REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 60 OF 2017

PETER WANYUTU KAHIGA .... APPELLANT

-VERSUS-

REPUBLIC .... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 101 OF 2017

CONSTANTINE MWENDA .... APPELLANT

-VERSUS-

REPUBLIC .... RESPONDENT

(Being an appeal against conviction and sentence from Original case file No.852 of 2014 at Githunguri for the offence of Robbery with violence contrary to Section 296(2) of the Penal Code before the Principal Magistrate Hon. C. Kutwa on the 29th March 2017)

JUDGMENT

1. The above appeals arose from the judgment of the trial Magistrate at Chief Magistrate's court at Githunguri being Criminal Case No.852 of 2014.

The two appellants were jointly charged with the offence of **Robbery with Violence Contrary to Section 295** as read with **Section 296(2) of the Penal Code.**

2. The particulars of the offence were that on the 18th June 2014 at Miguta village of Githunguri District in Kiambu County, jointly with others not before the court robbed **Joel Gikundi Dio of motorcycle Registration No. KMDG 790u make Tiger** valued at Kshs.85,000/= and at or immediately before after the time of such robbery while armed with crude weapons used personal violence against Joel Gikundi Dio.

The victim Joel Gikundi Dio died eight days later as a result of the injuries.

3. Upon full hearing the appellants were convicted of the offence and sentenced as per the law provided. That was on the 29th March 2017.

This appeal is against both the conviction and sentence.

4. In their petitions and Memorandums of appeal dated 7th April 2017 and amended on the 19th March 2018 by both several grounds were stated but shall be condensed as hereunder.

> ***(1) That the trial magistrate erred in law and fact by convicting on a fatally defective charge sheet.***
>
> ***(2) That the learned Magistrate erred in law and fact by relying on circumstantial evidence that was not proved beyond reasonable doubt as required under the law***.
>
> ***(3) That the trial Magistrate failed to comply with mandatory provisions of Section 200(3) of the Criminal Procedure Code and***

Section 65 of the Evidence Act.

(*4) That the trial magistrate failed in law and fact by failing to accord the appellants their fundamental rights by way of facilities to prepare their defence and be heard contrary to Section 50(1) (2) of the Constitution.*

(5) That the trial court erred in both law and fact by rejecting the appellants defence without giving any cogent reasons.

5. Both the Appellants and the Respondent filed written submissions on the appeal.

6. **Defective charge sheet**

The appellants were charged with the offence of **Robbery with Violence Contrary to Section 295** as read with **Section 296(2) of the Penal Code.**

I have considered the appellants submissions. They have not submitted on this ground. They have not told this court what is defective in the charge sheet nor in the particulars of the offence.

It is trite that any person who wishes the court to believe in their allegation of facts they must prove them, that it is not enough to allege them.

See **Section 107 of the Evidence Act, and Criminal Appeal No. 38 of 2015 Charles Nega -vs- Republic (2016) e KLR.**

This ground is without merit, and I proceed to dismiss it.

7. **Provisions of Section 200 (3) of the Criminal Procedure Code** is on the matter of Conviction on evidence partly recorded by one magistrate and partly by another. It states

(3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re summoned and reheard and the succeeding magistrate shall inform the accused of that right.

Section 65 of Evidence act Cap 80 laws of Kenya talks of primary evidence, by way of documentary evidence.

8. The appellants in their submissions did not state in what manner the trial magistrate failed to take the above two provisions into account. The trial proceeded before Hon. J. Kwena SPM where five prosecution witnesses testified. Hon. M. Ochieng SPM then took over, and later Hon C. Kutwa PM finalised.

I have perused the proceedings. Whenever there as a change of magistrate, it is evident that the appellants were so informed. I am satisfied that upon their request, they were supplied with typed proceedings of the previous magistrate.

There is no record that the appellants demanded recall of any of the prosecution witnesses and the court denied their request.

I find no substance in the appellant's allegations.

As to **Section 65 of the Evidence Act** (cited above), nothing turns on it as no submission or otherwise was adduced before me.

9. For a party to rely on **Article 50 of the 2010 Constitution,** to state that no fair trial was accorded, it is upon that party to prove the allegation by cogent and credible evidence. No such proof was tendered either by way of submissions or highlights.

10. **Article 50(2)** states:

"- Every accused person has the right to a fair trial, which includes:

(a) to be presumed Innocent until the contrary is proved,

(b) to be informed of the charge, with sufficient detail to answer it

(c) to have adequate time and facilities to prepare a defence.

11. I have noted from the proceedings that upon the close of the prosecution case **Section 211 of Criminal Procedure Code** was explained to the accused persons. Their complaint is that they were not given adequate time to prepare their defence, nor informed of the manner of tendering their defence, whether sworn or unsworn, and whether they could bring their witnesses.

12. On Page 53 of the court proceedings, I noted the following: 14th November 2016:

COURT - **Section 211 of Criminal Procedure Code** explained to the accused.

Accused: I will give unsworn statement and call witnesses.

Accused: I will give unsworn.

Court: Defence hearing on the 29th December 2016.

13. The appellants statements above show that they were properly explained the various ways of stating their defence under **Section 211 of Criminal Procedure Code.**

I find that they were given adequate time well over a month to prepare their defence – and in any event, the defences were taken on the 25 th July over a period of two months, in Kiswahili which is the language both had indicted they understood. I find no merit in this ground

14. The more substantive complaint by the appellants is based on circumstantial evidence and the doctrine of recent possession.

For a conviction of Robbery with violence to be sustained, the court must be satisfied that the three ingredients of the offence have been proved beyond reasonable doubt.

These have been set down by the **Court of Appeal in Mohamed Ali -vs- Republic (2013) e KLR**, that:

(a) The offender is armed with any dangerous and offensive weapon or instrument, or

(b) The offender is in the company with one or more persons, or

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats strikes or uses other personal violence to any person.

15. The court proceeded to state that **proof of any one** of above ingredient is sufficient to establish an offence under **Section 296(2) of the Penal Code.**

16. As the first appellate court, I shall re-examine the entire evidence presented before the trial court to satisfy myself, and to come to my own conclusion, and being aware that I never saw or heard the witnesses testify - **Republic -vs- George Anyango Anyona & Dennis Oduol - Cr. App. No.53 of 2016 e KLR.** I have also considered the trial magistrates judgment delivered on the 29th March 2017.

17. In order to prove that the offence was committed, the evidence of the theft, the number of attackers, and the manner of the theft are important.

18. **Prosecution Case**

PW1 was **Isaiah Kamwenda** and father of the deceased, Joel Gikundi Dio who was robbed of his motorcycle registration No. KMDG 790U at Migunda village Githunguri. He was not a witness to the robbery incident.

PW2 Douglas Githinji Mutunia was a *bodaboda* rider and on the 18th June 2014, a Mr. Kanyaru called him and told him to go to Majengo-Nairobi to meet the owner of a motorcycle who wanted a rider, and while there, the owner was pointed to him as the 2nd appellant who also gave him Kshs.3.000/= for fuel and instructed him to ride the motorbike to Meru.

It was his evidence that at Meru(Nkubu) he was arrested on grounds that the motorbike had been stolen.

19. Upon cross examination, it was his evidence that he was given the motorcycle by Mwenda (2nd appellant) together with money for fuel and that at the time he was given the motorcycle PW2 was with Appellant No.1 who was lying on it. He could remember the registration No. as KMDG only.

20. **PW3 Kanyaru Kabaya** was awitness who set in court through the proceedings. The trial court declined to disallow him from testifying upon objection by the defence on grounds that upon his discretion, the evidence of the witness was very crucial and that, the Criminal Procedure Code does not disqualify any witness from testifying when he sits in court but that the court during proceedings should warn itself and be cautious in admitting evidence.

21. His evidence was that it was the 2nd appellant who called him on the 18th June 2014 in the evening and asked him to get him a motorcycle rider for him as he had one and wanted it taken to Meru, which he did. He confirmed that the 2nd appellant, at their place of work, gave him Kshs.3,000/= and as instructed, rode the motorbike to Meru. However on 19th June 2014, PW2 called him to say that he had been arrested at Nkubu, Meru. It was **PW3** evidence that he knew both appellants as he used to sell *miraa* to them.

22. **PW4** confirmed having employed the deceased and had bought the subject motorcycle No. KMDG 790U for him. He told the court that on the 18th June 2014, the deceased did not come home and on the 19th June 2014 he learnt that the deceased was attacked by robbers at

Kianjogu area who also took away the motorcycle where he went and found him unconscious, having been cut on the head several times – and was taken to Kenyatta National Hospital where he died eight days later.

23. The investigating officer, **PW6** was police Constable Bernard Onyango. His evidence was that he interrogated Kanyaru(**PW3**) who informed him that it was the appellants who gave him the motor cycle, that he arrested them at Kayole hospital and Meru respectively, and got the motorcycle recovered from Meru.

24. **Appellants case**

In their unsworn defences, the appellants opted not to call any witnesses. They also denied the robbery.

Upon the above evidence, the trial magistrate convicted the two on the 29th March 2017.

I have analysed the entire evidence as well as the judgment by the trial magistrate, and also the parties written submissions.

25. There is no dispute that the entire appeal revolves around circumstantial evidence. For conviction to be based on such evidence, the court must warn itself of the credibility of the evidence. **The Court of Appeal laid down the test in the case Abanga *Alias* Onyango -vs- Republic Cr. Appeal No. 32 of 1990 (UR)** that:

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests that:***
>
> ***(i) The circumstances from an inference of guilty is sought to be drawn, must be cogent and firmly established.***
>
> ***(ii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and no other.***
>
> ***(iii) The court must draw inference that no other co-existing circumstances would weaken or destroy the inference of guilt.***

26. If such tests are not met, then the accused would be entitled to an acquittal.

The appellants were not able to offer any persuasive evidence to counter that of **PW3** whose evidence was so consistent as to how the subject motorcycle was found in possession of the rider **PW2** who was hired to take the same to Meru by the 2nd appellant in the presence of the 1st appellant.

It is the 2nd appellant who posed as the owner of the motorcycle and indeed gave **PW2** money for fuel with instructions to take the motorcylce to Meru. **PW3** gave **PW1** the father of the deceased gave hints that lead to the arrest of the appellants, from his interrogation of **PW2**.

27. I believe the narration of events as testified by **PW2** and **PW3.** Their evidence was not shaken at all and each of the prosecution witnesses corroborated each other on the events.

There is no dispute as to where the subject motorcycle was stolen, the place where the rider (the deceased) was found unconscious with severe cut wounds on his head. He eventually died in hospital eight days after the robbery.

28. **PW6** the investigating officer upon production of **Safaricom data** of telephone lines of the Appellants was able to place them at the place where the deceased was attacked through robbed by their calls at the scene. The appellants in their own wisdom did not find it necessary to cross examine the witness or to question the Safaricom data with after the robbery traced the 1 st appellant at Meru, where also the motorcycle was traced. The 2nd appellant was arrested at Kayole. As stated in the case **Abanga** *alias* **Onyango(Supra),** the prosecution evidence was cogent and firm. It was not shaken at all. I found it credible as well.

29. The chain of events from the night of 18th June 2014 to the 19th June 2014 was so tight as narrated by the prosecution witnesses and specifically **PW2** and **PW3** that no other inference could be drawn as to who committed the offence, but the appellants – See also **Sawe -vs- Republic (2002) e KLR 364** where the above sediments were expressed. Further I find non existent or existing circumstances that would weaken or break the chain of the circumstances stated by **PW2** and **PW3**.

30. I agree with the trial magistrate that under **Section II(1) and 119 of the Evidence Act**, a statutory presumption existed against the appellants to explain why they were in Miguta area how they came into possession of the deceased's motorcycle. They totally failed to do so. The only reasonable explanation, supported by the prosecution evidence was that they robbed the deceased of the motorcycle and before during or after the robbery used violence injuring the deceased from which injuries he died.

31. Cumulatively, there can be no escape from the conclusion arrived at by the trial magistrate, and which I too find credible, that the offence of robbery with violence was committed by the 1st and 2nd appellants on the night of 18th June 2014.

32. **Doctrine of recent possession**

The property subject of the robbery was a motorcycle Registration Number KMDG 790U. In the charge sheet, it was described as KMDG

7904 make Tiger. **PW5** the owner of the motorcycle and who had employed the deceased produced the log book that confirmed the registration number as KMDG 790U, not 4, and his ownership.

All the witnesses referred to the motorcycle as such. **PW6** the investigating officer who recovered the motorcycle from Meru confirmed the registration number as the property of **PW5** Atansia M. Mugo.

Being a clerical error as I find it to be, the court is empowered to correct such errors as the correction would not prejudice any of the parties – See **Section 99 of the Civil Procedure Act**.

33. The **test on the doctrine of recent possession** is now settled. An offender found in possession of an item suspected to have been stolen will be imputed on him to have committed the offence.

In the case **Erick Otieno Arum -vs- Republic (2006) e KLR** the Court of Appeal in defining the doctrine of recent possession stated thus:

> ***"In our own view before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words there must be positive proof first, that the property was found with the suspect, secondly that the property is positively the property of the complainant, thirdly, that the property was recently stolen from the complaint."***

34. Thus the three preconditions must be met, being

> ***1. that the property belongs to the complainant.***
>
> ***2. That the property was recently stolen from the complainant.***
>
> ***3. That the property was found in possession of the suspect.***

35. Evidence was adduced by the prosecution that met the above three preconditions. See **Lawrence Gitau Gathuka -vs- Republic Nakuru Criminal Appeal No. 64 of 2014** where the above principles were applied. **PW5** by production of the motorcycle log book was able to positively confirm that it belonged to him, and that the deceased was his employee, and therefore had his authority to use the motorcycle on the night he was attacked and robbed of the same.

36. **PW2, PW3 and PW6** evidence was categorical and firm on how the motorcycle was stolen from **Miguta** village/Kiambu and recovered at Meru a day after the robbery.

How the appellants came into possession of the motorcycle and later hiring **PW2** to take it to Meru overnight where it was recovered was sufficiently proved. This evidence by **PW2**, **PW3** and **PW6** remained unshaken and unchallanged. I fully believe in its credibility.

There is therefore no doubt in my mind that the above ingredients were proved beyond any reasonable doubt.

37. It is noted that the appellants not only robbed the deceased of the motorbike but in the process inflicted fatal injuries to him.

In the case **Miller -vs- Minister of Pensions (1947),** the celebrated judge, **Lord Denning** explained what **reasonable doubt** is. He stated:

> ***"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt---"***

Upon re-analysing and re-examining the entire evidence, I come to the conclusion that the prosecution indeed proved the case beyond a reasonable doubt, and without a shadow of doubt. **The appeal on conviction fails as without merit.**

38. The appellants have urged me to interfere and vary the death sentence meted upon them by the trial magistrate should conviction be upheld.

In **Supreme Court of Kenya Petition No.15 of 2015 – Francis Karioko Muruatetu & Another -vs- Republic (2017) e KLR,** the Honourable Judges interrogating the death penalty for capital offences rendered that (Par. 112)

> ***a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.***

39. The above decision untied the court's hands in terms of discretion in sentencing. I am now at liberty to exercise my discretion, upon taking all relevant factors into account, any aggravating factors if any, and the appellant's mitigation in line with the Supreme court's directions in the **Muruatetu** case above.

40. I have also considered relevant cases being **HCCRA No.13 of 2018 Benjamin Kemboi Kipkore -vs- Republic (2018)e KLR, Wycliff Wangusi Mufura -vs- Republic (2018) e KLR, and Moses Kinyua Muchai -vs- Republic HCCRA No.142 of 2017.** The Learned Judges upon consideration of the mitigating factors by the appellants substituted the death sentences with jail terms of various periods.

41. I have considered that the victim of the robbery with violence died soon thereafter.

I shall therefore substitute the death sentence meted upon the Appellants to a sentence of life imprisonment.

Dated, and signed at Nakuru this 26th Day of July 2018.

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J.N. MULWA

JUDGE

Delivered at Kiambu this 2nd .Day of August 2018

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J. NGUGI (PROF.)

JUDGE