



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 57 OF 2014

(Being an appeal arising from Kitale Chief Magistrate's court criminal Case No. 3023 of 2012 delivered by J.M. Nang'ea Senior Principal Magistrate on 19/5/2014)

ELKANA ANZENZE Alias PATRICK SIMIYU.....APPELANT

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 charge were that **on the 6th day December 2012 at Lunyu farm within Trans Nzoia county jointly with others not before court while armed with offensive weapons namely pangas, robbed Kennedy Wanyama Namasaka of his motorcycle make TVs Star blue in colour Registration No. KMCK 585H, two mobile phones make Nokia and cash Kshs 2,200/= all valued at Kshs 89,800/- and at the time of such robbery used actual violence to the said Kennedy Wanyama Namasaka.**

2. He was equally charged with the alternative count of **handling stolen goods** contrary to **Section 322(2) of the penal code**. The particulars of the charge were that **on the 7th day of December 2012 at Lunyu farm bondeni area Kwanza within Trans Nzoia County jointly with others, other than in the course of robbery with violence, dishonestly retained one motorcycle Registration No. KMCK 585H valued at Kshs 82,000/= having reasons to believe it to be stolen goods.**

3. The appellants was found guilty, convicted and sentence to suffer death hence this appeal. The substance of his appeal was that the trial court failed to appreciate that the identification was not full proof and there were inconsistencies in the prosecution witnesses.

4. The evidence as presented during trial were clear and straight forward and can be summarised as follows.

5. **PW1 Kennedy Wanyama Namasaka** testified that he was asleep with his wife and children on 6/12/2012 at around 10.00 pm when the door was broken violently. The intruders entered their house and tied them. They cut him using a panga and stole among others his employers motor cycle Registration No. KMCK 585H as well as a sum of Kshs 2700. In the process and through the flashing torches they were using, he managed to identify he appellant through his voice . He said that he had known him for the last 10 years.

6. After the robbers left he called his neighbours and he went to centre Kwanza hospital for treatment. The following day he was informed by the police that the motorcycle had been traced and the appellant arrested. He was equally issued with a P3 form which was filled at the hospital.

7. **PW2 Stella Mbone** the wife to PW1 gave almost the same testimony. She said that she lost her 2 Nokia 16 phones and that she recognised the appellant through his voice as he was also their neighbour for over 10 years.

On cross-examination she said that the appellant had equally been her customer at her shop.

8. **PW3 Peter Wambulwa Khaemba** the owner of the motor cycle Registration No. KMCK 585K testified that he had given the same to PW1 to carry out the bodaboda business. He produced the logbook and the purchase receipts for the said motorcycle.

9. **PW4 Sergeant Luka Wandetu** a police Reservist at Kwanza patrol base was called by PW1 after the incident. He met him on his way to the home and he told him that one of the attackers was the appellant who was a neighbour. He took PW1 for treatment at Kwanza health centre. He also informed Mr. Kirui from Kitale police station concerning the incident. The following day he was informed that the

motorcycle had been recovered and the appellant arrested. He knew the appellant who was a son of his neighbour, a teacher.

10. **PW5 Juma Sunguti** also a police reservist testified that he was on a patrol on 6/12/12/ when he heard screams from a petrol station. He rushed there and found members of the public having arrested a suspect and beside him was a motorcycle. They took him to Kitale police station.

11. **PW6 P.C. Patrick Bett** from Kitale police station received a suspect when he was brought at the police station by police reservist. He said that the suspect could not explain how he came into possession of the motorcycle. The owner of the motor cycle came to the station the following day. He identified the attacker.

12. **PW7 Kirwa Labatt** from Kitale District hospital produced the P3 form filled in respect to PW1. He found they injuries on his hand, wrist and cut wounds. Both lips were bruised.

13. **PW8 P.C. William Kimtai Kemboi** produced the photographs of the motorcycle as well as its accompanying certificate.

14. **PW9 P.C. Henry Kirui** carried out the investigations and recorded the statements from the witnesses and preferred charges against the appellant. He did also produce the purchase receipts for the motorcycle as well as the logbook.

15. When put on his defence the appellant gave unsworn evidence denying the charges. He said that he was a farmer as well as a pastor. He said that he was arrested on 6/1/2012 on his arrival from Nairobi at 1.00 pm at classic hotel in Kitale. He said that he attempted to restrain the police from beating someone but he was instead beaten up. The victim then ran away. He was arrested instead.

Analysis and Determination

16. The court has perused the proceedings herein as well as the lengthy hand written submissions by the appellant.

17. What take centre stage in my view is the question of whether the appellant was among the robbers

that struck that night. If so was he identified? Was there need as alleged by the appellant that a parade identification ought to have been undertaken?

18. It seems from PW1 and PW2 evidence that they were not able to identify the assailants from any sources of light especially the torches that were being flashed. The only recourse was therefore the voice of the assailants. The appellant in his defence or even at cross-examination did not argue that he was not from the same area. He did not deny the fact that he was known by PW1 and specifically PW2 whom he was her customer at her shop.

19. PW1 stated that;

“ I had recognised the voice of one of the raiders as Wangila Patrick. He is my neighbour. I grew up with him for over 10 years.”

20. Similar line of evidence was given by PW1 who said that he was her customer at her shop.

21. PW1 told PW4 as he went to the hospital that one of the attacker was the appellant . PW4 knew the appellant as a neighbour whose father was a teacher. This line of evidence was not controverted by the appellant.

22. More importantly the appellant was arrested by PW5 with the help of the members of public while he was in possession of the motorcycle. He could not explain how he came into contact with the motorcycle. Even in his unsworn defence he could not explain himself.

23. In the premises I am fully satisfied that the prosecution contrary to the appellants assertion proved its case beyond any shadow of doubt. The voice identification was not challenged at all. In fact based on the evidence on record, I did not see any need for the police to have conducted an identification parade.

24. The complainant together with his wife were able to recognise the appellant through his voice. They told PW3 who notified the police. The appellant was apprehended while in custody of the motorcycle recently stolen from the complainant. On being probed, he was unable to explain how it came into his possession. Worse still he had its keys and did not have its legal documents.

25. In a nutshell, this appeal is unmeritorious. The conviction and sentence against the appellant was

based on sound and factual evidence. The issues raised by the appellant in his submissions are periphery and does not add much to discredit the prosecution case.

26. The appeal is dismissed.

27. On sentencing, it is common knowledge now that although the death sentence is still in our statutes books, it has been found by the Supreme Court in the case of *Francis Muruatetu & others Versus Republic (2015) S.O.K*, that the same is not efficacious alone and other forms of sentencing can be considered.

28. Consequently and in line with the Supreme court's directions, I shall set aside the sentence of death meted against the appellant. I shall permit him however to mitigate afresh and thereafter consider an appropriate sentence.

Orders accordingly.

Delivered, signed and dated at Kitale this 17th day of December, 2018.

H.K. CHEMITEI

JUDGE

17/12/18

In the presence of:

Mr Kakoi for Respondent

Appellant – present

Court Assistant – Kirong

Judgement read in open court.