



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 3 OF 2015

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court in Criminal case No. 2301 of 2013 delivered by V.W. Wandera Chief Magistrate on 5/1/2015)

JOHN TITUS OMUTEKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that **on the 7th day of September 2013 at Kitale Ndogo Estate in trans Nzoia County jointly with another not before court robbed one Daniel Wekkesa Tendo his Motor cycle make TV's Star registration Number KMDB389C valued at Kshs 87,000/- and at the time of said robbery used actual violence to the said Daniel Wekesa Tendo.**
2. The appellant was convicted and sentenced to death hence this appeal. His grounds of appeal dated 20/1/2015 essentially attacks the decision of the lower court that it did not take into consideration that the case was not proved beyond shadow of doubt and that his defence was not considered.
3. Before looking at this it shall be worthwhile at this juncture to summarise the proceedings from the trial court.
4. **PW1 the complainant** testified that he was a boda boda operator and owned motor cycle registration No. KMDB 389C which he purchased for a total sum of Kshs 88,000/- that on 6/9/2013, the appellant, a mason, who worked for one Alice requested for his telephone number which he gave. He also told him that he was to ferry him to Kitale the following day very early in the morning from Maridadi.
5. He received a call at 4.36 am from the appellant and he went to Mama Alice place to collect him. They went to Kitale town and alighted at Eldoret Express petrol station. The appellant then gave him Kshs 1000 note but he did not have change. He went looking for it but later told him to take him to Kitale Ndogo as there was someone else her was to travel with.
6. On reaching Kitale Ndogo they met a man who wore a skirt. At that moment and while the motorcycle was stationary the appellant took a robe (nylon) and forcefully tied on the complainant neck. He was pulled off the motorcycle and taken to a maize field and left for death. He regained his consciousness at Kitale District hospital at around 7.00 am.
7. He reported too Matisi police post where Mama Alice was equally called for interrogation. The appellant was traced to Teso where he was arrested and brought to Matisi police station and later charged. The complainant identified the appellant at the police station after his arrest.
8. **PW2 Alice Amoit Murie** testified that she had employed the appellant as her mason and was building her house before he left for Teso (Amagoro). She said that he wanted to leave on 6/9/2013 but she told him that it was not right to leave as it was already late. The following day morning, at around 5.00 am she heard a motorcycle outside her gate and knew that it had come to collect the appellant. She was informed by her other employees that the appellant had left very early.
9. **PW3 Oliver Makhaso** the clinical officer from Kitale District hospital produced the P3 form on behalf of one Chrisantus Masinde who had examined the complainant and found that he had bruises on the anterior part of the neck (front part) and there was pain on swallowing. There was also a sub conjunctural hemorrhage in both eyes.
10. **PW4 P.C. Erick Riungu** from Kitale Police station carried out investigations after the report was made. He recorded statements from the witnesses and preferred charges against the appellant. He produced the receipt for the purchase of the motorcycle. Apparently the same was not traced.

11. When put on his defence, the appellant gave unsworn defence explaining how he was engaged at Mama Alice Amoit's home in building her house. That on 6/9/2013 he had not completed the work and slept till the following day when he left very early at 6.30 am. That it was Alice's son Moses who informed him that he would be carried to the stage by a motorcycle.

12. Indeed the following morning at 5 am a boda boda person came and collected him. He gave him kshs 1000 which he did not have change. The Matatu conductor paid on his behalf and on reaching Bungoma he was given back his change less 100 paid to the boda boda person.

On 8/9/2013 as he went to a construction site he was confronted by 2 people who escorted him to Moding police patrol base and later escorted to Malaba police station where he spent 3 days before being taken to Kitale police station and charged with the offence. He denied knowing the complainant or at all.

Analysis and Determination

13. This court is enjoined to re-evaluate the evidence afresh and come up with a fresh and independent finding with a reminder that it did not have the luxury of seeing the witnesses who testified during trial.

14. The court has perused the evidence as presented during trial, the written submissions of both the appellant as well as the respondent.

15. There is no doubt that the only key eye witness is the complainant alone. The rest of the witnesses generally corroborated the evidence of PW1.

16. In the case of **Maitanyi Vs Republic (1986) KLR 198**, the court of Appeal had this to say in respect to a single witness – thus

“ (1) Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing whether the greatest case the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

(2) When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3) The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decisions, it must do so when the evidence is being considered and before the decision is made.

(4) Failure to undertake any inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

17. From the above authority, can one clearly say that the conditions in which the appellant was attacked were favourable? Did the appellant call the complainant to take him to Kitale town that morning?

18. Having read the chronology and sequence of events as presented by PW1, PW2 as well as the appellant's, I have no doubt in my mind that it was the appellant who invited the complainant to ferry him to Kitale town that morning. This is informed by the simple reason that during cross-examination of the complainant, no where did the appellant suggest that he was picked by a bodaboda person courtesy of one Moses the son to PW2.

19. It seemed, and it is clearly so, that the complainant knew the appellant very well as a neighbour and one building PW2's house. The appellant did not deny that he worked for PW2. As a matter of fact it was PW2 who advised him not to leave that evening as it was dangerous but should instead leave the following morning.

20. PW2 testified that she heard the motorcycle that early morning and was later informed by the employees that the appellant had left.

21. I did not find the evidence of PW1 wavering at all. Even during cross-examination he maintained that it was the appellant who put a rope on his neck with the aid of his colleague who was wearing a skirt though he was a man.

22. Equally on identification a part from stating that he had known the appellant for the last 6 months and giving the police the name of the appellant as Titus, he went on to state that:

“ Mama Alice home the head lights of my motor bike flashed at you before you opened the gate.”

23. The injuries sustained by the complainant was clearly consistent with his evidence in chief.

24. In short all the ingredients of robbery with violence were established despite the motorcycle not being recovered. For the above reasons the appeal is unmeritorious. The defence as presented by the appellant did not oust the evidence by the prosecution.

25. On the question of sentencing current jurisprudence based on the Supreme Court decision in **Francis Kanoko Muruatetu & Another Vs Republic, Petition No. 15/2015** as well as the case of **Wycliffe Wangusi Mafura Vs Republic (2018) eKLR**, demands that the death

sentence imposed on the appellant ought to be revisited.

26. In the premises I set aside the death sentence imposed against the appellant and substitute it with 15 years imprisonment from the date of delivery of the lower court's judgment.

Orders accordingly.

Delivered, signed and dated at Kitale this 11th day of April 2018.

H.K. CHEMITEI

JUDGE

11/4/18

In the presence of:

Mr Kakoi for State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.