

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.9 OF 2018

(Being an appeal from the decision and sentence by Hon. B. R. Kipyegon (SRM) in Kericho CM Cr. No.330 of 2014)

BRIAN MORACHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was tried and convicted after a full trial of robbery with violence contrary to section 296 (2) of the Penal code. The particulars of the offence being that on 26th May 2017 about 19.20 hrs at Tea Point in Kericho District within Kericho County jointly with another not before the court while armed with dangerous/crude weapons namely panga and hammer robbed one Gilbert Cheruiyot his motor cycle Frame No.MDZAZIBZ5GWW85859, Engine No.PFZWGG79374, Registration No.KMDZ713J, Make Boxer Bajaj valued at Kshs.107,000/- and at the time of such robbery threatened to use actual violence against the said Gilbert Cheruiyot. He was sentenced to suffer death.
2. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He initially filed his appeal in person. However, later he filed supplementary grounds of appeal through counsel Job Obure & Company Advocates. The main ground of appeal was that he was not positively identified as the culprit.
3. Counsel also filed written submissions which I have perused and considered. On the hearing date Mr. Obure learned Counsel for the appellant highlighted the written submissions by submitting that there were many gaps in the prosecution evidence. The main gaps are that the appellant was not positively identified as one of the robbers, that there was no evidence on how the appellant was arrested, and the weapon (panga) said to have been recovered by PW1 was not produced in court. Lastly, that crucial witnesses were not called to testify.
4. The appeal was opposed by the State. Learned Assistant Director of Public Prosecutions Mr. Ayodo submitted that the appellant was positively identified as one of the robbers, the failure to produce the panga was a technical fault which was not fatal to the conviction, and that the prosecution called sufficient witnesses to prove their case against the accused person.
5. This is a first appeal. As a first appellate court, I am required to re-evaluate the evidence on record and come to my own independent conclusions and inferences, bearing in mind that I did not have the opportunity to see witnesses testify to determine their demeanour and give due allowance to that fact – see **Okeno –vs- Republic [1972] EA 32**.
6. I have re-evaluated the evidence on record. The incident occurred at night, in the early hours at 7.30 p.m. According to PW1, there was adequate light at the scene where two customers hired him to ferry them on a motor bike to Tea Point in Kericho. The motor bike was later robbed by the two and was later found at the junction to Londiani towards Nakuru Town by other motor bike riders (popularly called boda boda).
7. In my view, on the evidence on record, the prosecution proved beyond any reasonable doubt that a motor bike was robbed from PW1 by two people that night. It was intercepted some minutes thereafter by other motor bike riders at Londiani junction on PW1 raising alarm. The robbers escaped and were not arrested at the site where the motor cycle was recovered.
8. The main issue is whether the appellant was one of the two people who robbed PW1 of the motor bike. In all criminal cases, the prosecution has the burden of proving the offence against the accused person beyond any reasonable doubt. Was the appellant positively identified as one of the two robbers?
9. The appellant, according to PW4 Sgt Johna Mutai of Kedowa Police Patrol in Londiani was brought by the area chief who was not called to testify. The investigating officer PW6 PC Justus Sila confirmed that no identification parade was conducted. The complainant PW1 Gilbert Cheruiyot did not describe the appearance of any of the suspects to any of the people he mobilized to trace the motor cycle before arrest. It is thus not clear in what circumstances, and for what reason the Chief arrested the appellant.
10. PW1 identified the appellant in court and described the clothes he wore to be those he wore during the robbery. That was dock identification which is not sufficient to amount to positive identification of a suspect, as he did not describe the features of the appellant and clothes he wore to anybody before arrest, and no identification parade was conducted.
11. I have to give the benefit of the doubt to the appellant and hereby do so.
12. In the result, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Kericho this 28th day of November 2019.

George Dulu

JUDGE