



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NO. 89 OF 2017

JAMES KIMAKI NGIZA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal on the conviction and sentence in criminal case No. 859 of 2105 Judgment of Hon. R.M. Oanda PM delivered on the 30th November 2017)

JUDGMENT

1. The appellant was charged with the offence of Robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars of the offence were that, "On the 3rd day of July 2015 at Game area within Masurura location in Transmara West District within Narok County, the appellant being armed with a dangerous weapon namely Rungu robbed David Chacha Wantahe of his motorcycle make Boxer Baja registration number KMCU 697J valued at Kshs. 88,000/- and immediately before or immediately after the time of such robbery struck and killed the said David Chacha Wantahe. The appellant was convicted and sentenced to death.
2. The appellant's grounds of appeal are; the conviction was based on an exhibit not in his possession, the trial court erred in basing his conviction on identification by recognition and that his defence was ignored and overlooked without cogent reasons. He seeks that the conviction be quashed and the death sentence set aside. Mr.Otieno for the state opposed the appeal.
3. As the first appellant court it's my duty to re-evaluate the evidence and reach an independent conclusion bearing in mind that I neither heard nor saw the witnesses testify. (See **Okeno vs. Republic [1972] E.A 32**).
4. The prosecution called a total of 9 witnesses. Pw1 Jacob Wantahe testified that on the 3//7/2015 he got a call from Esther Robi that his brother David Chacha had not been seen from 9am. His brother had left his home on a motorcycle. He called his brother's number but there was no response. On the 4/7/2015 he reported that matter at Kehancha police station. He tried to track his brother through the CID and found that his phone had gone off at 10.00 at Nkararo area. They went Nkararo and was told that the motorcycle had passed there. On the way to Enoosaen a certain mzee informed him that a motorcycle KMCU 687J had been detained at Mageche area. They found the motorcycle at the chief's place at Mageche. The chief called the brother of the person who took the motor cycle to him. Whilst at the chief's place the police called him and told him that his brother had been found dead at Gem. Omwenya Kimaki Ngiza had been already been arrested by then. The police informed him that the real culprit had been arrested. He identified the body of his brother. He did not know the appellant.
5. Pw2 Esther Robi a bodaboda operator testified that on the 3/7/2016 at 1.00pm she was at Game stage when her colleague David left with a customer, the appellant who was dressed in the same clothes he had on the day he hired David. They left for Ogwedhi. David did not return he was later on found dead.
6. Pw3 Omwenga Kimaki Ngisa testified that on the 3/7/2015 at 6pm his uncle John Ngere called him and told him that his brother the appellant had arrived at his home with a motor cycle and he suspected him. He went to the uncle's place the next day and found the appellant with the motor cycle. On asking the appellant where he got the motor cycle the appellant told them that he had teamed up with someone and went into gold mines. They got gold and got a buyer who was to buy it for Kshs. 90,000/= and that when the money his colleague took the money and ran away with the money leaving behind the motorcycle and that he took the motorcycle as security. The appellant followed him to his home. He advised the appellant that the motorcycle KMCU 687J should be taken to the chief. He (Pw3) took it to the chief the next day.
7. Pw4 Sabayo Peter Mukira testified that on the 3/7/2015 at 8.00pm he was called by a brother to his motorcycle rider David Wantahe that he had not been seen. They looked for him in vain. The next day they were informed that the motorcycle was at the chief's place the next day. The chief explained how the motorcycle got to her office, she arrested the person who had the motorcycle. The body of David Wantahe was later found. The appellant was arrested later.
8. Pw5 John Ngare Okechi testified that on the 3/7/2015 the appellant went to his home at 1.00pm with a motorcycle. The appellant was

soiled and dirty. He asked him where he was from. The appellant told him that he had bought the motorcycle. He wondered where he was from. At 5pm he began to call relatives. He was informed that the appellant did not have a motorcycle. He called the appellant's brother who went to his place the next day. The appellant could not tell them how he got the motorcycle. Later he had the appellant arrested.

9. Pw6 Paul Chacha testified that he is a bodaboda motorcyclist at Kehancha. On the 3/7/2015 at 8am the appellant went to their stage. The appellant signalled one of them and he took the motorcycle they headed towards Ogwedhi area. The motorcycle rider did not return. They looked for him his motorcycle was found at the chief's place.

10. Pw7 No. 46361 CPI Andrew Bett testified that on the 5/7/2015 together with CPI they got a report from David Njoga of a body in Gem area. They went to the said area and recovered the body in a thicket. They learnt the deceased was a bodaboda motorcyclist. Later they learnt that the appellant had been arrested and the motor cycle recovered.

11. Pw8 No.59928 PC Job Kipyegon testified that on the 5/7/2015 at 4pm he received a report from bodaboda riders that one of them called David Chacha was missing after being hired by unknown passenger. They received a report later from Mageche police station that the motorcycle had been abandoned at the chief's place. The appellant was arrested at the uncle's place. They recovered a bolted rungu from the place the appellant was sleeping and motorcycle which was at the chief's place.

12. Pw9 Doctor Victor Omacho testified that he has worked with Doctor Ndege who worked at St. Joseph's Mission hospital and he was conversant with his handwriting. He produced the post mortem report done by Doctor Ndege. Examination revealed that the body had a blunt chest injury causing massive bleeding inside causing acute respiratory arrest.

13. The appellant in his defence testified that on the 6/7/2015 he woke up and went to school. He met an AP of Moticho who arrested him. He asked the officer why and the officer informed him that he had been instructed to do so. At the AP camp he was transferred to Nyamaiya police station, he was placed in the cells the next day he was taken to Kilgoris court and charged. He was given statements. He found that someone was arrested with a motorcycle and taken to Nyamaiya police station. He asked the court to find out where the person was taken to. Pw1 stated someone was arrested with the motorcycle. The person was in court. When the 1st report was read in court the names there were two and different. They are that of the witness and Juma Kimaki. The case was planted on him. That someone else ought to have been charged. The witnesses came from Migori County. That if the chief told them about the motorcycle was not called to testify. None of the persons who were in the area the motorcycle was recovered wrote their statements. That the person who had the motorcycle agreed that he had planted tea and tress on his land and that is why they said it was him. He urged the court to look at both sides.

14. The trial magistrate found that the robbery had taken place and that the appellant picked the deceased from the stage and went with him, that was the last time the deceased was seen alive and that the appellant was found with the motorcycle the deceased had and that his defence that he was arrested after the rider stopped and went for fuel was unbelievable.

15. In **Oluoch vs Republic [1989]KLR** the Court of Appeal held that the offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:

- (i) The offender is armed with any dangerous or offensive weapon or instrument; or
- (ii) The offender is in the company with one or more other person or persons; or
- (iii) 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."

The offence of robbery with violence under **section 296(2)** of the Penal Code is proved if the prosecution proves any of those three elements.

16. After evaluating the evidence I am satisfied that a robbery was committed on the 3/7/2015. The testimony of Pw2 and Pw6 was that they saw the colleague David (deceased) leave with a person who had hired him and that he did not return. He was found dead with injuries on his body on the chest, the motorcycle he had was not found elsewhere.

17. The next issue is whether the appellant was identified as the assailant of the deceased. The evidence that was adduced was circumstantial evidence. In **Criminal Appeal No. 135 of 2016 Ahamed Mohammed & Another vs R, eKLR the Court of Appeal** held as follows,

"Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In **Abanga alias Onyango v Republic, Cr. App No. 32 of 1990** this Court set out the conditions as follows:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

(See also **Sawe v. Republic(supra)** and **GMI v. Republic, Cr. Ap. No. 308 of 2011.**

In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

(See *Teper v. R.* [1952] All ER 480 and *Musoke v. R.* [1958] EA 715). In *Dhalay Singh v Republic*, Cr App. No. 10 of 1997, this Court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

18. The evidence adduced was that the deceased David Chacha a motorcycle was hired by the appellant. Pw2 and Pw6 testified that on the 3/7/2015 they saw their colleague David and the appellant headed towards Ogwedhi. It was during day. Pw2 further informed the court that the appellant had on him the same clothes he had on the day he hired their colleague. Later the same day the appellant went to the home of his uncle Pw5 with the same motorcycle and he could not explain how he got it. His uncle got suspicious and called their relatives. This evidence was corroborated by that of his brother Pw3 who found him with the motorcycle the next day at his uncle's. His brother decided to take the vehicle to the chief's. The circumstances points to the appellant as the one who was last seen with the deceased and was later found with the motorcycle the deceased had on the date he disappeared and was later on found dead. The evidence irresistibly point to the appellant as the one who robbed the deceased. The appellant's defence that Pw3 was out to get his shamba was an afterthought and also the explanation to the uncle. The appellant was found with a motorcycle which had been stolen as its rider didn't return to his work place, the appellant failed to offer a reasonable explanation. The evidence of the uncle and the brother was consistent. His brother testified that he had to take the motorcycle to the chief's place as that was the proper thing to do. Having taken it there he was arrested and later released. This evidence coupled with the evidence of Pw2 and Pw6 point to the guilt of the appellant. The officers who went to the chief's place testified on how they recovered the motorcycle after it was taken there. The persons who went to the chief were called to testify and both were consistent in their evidence.

19. The appellant has raised the issue that the chief to whom the motorcycle was taken was not called. In **Sahali Omar vs Republic MSA No.44 of 2016[2017]** the Court of Appeal held that, *“the prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon the witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt (see Keter v Republic[2007]1EA 135).*

20. The chief received the motorcycle from the appellant's brother, the fact that he was not called does not destroy the inference of guilt. The evidence adduced was sufficient. I am satisfied that the prosecution proved their case beyond reasonable doubt. The conviction on the offence of robbery with violence was safe and it's upheld.

21. The appellant was sentenced to death. The Supreme Court declared the death penalty as unconstitutional (see **Francis Karioko Muruatetu & Another vs Republic SCK Pet.15 of 2015 [2017] eKLR**). I therefore set aside the death sentence and call upon the appellant to make his mitigation before sentence.

Dated and delivered at Kisii this 20th day of December 2018

R.E.OUGO

JUDGE

Appellant In person

Mr.Otieno Senior Prosecution Counsel

Dorothy Court clerk