



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 70 OF 2015

ELIJAH MULUNGUSU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 192 of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.G. Nderitu (SPM) on 14th October 2015)

JUDGMENT

1. The Appellant herein, Elijah Mulungusu, and Kiplagat Rono Kiporo (hereinafter referred to as "the Appellant's Co-Accused") were jointly charged on Count I which related to the offence of robbery with violence contrary to Section 295 of the Penal Code Cap 63 (Laws of Kenya) as read with Section 296 (2) of the Penal Code.
2. The particulars of the said charge were that on the 9th day of February 2015 at Sophia Estate at Voi town within Taita Taveta County jointly with another not before court, they robbed Joseph Matano Ndaka (hereinafter referred to as "PW 1") of his Motor Cycle Registration Number KMDL 477G make Haojin 1500cc (hereinafter referred to as "the subject Motor Cycle") valued at Kshs 95,000/= and immediately before such robbery used actual violence on him. Only the Appellant's Co-Accused was charged with Count II that was in respect of the offence of handling stolen property contrary to Section 322(2) of the Penal Code.
3. The Learned Trial Magistrate Hon. E.G. Nderitu, Senior Principal Magistrate convicted the Appellant of the offence of simple robbery and sentenced him to seven (7) years imprisonment. She, however, acquitted the Appellant's Co-Accused on both Counts.
4. Being dissatisfied with the said judgment, on 25th November 2015 the Appellant filed a Notice of Motion application seeking leave to file his Petition of Appeal out of time, which application was granted and deemed to have been duly filed and served. At the time, he relied on three (3) Mitigation Grounds of Appeal.
5. On 6th March 2016, the firm of M/S Juma Nyaga & Co Advocates wrote to the Deputy Registrar High Court of Kenya Voi indicating that they had instructions to act for the Appellant in this matter. However, the said firm of advocates never appeared in court at any given time as a result of which the said Appellant represented himself.
6. After this court gave directions for the filing of Written Submissions, the Appellant filed a Notice of Motion application on 9th December 2016 seeking to be furnished with a First Report to enable him

prepare his Written Submissions. However, this court found the said application not to have been merited and dismissed it vide its Ruling of 15th June 2017.

7. On 27th June 2017, he filed Written Submissions on the main Appeal in which he cited fresh Grounds of Appeal therein. On 12th October 2017, the Respondent filed its Written Submissions and a Notice of Enhancement of Sentence both dated 11th October 2017 seeking to have the Appellant's sentence enhanced from seven (7) years imprisonment him suffering death as required by law. On 1st November 2017, the Appellant filed his submissions in respect of the Notice of Enhancement and his response to the State's substantive Written Submissions, on 15th November 2017.

8. When the matter came up on 15th November 2017, both he and the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

10. After perusing the Appellant's and the State's Written Submissions, this court was of the view that the issues that had been placed before it for determination were as follows:-

- 1. Whether or not the Charge sheet was defective;**
- 2. Whether or not the Appellant properly identified;**
- 3. Whether or not the Prosecution proved its case beyond reasonable doubt; and**
- 4. Whether or not the sentence that was meted upon the Appellant was harsh, severe and manifestly excessive warranting interference by this court.**

11. Notably, the Appellant did not list his Amended Grounds of Appeal separately making it difficult for this court to itemise the same in its decision herein.

I. CHARGE SHEET

12. The Appellant submitted that the charge sheet as drafted against him was not proper hence defective. He submitted that the Charge Sheet indicated that PW 1 was attacked by two (2) people which contradicted his initial report that he was attacked by one (1) person.

13. He averred that there were two contradicting reports in the Occurrence Book (OB). He stated that in OB Number 28/21/3/2015, PC Kemboi recorded a normal stealing of motorcycle while in OB Number 85/9/2/2015, PC F. Mbithe indicated that it was a robbery.

14. He contended that the real date of the incident was not properly established. He pointed out that the Charge Sheet indicated that it was on 9th February 2015, Benson Mwema (hereinafter referred to as “PW 2”) testified that it occurred on 7th February 2015 while and Peter Meme Mwero (hereinafter referred to as “PW 3”) testified that it occurred on 10th February 2015. He further contended that the Charge Sheet

indicated that PW 1 was injured which contradicted his evidence that he was not injured at all.

15. He submitted that when the prosecution amended the Charge Sheet and he took plea afresh, the Trial Court should have informed him that PW 1 would give evidence afresh. He submitted that it was on that basis that the Charge Sheet was defective and the trial a total nullity.

16. On its part, the State submitted that it was not clear from the Appellant's submissions which part of the Charge Sheet or Amended Charge Sheet was defective. It pointed out that a First Report comprises particulars of a complaint with regards to commission of a criminal offence by giving brief details of the facts of the offence, nature of the offence, particulars of the offence, description and name of the perpetrator if possible or if known, any other details the reportee can recall.

17. It explained how the officer at the reporting desk records what he is told by a reportee whereafter an investigating officer is assigned to conduct investigations and that if it is established that an offence had been committed, the matter is forwarded to the office of the Director of Public Prosecution (DPP) for prosecution. It averred that if the evidence and statements provides for a different charge, then a fresh charge sheet is drawn up.

18. It pointed out that the Charge Sheet was amended and read afresh to the Appellant and his Co-accused and they were allowed to Cross-examine PW 1 afresh, a fact that this court verified from the proceedings from the lower court.

19. As was rightly pointed out by the State, it was not clear what part of the Charge Sheet the Appellant had contended was defective. The fact that PW 1, PW 2 and PW 3 gave different dates of when the offence occurred did not render the said Charge Sheet defective.

20. Indeed, a charge sheet does not become defective merely because the evidence that has been adduced during trial does not prove the facts in such a charge sheet. If the evidence that is presented in court does not prove any offence, the trial court is obligated to acquit an accused person as envisaged in Section 210 and Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya) as the prosecution will either have failed to demonstrate that a *prima facie* has been established or to prove its case beyond reasonable doubt.

21. Section 382 of the Criminal Procedure Code provides as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

22. In the absence of any demonstration by the Appellant of what prejudice he suffered this court was not persuaded to find that the Charge Sheet as drafted was defective.

23. In the circumstances foregoing, his Ground of Appeal in respect of this issue was not merited and the same is hereby dismissed.

II. IDENTIFICATION OF THE APPELLANT

24. The Appellant submitted that PW 1 did not properly identify him to the police. It was his averment that PW 1 did not give the police his correct names or the material descriptions of his attacker. He

submitted that the Learned Trial Magistrate erred when she failed to consider that the name indicated in the first report was not his.

25. He stated that in the OB Number the Investigation Officer, 60035 PC Paul Ouma (hereinafter referred to as “PW 4”) stated that PW 1 reported that he had been robbed by one Elijah Makosi which he said was not his name and that during his Cross-examination PW 1 referred to him as “Elijah Mwathi Malungusu.”

26. It was his contention that since PW 1 purportedly knew his attacker as having been the Appellant, it was a case was about recognition rather than identification and consequently, an identification parade was not done. He pointed out that PW 1 never even mentioned that he was once his employee. He relied on the case of **Swaleh Suleiman Bonge vs Republic Criminal Appeal No 227 of 2003** at Mombasa where the appellate court therein questioned why the proper names and description of the attacker had not given to the police.

27. He further relied on the case of **Lesarau vs Republic (1988) KLR 783** where the appellate court held that where identification was based on recognition by reason of long acquaintance, there was no better mode of identification than by name. He also placed reliance on the cases of **Simiyu and Another vs Republic (2005) 1 KLR 192** and **Tekerali and Another Vs. Republic (1952) EA 259** where the common thread was that the description of an attacker is of highest importance.

28. The State submitted that the Appellant was well known to PW 1 as he had worked for him for four (4) months in 2013 and that on the material date of the offence, they had spent considerable amount time together and consequently, there was no error of the Appellant’s identification by PW 1.

29. It contended that the error on the Appellant’s second name as written in the OB did not in anyway vitiate his identification or affect the facts as presented before the Trial Court. It stated that the police officers who wrote the occurrence in the OB wrote his first name correctly but erred on his second name. It pointed out that the Trial Court erred in writing down his second and third names during PW 1’s testimony but that did not mean that the whole proceedings were void or did not relate to him.

30. It placed reliance on the case of **Wamunga vs Republic (1989) KLR 424** where it was held that a court is enjoined to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can make it the basis of conviction.

31. A perusal of the Charge Sheet showed that it related to Elijah Mulungusu. The Appellant pleaded to the said name. The indication of his name in the proceedings as “Elijah Mwathi Malungusu” did not imply that the same related to another person. There was no doubt in the mind of this court that the proceedings related to the Appellant herein.

32. In the event there was an error in the spelling of his name in the proceedings or Charge Sheet, Section 382 of the Criminal Procedure Code was very clear that no appeal shall be reversed on account of an irregularity in any proceedings unless the same of course has caused an appellant prejudice. What was of utmost importance herein was whether or not PW 1 properly identified the Appellant herein.

33. In his sworn evidence, the Appellant stated that he was on bedrest after being involved in an accident when on 17th March 2015, his friend, Paul Kiratu, visited and informed him that his former boss had alleged that he had stolen his motor cycle. The Appellant then went to Mtito Andei Police Station.

34. This court did not therefore find any value in analysing the respective parties’ Written Submissions relating to the issue of recognition, identification and identification parade as it was clear from both PW 1’s and the Appellant’s evidence that they were known to each other previously. The question as to whether or not the Appellant robbed PW 1 as had been contended by the Prosecution was a different matter altogether and the said issue was addressed hereinbelow.

III. PROOF OF THE PROSECUTION’S CASE

35. The Appellant contended that the Prosecution's case had very sharp contradictions in evidence. As can be seen hereinabove, he pointed out that there was a discrepancy in the day the alleged offence was said to have occurred. His argument was that from PW 2's evidence that police officers went to look for the Appellant's Co-Accused on 12th February 2015 which was five (5) days after he had seen Appellant at Voi Bus park, the alleged offence could only then have been committed on 7th February 2015. He stated that this contradicted the Charge Sheet which had indicated that the incident occurred on 9th February 2015 and PW 3's evidence that he went to the butchery on 10th February 2015 when he found PW 3 and his Co-Accused working.

36. He relied on the case of **Denkeri Ramkishan Pandya vs Republic Appeal No. 106 of 1950 EACA 93** where the court therein stated as follows:-

“It is difficult to distinguish the truth from untruth and who was telling the truth and who was telling lies where evidence is contradicted.”

37. He submitted that the two reports in the OB aforementioned had glaring contradictions and that the Prosecution ought to have called crucial witnesses to corroborate PW 1's evidence. In particular, he stated that PW 1's wife ought to have been called to confirm if really he went to their house and that she cooked for him. He further submitted that the KWS guard manning the gate should also have been a key witness to confirm that he did in fact enter and leave KWS as PW 1 had contended.

38. He placed reliance on the case **Bukenya vs Uganda (1972) EA 549** where the court therein held as follows:-

“The prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so in any inappropriate case lead to an inference that the evidence of uncalled witnesses would have tended to be averse to the prosecution.”

39. On its part, the State submitted that the Prosecution witnesses gave cogent and true testimony of the events of PW 1's robbery up to the point of the Appellant's arrest and recovery of the motorcycle. It further submitted that the factual account was undisputed as there were no inconsistencies in the testimonies of the said witnesses and their testimonies remained unshaken during their Cross-examination.

40. It pointed out that the Appellant's Co-Accused reiterated the same facts during his testimony from the moment the Appellant brought the stolen motorcycle to him for sale, when he wanted to borrow money from PW 2 to purchase the motorcycle up to when PW 4 went and recovered the motorcycle from him.

41. According to PW 1, he had last seen the Appellant in 2013 when he (the Appellant) had been his employee for about four (4) months. He testified that on 9th February 2015, the Appellant went to his house and requested him to take him to his sister who stayed at Kenya Wildlife Services (KWS) to look for fare to go home. He agreed to take him. Along the way, the Appellant entered a house where ventilation was made and he stayed there for about twenty (20) minutes as he waited for him. They then proceeded to KWS. About a hundred (100) metres from the KWS gate, the Appellant asked him to stop and a person who was beside the road grabbed his neck and removed him forcefully from the subject Motor Cycle.

42. The Appellant rode the said subject Motor Vehicle to KWS and came back after having changed his clothes. He picked up the person who was still stepping on his neck and sped off. He then informed passersby what had transpired whereafter he proceeded to Voi Police Station where he reported the incident. He further stated that the police established that the Appellant's sister actually lived at KWS. A month later, the subject Motor Vehicle was recovered from the Appellant's Co-Accused's grandmother's home at Kulele Village in Tausa. Thereafter, the Appellant and his Co-Accused were both arrested at Mtito Andei and charged with the present offences.

43. The evidence that was adduced in court was that the Appellant handed to his Co-Accused, the subject Motor Cycle. According to PW 2, the Appellant and his Co-Accused went to where he was working at Voi Park. The Appellant's Co-Accused asked him whether he knew the Appellant and he told him that they knew each other from when they were young and that he had in fact gone to school with the Appellant's younger brother. During his Cross-examination, PW 2 was emphatic that he had seen the Appellant ride the said subject Motor Cycle.

44. PW 3 stated that on 10th February 2015, the Appellant went to the butchery where he used to work with the Appellant's Co-Accused and asked who was a Kamba. He directed the Appellant to the Appellant's Co-Accused on the ground that they could understand each other. His evidence was that the Appellant and his Co-Accused went outside and spoke for about twenty (20) minutes and when the Appellant's Co-Accused came back, he borrowed from him Kshs 20,000/= from him which he and gave it the Appellant herein for purchase of a motor cycle.

45. His testimony was that he warned the Appellant's Co-Accused not to purchase the subject Motor Cycle because it did not have a log book but he did not heed to his warnings. He stated that his friend Musembi mentioned to him later that the Appellant's Co-Accused would get in trouble because the said motor cycle had been stolen. He said that the Appellant's in-law was one of the people who came to arrest him so that he could show them the whereabouts of the Appellant's Co-Accused. PW 4 confirmed that the subject Motor Cycle was recovered from the Appellant's Co-Accused's grandmother's house. His testimony was that when he went to the butchery, the Appellant's Co-Accused ran away. He also stated that the Appellant's Co-Accused disappeared from his house at night and he was only arrested at Mito Andei and the subject Motor Cycle recovered from his grandmother's house.

46. In his sworn evidence, the Appellant's Co-Accused testified that he gave the Appellant a sum of Kshs 20,000/= and kept the subject Motor Vehicle as a collateral until such time that he paid him back the money. He denied ever having stolen the Motor Cycle. PW 2 called him and informed him that he had been arrested on suspicion of having stolen the subject motor Cycle.

47. Having analysed the evidence that was adduced by the Prosecution witnesses, there appeared to have been a gap leading to the Appellant's arrest. Several questions also arose. Although it was not improbable, this court nonetheless found the following questions amongst many other questions it did not itemise herein to have been pertinent. Some of the questions were as follows:-

a. How was it that the Appellant would go to his former boss PW 1 two (2) years after they had last met just to be taken to his sister to get fare and for PW 1 to go out of his way to do so and more so to even wait for him for twenty (20) minutes as he went to a house where they made ventilation?

b. What were the odds of an employee asking his employer who he had met in 2013 to take him to his sister to get fare to go home?

c. If the Appellant had tricked PW 1 into taking him to his (the Appellant's) sister's house at KWS, it appeared odd for the Appellant would have stolen the subject Motor Vehicle, gone to his sister's house in a guarded place like KWS, changed clothes, escape through the same route he had robbed PW 1 and find his accomplice still stepping on PW 1's neck and taking him in the subject Motor Cycle without him worrying of being caught by members of public.

d. How did the Appellant's Co-Accused know that the Appellant was known to PW 2 for him to take the Appellant to PW 2 to confirm if they knew each other?

e. If the Appellant robbed PW 1 of the subject Motor Cycle and took off, what circumstances led the Appellant's in-law to go to PW 3 to ask him about the Appellant's Co-Accused and subsequently arrest him?

f. How did the Appellant's in-law connect the Appellant's Co-Accused to the subject Motor

Cycle which made him ask PW 3 where the Appellant's Co-Accused was?

g. How was it that when the Appellant went to where PW 3 worked at the butchery, he asked for a person who speaks Kikamba and PW 3 showed him the Appellant's Co-Accused? The Prosecution did not demonstrate that indeed, the Appellant's Co-Accused could speak Kikamba as had been contended by PW 3.

h. How did the said Musembi know that the subject Motor Cycle had been stolen?

i. Why did the Appellant's Co-Accused run away from the back door of the butchery and vacate his residence at night only for the subject motor Cycle to have been found at his grandmother's house as was stated by PW 4?

48. While it was not impossible, it did not sound plausible that the Appellant having robbed PW 1 could have opted to spend time at his sister's house changing clothes before escaping through the same route where he had just committed a robbery to escape.

49. As PW 1 stated that police established that the Appellant's sister stayed at KWS, nothing would have been easier than for the Prosecution to have established the fact to corroborate PW 1's evidence that the Appellant's sister used to stay there and that is where he was taking the Appellant on the material date. This court took PW 1's evidence that the Appellant's accomplice stepped on his neck as the Appellant went to his sister to change and then picked his accomplice with a pinch of salt.

50. The Prosecution ought to have established a time line to demonstrate that the Appellant would have had enough time to go his sister's house to change clothes and for the Appellant's accomplice who was not armed to have still restrained PW 1 without him raising an alarm or passerby passing by and rescuing him.

51. Having analysed the evidence herein, this court came to the firm conclusion that although the circumstances of the case herein were not improbable, the inconsistencies and gaps in PW 1's, PW 2's and PW 3's evidence led it to believe that there was more than met the eye in this matter and that the full story had not been told to the Trial Court.

52. Notably, although the Learned Trial Magistrate acquitted the Appellant's Co-Accused of the charges that had been referred against him having found that the Prosecution had not proved the same against him, this court noted PW 4's evidence that the Appellant's Co-Accused escaped from the butchery and from his house only for the subject Motor Cycle being recovered at his grandmother's house to have tilted heavily against the Appellant's co-Accused.

53. There was no logical explanation why he was running away unless he was not guilty. His conduct led this court to infer a negative inference. However, since he was not party to proceedings herein, this court will say no more about his role in this matter.

54. The above notwithstanding, this court found the ownership of the subject Motor Cycle to have been of paramount importance because it was also not clear to it what the connection between Abson Motors Limited whom the logbook showed was the registered owner of the subject Motor Cycle and PW 1 was. There was no evidence that pointed to the sack that the subject Motor cycle belonged to PW 1. If indeed the said subject Motor Cycle belonged to him but was still registered in the aforesaid name, nothing would have been easier than for the Prosecution to have laid that basis to prove his ownership.

55. The Appellant was under no obligation to assist the Prosecution prove its case. He had a constitutional right to remain silent during the whole trial. This court found and held that the Prosecution did not discharge its burden of proof in this case and it failed to prove its case against the Appellant herein beyond reasonable doubt. It also agreed with the Appellant that the evidence that was adduced by the Prosecution witnesses was inconsistent, incredible and contradictory to sustain a safe conviction against him.

56. It was thus not persuaded by the State's submissions that it had demonstrated that the Prosecution had proven the offence for robbery with violence contrary to Section 296(2) of the Penal Code warranting this court to enhance the sentence from seven (7) years imprisonment that had been meted upon the Appellant by the Learned Trial Magistrate to death sentence as prescribed by law as the State had argued.

DISPOSITION

57. The upshot of this court's decision was the Appellant's Petition of Appeal that was lodged on 25th November 2015 was successful. Accordingly, this court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

58. The State's Notice of Enhancement of the Sentence dated 11th October 2017 and filed on 12th October 2017 was not merited and the same is hereby dismissed.

59. It is so ordered.

DATED and DELIVERED at VOI this 17th day of January 2018

J. KAMAU

JUDGE

In the presence of:-

Elijah Mulungusu - Appellant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk