer in uniform suddenly opened the door and asked where the people who had boarded the motor cycle were. That when he asked "who" the officer called someone from the vehicle and he saw it was the rider he was waiting for. That the rider confirmed that he was waiting for him when a customer came and he carried him promising to come later. He was ordered to enter the vehicle so he could record a statement. He was taken to Bamburi police station where the other officers asked him to go into the occurrence book area and sit down. He was then told that if he would not say who had boarded the motor cycle that he would be charged. He tried to ask the complainant to explain what had happened but the police told him to leave him alone because he was the one who was conspiring with robbers. Dw1 said that he was arraigned in court and he believed that the police just wanted to satisfy the owner of the motor cycle. He even produced the charge sheet where he had been charged alone as D exhibit 1.

In cross examination, Dw1 said that he knew the complainant as he used to carry him but they had no relationship beyond that. He said that it is possible to have been mistaken. He reiterated that he was charged alone and did not know who else was involved.

Dw2, THOMAS MBATHA MUSYOKA, told court that he lives at kwa Karama at Kongowea where he has a vegetable stall. He testified that on the day he was arrested, he woke up, as usual, went to buy his stock and hired someone to carry them for him. He went to the stall and paid the man. He then left for the lights area where his friend roasts maize because he had given him money to make necklace for him. And while there he saw a person who used to carry stock for him on credit. He had not seen the man for 3 days. The man confronted him and told him that he had contracted some else without paying him. He then asked the man to go to him so he would pay him but the man refused saying that he was back in Mombasa and Dw2 would know it. He gave the man's name as Muhuku. He waited for roast maize and was surprised when he was caught by two people he did not know. That one of them told him he was a police officer and told him that he had robbed someone of a motorcycle. He was then taken to a place where motor cycles are sold in a "Tuktuk" and then to the bodaboda stage. He was put in "tuk tuk" with two other boda boda operators and taken to Bamburi police station where he was locked up. Dw1 said that despite the torture he was put through at the police station, he maintained that he knew nothing about the motor cycle. He went on to state that an officer by the name Wahome hit him on the knees and elbows with an iron rod and he decided to agree knowing that he could be arraigned in court for the truth to come out. He said that he only saw the driver in court.

In his judgment, the trial magistrate had this to say at page 47; lines 5 to 13

"I have considered the evidence. It is clear to me that Pw1 and 1st accused were well known to each other because Pw1 used to ferry 1st accused even on credit. I am also satisfied that Pw1 knew 2nd accused. The latter denied not withstanding because it's his description of him that led to his arrest. He saw who had ferried. At the core of the prosecution evidence the narration of events is consistent and the differences e.g. failure of the complainant to mention who exactly applied the iron bar on him while other witnesses say it is the 2nd accused are not so wide as to render the national inconsistencies that would cast reasonable doubt on the prosecution's account of events....."

I am satisfied that Pw1 recognized the second accused as part of the group that robbed him.....In the trial analysis, I have no doubt that the 2nd accused were at the scene of the robbery and were recognized by the victim and there is no particular reason why he should implicate them.

The upshot is that the accused are both found guilty of the offence of robbery with violence and are accordingly convicted."

The two appellants were sentenced to death.

DETERMINATION.

I have considered the grounds upon which the Appellants have appealed against their conviction sentence, in line with the evidence that was adduced before the trial court and the arguments in the submissions by both sides together with the cited authorities and the law. I find the issues for determination being;

- (a) Whether the Appellants were properly identified.
- (b) Whether the prosecution's evidence against the Appellants was sufficient and satisfactory to warrant their conviction and subsequent sentence
- (c) Whether the Appellant's defence was not considered.

On the issue of whether identification was properly found, I find that the Appellants were identified by Pw1. In his evidence to court, Pw1 stated;

“.....when the passenger alighted, I got another passenger called Tom he was going to the place of Blanket called Minazi Mingi. When we got there he asked me to proceed to Utange Baptist. He was to see someone there. When we got there, as I waited for my fee, when he alighted, two (2) people came from the bushes, they beat me and took all my belongings. I knew 2 of them. Tom and one called Morio, that is how we all call him. I did not know the 3rd person. They beat me with a metal I did not see what type of metal. I first blocked it with my hand and it feel. Tom took the motorcycle and rode it carrying the other 2. Tom was my passenger”

The place where the bike was taken had lighting. One could see someone at a distance of 5 metres away. The lighting was from electric bulbs at Utange Baptist school. I knew tom and Morio before. Tom used to be a boda boda operator and Moiro was a regular customer.

In cross examination by 1st Appellant, Pw1 stated;

“ I knew you but not for very long. I knew you work around SerenaWe know you are called ‘Morio’ from the time of incident till the time you were arrested as approximately one (1) hour. I was with the police even police knew you Yes I have carried you on credit before. I did not say that if you did not pay then you would regret.

And when cross examined by 2nd Appellant, Pw1 stated;

“I knew you, you are a motor cycle operator. I knew you for about a year. I knew you as a bad person. You were going home. I also knew you parents. I could not leave you.....”

Clearly this is evidence of identification by recognition and by a sole identifying witness. In the case of **REGINA VRS TURN BULL (1976) 3 ALL E.R 549**, the court observed:

“ Recognition may be more reliable than identification of a stranger, but even when witnesses are purposely to recognize someone when she or he knew the jury should be reminded that mistakes of recognition of close relatives and friends are sometimes made”

The 1st Appellant, in his defence did not deny being known to the complainant in this case, having used him to collect him on his motor cycle to and from work at Serena area. He even confirmed that on the day of the alleged incident he let the complainant transport a customer of his as he waited and was arrested while waiting for him to come back for him.

The 2nd appellant denied knowing of the motor cycle rider (Pw1).

In analyzing the evidence of Pw1, I find that the evidence with regard to him being well-known to the Appellant was not challenged. The incident took place at night but he testified that he had ridden with the 2nd Appellant who he identified as Tom from Serena area to Utange. He also testified that he knew the 1st Appellant for he had been his customer for some time. There was also evidence from him that there was light from electricity bulbs at Utange Baptist school. Which would enable one see up to a distance of about 5 metres away. The circumstances which were brought out by Pw1 in his evidence were favorable for recognition and positive identification so that there was no mistaken identity. As set out in the cases of **ANJONONI VRS REPUBLIC (1980) KLR 54**, **REGINA TURNBULL (1976) 3 ALL E R 549**, **MAITANYI VRS REPUBLIC (1986) 2 ELR 75**, **KARANJA & ANOTHER VRS REPUBLIC (2004) 2 KLR 140** and **WANJOHI & OTHERS VRS REPUBLIC (1989) KLR 415**.

On the second issue of whether the prosecution adduced sufficient evidence to warrant the conviction and subsequent sentence against the Appellants, it is clear from the evidence of all the prosecution witnesses that their evidence was consistent and well corroborated with regard to the incident of the night. The accused persons on the other hand did not dislodge the prosecution's evidence with their evidence. The appeal by the Appellants is unmeritable and their conviction is hereby upheld.

As for the death sentence that were meted against them, I wish to reconsider the same in view of the recent holding by the Supreme Court in

the MURUATETU case.

I therefore refer the matter to probation officer for a social inquiry on each accused person to enable me reconsider a review of the same.

Order accordingly

Judgment dated, signed and delivered this 6th date of February 2019.

LADY JUSTICE D. O. CHEPKWONY

Appellant I pray that I be allowed to file them.

Court – The social inquiry reports on the appellants have been filed.

Mention on 10.4.2019 for direction and consideration.

D O Chepkwony (Judge)

4.4.2019

10.4.2019

Before Hon D O Chepkwony (J)

C/clerk- Beja

M/s Ocholla counsel for the state

Appellants – Both present

Court; The appellant appealed against their conviction and sentence vide CR Case No 2887 of 2008 were they had been charged with the offence of robbery with violence.

Their appeal was dismissed after the court confirmed their conviction by the trial magistrate with regard to the sentence, the case was referred to social inquiry for each appellant in light of the Supreme Court's decision in the Muruatetu case, on the constitutionality of the death sentence.

The social inquiry reports by Mr Migwi, the probation officer have been filed in court. I have read through them and find the same favourable in respect of each appellant.

I have also considered the degree of injuries the complainant sustained and what he lost as a result of the robbery, coupled with the period they have served.

From the social inquiry it appears to be confirmed that the Appellants have reformed and are ready to be reintegrated back into society and live normal lives.

I therefore revise the sentence that was imposed upon them I proceed to quash the death sentence and substitute the same with a sentence of ten (10) years imprisonment to start from the date they were sentenced to death.

Orders accordingly.

Order delivered, dated and signed this 11th day of April, 2019.

LADY JUSTICE D.O. CHEPKWONY