



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO. 4 OF 2018

MOHAMED ABDI KATELO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No.269 of 2017 of Senior Resident Magistrate's Court at Moyale)

JUDGEMENT

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 are that the appellant on the 29th day of June 2017 at Holale area in Moyale sub county within Marsabit County, jointly with others not before Court, robbed Toche Age of his motor cycle registration number KMEB O54H make Bajaj Boxer 15OBM valued at Ksh.115,000/= and immediately before the time of such robbery wounded the said Toche Age

The trial court convicted the appellant and sentenced him to suffer death.

The grounds of the appeal are that:

- 1. The appellant pleaded not guilty***
- 2. The learned trial magistrate erred in law in that there was no eye witness to prove the prosecution case.***
- 3. The learned trial magistrate erred in law and in facts by relying on the evidence adduced by PW2 which was uncorroborative and inconsistent. Also contradicting.***
- 4. The learned trial magistrate erred in law by relying identification parade done after four months.***
- 5. The learned magistrate erred in law in that the appellant's defense was rejected without giving cogent reason.***
- 6. That the learned trial magistrate erred in law that no any weapon was recovered from the appellant.***
- 7. The learned trial magistrate erred in law that witness PW3, a Police office, r confirmed that appellant was not arrested but took himself to the Police station.***
- 8. The learned trial magistrate erred in law by convicting the appellant on unproved allegations.***
- 9. The learned trial magistrate erred in law in that complainant did not properly identify the appellant.***
- 10. The learned trial magistrate erred in law by convicting the appellant without enough evidence.***
- 11. The learned trial magistrate erred in law in that there is no any witness from the crime office to prove the allegations.***

The appellant submitted that the probation officer prepared a bad prebail report claiming that the appellant's life was at threat. The appellant was not arrested by the police but went to the police station himself. The Investigating Officer took blood samples from the appellant and

testified that he did not find anything in the blood that could connect the appellant to the offence. The conviction is unfair. If the appellant had committed the offence he could have run away but instead he went to the Police station. The Police officers told him to sign a document and he refused. He was assaulted and then decided to sign the document. He told the trial court that he was assaulted.

The state opposed the appeal. Mr. Chirchir, prosecution counsel submitted that the offence occurred in day broad light. The complainant and the appellant knew each other. Identification was by way of recognition. On the material day the complainant carried the appellant in his motor cycle for about one hour. The appellant started attacking the complainant using a machete. The complainant became unconscious. The complainant had identified the appellant before becoming unconscious. There was no need of an identification parade. Members of the public were looking for the appellant and that is why he surrendered himself to the Police. At about mid-day the appellant went to PW2's house and changed his clothes. That proved that there was a struggle as the appellant's clothes were torn. It is the same time the complainant was attacked. Counsel submit that although the sentence is provided by law, the Court can interrupt the sentence.

This is a first appeal and the court has to evaluate the evidence afresh and make its own conclusion. Eight witnesses testified before the trial Court. **PW1 Toche Age Adura** was the complainant. He is a boda boda operator. On the 29.6.2017 at about 11.30a.m he was in the cause of his duty when he ferried the appellant. He was to take the appellant to Holale. When they reached there the appellant asked him to stop at a certain point. Before he could completely stop the appellant placed a machete on his neck and he was hit with the machete on the neck. At the time he had picked the appellant he had nothing with him but on their way to Holale the appellant had requested him to pass through a guest house where he had to pick something. They also stopped at a butchery where the appellant picked his jacket. He could see that there was something wrapped inside the jacket. They made a third stop over at the junction to Moyale Boys' High school where the appellant had to pick his mobile phone. PW1 further testified that he was cut with the machete and he passed out. Shortly he regained consciousness and saw the appellant starting the motor cycle. The machete was there. He asked the appellant why he wanted to kill him. The appellant took the machete and inflicted more injuries on PW1. When he was attacked again he lost consciousness. He regained consciousness and called his uncle, Adiso who went to the scene. The appellant had driven away the motor cycle. He was rescued and taken to the Police station. He was taken to Taqwa nursing home and later to Consolata hospital in Nkubu. At the time of the incident he knew the appellant but did not know his name. He however gave the appellant's description to the Police. On 17.7.2017 he went to Moyale Police station and identified the appellant in an identification parade. The motor cycle belonged to him and was never recovered. Prior to the incident he had worked with the appellant and he knew him very well.

PW2 Halima Edin Bagaja is a nephew to the appellant. On 29.6.2017 at about 11.00am the appellant went to her home in Butie. The appellant had a green jacket. The appellant returned to her home and picked his jacket at about 12.00noon. At about 2.00pm the appellant went back to her home and asked her to wash his clothes. The appellant changed his clothes and his trouser was torn at the knee area and was blood stained. He had a T-shirt which had no blood stains. The jacket had no blood stains. The appellant left. As she was still washing the clothes Police went to her home and arrested her uncle Abdi Noor Ali. She was also arrested later.

PW3 Gale Aila Dawe is a businessman. On 29.6.2017 he was at a construction site when his nephew PW1 called and informed him that he had been robbed and injured at Holale area. He went to the scene and found PW1 had been badly injured. He had an injury on the neck and his clothes were soaked in blood. He took PW1 in his vehicle and while on their way to Moyale PW1 pointed a certain butchery by the name baraka where the appellant had picked a jacket. PW1 was taken to the Police station and later rushed to Taqwa nursing home. On the same day the Police went to the butchery and arrested the owner. PW1 informed him that he knew the person who had injured him. **PW4 Robinson Kasamani** is a clinical officer who was based at Taqwa nursing home. On the material day at about 1.30pm PW1 was taken to Taqwa nursing home claiming to have been wounded by his customer. He noted some wounds on both sides of PW1's neck. The wound on the right side of the neck was deep and still bleeding. PW1 was conscious and talking. He was pale meaning that he had lost a lot of blood. He treated PW1 and referred him to Kiirua Mission Hospital for further treatment.

PW5 DR. Mohamed Khalif is a medical officer and was stationed at Moyale sub county hospital. He produced a P3 form that was filled by his colleague Dr. Khalumi whom he had worked with. Dr. Khalum was in Nairobi undertaking a masters degree. According to the P3 form PW1 had a cut wound about 3cm long near the right ear. There was a 12cm cut on the right of the neck which extended towards the back. There were other cut wounds on the neck. The degree of injury was assessed to be grievous harm. **PW6 PC Kesis Saima** was attached at the Moyale Police station. On 29.6.2017 he accompanied the OCS Chief Inspector Kihara and two other officers to the scene. They recovered a yellow helmet that was soiled and had blood stains. Beside the helmet there was a pool of blood. They collected blood samples. They got information that the victim had stopped at a certain homestead while carrying the suspect. They went to the homestead and found PW2 who was cleaning clothes. PW2 told them that some of the clothes she was washing belonged to Abdi Katelo the appellant. Among the clothes was a green jacket with white stripes. PW1 later identified the jacket to be the one the assailant was wearing. They also recovered a jeans which had blood stains at the knee region. At around 5.00pm on the same day the appellant surrendered himself and was arrested. The appellant had been previously charged with the offence of stealing motor cycle and assault but the case was withdrawn. Members of the public were on man hunt and that is why the appellant surrendered. The jeans was taken to the Government chemist for analysis. The motor cycle was not recovered.

PW7 Chief Inspector Timothy Kihara was incharge of Moyale Police Station. On the 17.7.2017 he conducted an Identification parade involving the appellant. The complainant, PW1 picked the appellant from the parade members. The parade was conducted after the appellant was charged in Court. He denied that the appellant was forced to sign the parade forms. **PW8 PC Julius Tum** was attached at the Moyale police station. He investigated the case. He received a set of clothes and one yellow helmet that had blood stains. He visited the scene where they saw dried blood. The scene was about one kilometre from the main road. He drew a sketch plan of the scene. The victim was hospitalised. On 17.7.2017 PW1 attended an Identification parade. It is his evidence that PW1 was not in court when the appellant was seeking bail before the Court on 17.7.2017

The appellant gave sworn evidence. It is his evidence that he is a turnboy. On 15.6.2017 he was acquitted in another case. Ten days after his acquittal he did not leave his home. This was during the months of Ramadhan. He had a motor cycle and carried three passengers. There was traffic jam and he was involved in an accident. He knocked a man who was crossing the Moyale Marsabit road. He got injured on the right knee and went for treatment at Afya nursing home. One of the passengers he was with, Isako Edin, went with him for treatment. By 29.6.2017 his right knee was okay and he decided to take a walk within Moyale town. He met boda boda operators including one Ibrahim Baja. At about lunch time he went to his aunt's home for lunch and changed clothes. He took a shower first before he changed his clothes. He was with Ibrahim Baja and Abdirahman Kalu when he went to his auntie's place. At about 4.30pm some young men who were

in Moyale town called Ibrahim Baja and told him that there were riots at Moyale town. Shortly his sister Habiba called him on phone and informed him that he was being sought by the police. He picked Ibrahim's motor cycle and went to Moyale police station at around 5.00pm. He was arrested and put in the cells. At one time he had worked for the complainant's uncle Adiso in his lorry This was in the year 2013. At that time they carried some luggage belonging to some people who had come from South Africa. The lorry was from Nairobi and was going to Moyale. When they reached Moyale the passenger claimed that one of their bags containing gold and silver had been lost. He was the turnboy in the lorry. The complainant's uncle Adiso claimed that he had stolen the bag and terminated the services. He was not paid his salary for three months and when he demanded the money he was threatened and told that he would be framed. It is his evidence that the charges were based on falsehood. He did not know the complainant. He did not have treatment notes from Afya nursing home.

The issue for determination in this appeal is whether the Prosecution proved its case beyond reasonable doubt. Is the conviction based on sound evidence? The Prosecution evidence proves that PW1 was robbed of his motor cycle on the 29th of June, 2017. PW3 went to the scene and found the complainant had been injured. Medical evidence by PW4 and PW5 proves that indeed PW1 suffered injuries during the robbery. PW1 was violently robbed of his motor cycle.

The evidence of PW1 is that it is the appellant who robbed him of his motorcycle. PW1 testified that although he did not know the appellant's name, he knew the appellant physically. He gave the appellant's description to the Police. PW3 testified that PW1 informed him that he knew his attacker.

The incident occurred during the day at about mid-day. It is PW1's evidence that he carried the appellant at 11.30am. They had three stop overs on their way to Holale. The appellant stopped the motor cycle at a guest house. PW1 testified that they stopped at a butchery where the appellant picked his jacket and the 3rd stop over was near Moyale Boys High School where the appellant picked his phone. All this time PW1 was able to see the appellant even though he knew him before the date of the incident.

There is the evidence of PW3 that while on their way towards Moyale town, PW1 pointed out at the butchery where the robber had picked his jacket. PW3 testified that the Police visited the butchery on the same day. PW2's evidence is that her uncle Abdi Noor Ali was arrested by the Police. PW6 testified that the Police went to a homestead where they found PW2 washing clothes. PW2 told them that some of the clothes she was washing belonged to the appellant. PW2's evidence is to the effect that the appellant had left his jacket at around 11.00am. He went back at 12.00noon and picked his jacket. He returned the same jacket at 2.00pm together with a T-shirt and blood stained jeans. PW1 identified the Jacket as the one the appellant picked at the butchery. It appears that PW2's homestead has a butchery.

The appellant's defence is multi-pronged. It is his evidence that he was involved in an accident. I believe this is an effort to explain why his trouser Jeans was torn. There is the explanation that PW3 had warned him of dire consequences for losing a client's bag. He also surrendered himself to the Police yet he could have run away if he had committed the offence. The trial Court dismissed the defence and correctly took into consideration that the appellant did not have the onus of burden of proof. PW3 testified and was not cross-examined about the lorry and gold luggage incident. I do find that that line of defence is an afterthought. Although the appellant could have opted to remain silent, once he decided to tender a sworn defence, he was expected to tender evidence that would have raised doubt on the prosecution case. His evidence that he was involved in an accident is not supported by any document. Does it mean that the Police were not informed when the appellant knocked a pedestrian with a motorcycle. Where are the medical records like treatment notes from Afya Nursing home where the appellant was treated. The appellant further testified that on the material day when he went to his auntie (PW2) for lunch, he was with one Ibrahim Baja and Abdirahman Kalu. PW2 seem not to have seen these two people. None of them testified. I do agree with the findings of the trial Court that the defence evidence does not raise any doubt on the prosecution case. There was no lost luggage or promise of dire consequences. Similarly, there was no accident involving the appellant and a pedestrian.

PW2 testified that the appellant went to collect his jacket at about mid-day. The evidence of PW1 is that he ferried the appellant at 11.30am. It is proved by the Prosecution evidence that on their way to Holale, the appellant picked his jacket from PW2. He returned the jacket two hours later at 2.00p.m. By then PW1 had been robbed of his motor cycle.

The appellant took himself to the Police station. According to PW6, members of the public were looking for the appellant. The Police were also looking for the appellant. If we go by the appellant's defence, his own sister, Habiba, called and informed him that the Police were looking for him. The only conclusion one can make is that the description of the robber by PW1 did fit the appellant. Members of the public also must have been given the description of the robber by PW1 or the Police. There is no confusion on the part of PW1 as to who robbed him. It is not mere coincidence that the appellant went to PW2's home at 12.00noon and collected his jacket. He used the jacket to hide the machete. PW1 saw the appellant trying to start the motor bike. The appellant's evidence is that he used Ibrahim Baja's motor cycle to go to the Police station. He therefore knows how to ride a motor cycle. He took PW1's motor cycle and it has never been found.

Given the evidence on record, I do agree with the findings of the trial Court. It is the appellant who robbed PW1 of his motor cycle. The prosecution proved its case beyond reasonable doubt and the conviction is proper. There is the issue of the Identification Parade. The trial Court held that the Parade was not necessary. The conviction is not grounded on the identification parade. PW1 knew the appellant before the incident.

The trial Court imposed the death penalty. As held in the case of **SAMSON MURUATETU & ANOTHER -V- ATTORNEY GENERAL & OTHERS, Supreme Court Petition numbers 5 & 6 of 2015** the mandatory nature of the death penalty is unconstitutional. In my view the unconstitutional nature of the death penalty cut across both murder and robbery with violence cases. The appellant was involved in another case of theft of a motor cycle but was acquitted or the case was withdrawn. He asked the Court to consider the period he was in custody. The incident occurred on 29th June, 2017. He was sentenced on 19.4.2018. Taking into consideration the circumstances of the case, I do find that the death sentence is not appropriate. Mr. Chirchir, Prosecution Counsel, appreciate

that the Court can alter the sentence. I do hereby set aside the death sentence and replace it with ten (10) years imprisonment.

In the end, the appeal on conviction is disallowed. The death sentence is set aside and is replaced by Ten (10) years imprisonment from the date of conviction.

Dated, Signed and Delivered at Marsabit this 17th day of December, 2018

S. CHITEMBWE

JUDGE