



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL APPEAL NO. 8 OF 2016

JOSEPH MWANGI NGANGARA ALIAS MUTHENGI....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence in the Principal Magistrate's Court at Marimanti in Criminal Case No.452 of 2015 delivered by L.N. Mesa - SRM on 15th November, 2016).

J U D G M E N T

1. **JOSEPH MWANGI NGANGARI ALIAS MUTHENGI**, the appellant herein was charged with two counts of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code** with alternative charges of handling stolen property contrary to **Section 322 (1)** of **Penal Code** vide MARIMANTI PM's COURT CRIMINAL CASE NO.452/2015. In the 1st count he was charged together with MARTIN MUTHOMI MWIKANGI ALIAS MARTIN MUTWIRI and the particulars of the charge were that on 23rd October, 2014 along Makutano Kinoru road Maua Township in Imenti North Meru County, the appellant and the co-accused jointly while armed with offensive weapons namely pangas robbed Lawrence Mwiti Murugu of his motor cycle Registration No. KMDK 892V make Tiger TG-150, cash Kshs.1,000, one bank plate and a wallet all valued at Kshs.**86,500/-** and used actual violence against the said Lawrence Mwiti Murugu

2. In the alternative count, the particulars were that on 26th April 2014, at Mionponi market in Tharaka South within Tharaka Nithi County, the appellant was found otherwise than in the cause of stealing, dishonestly having undertaken the disposal of one motorcycle chassis No.LSRPCKLIIEA 700225 engine No.161FMJ140088500 make TIGER knowing or having reason to believe that was stolen property or unlawfully obtained.

3. In the 2nd count, the appellant together with his same co-accused were charged with robbery with violence contrary to **Section 295** as read with **296 (2)** of the **Penal Code** and the particulars were that on 11th day of May 2014 along Nkubu-Kariene road in Imenti South Sub-County within Meru County, the two jointly while armed with pangas robbed Alex Munene Mwiti of his motorcycle Registration No.KMDC 900G make Captain CP 150 cash **Kshs.67,500** and at the time of such robbery used actual violence to the said Alex Munene Mwiti. The appellant also faced an alternative charge of handling stolen property contrary to **Section 322(1) (2)** of the **Penal Code** and the particulars were that on 10th November, 2014 at Mionponi area in Tharaka South Sub-County in Tharaka Nithi County, otherwise than in the course of stealing, dishonestly undertook the disposal of one motorcycle number plate Registration No. KMDC 900G knowing or having reasons to believe it to be stolen property or unlawfully obtained.

4. The appellant denied all the charges and trial proceeded whereupon the appellant was convicted by the trial court in respect to the first count (count 1) and the alternative charge in the 2nd count (count II) of handling stolen property contrary to **Section 322 (1) (2) of the Penal Code**. He was sentenced to death in regard to the first count and the sentence in the alternative count was held in abeyance given the nature of the first sentence. The appellant felt aggrieved by both the conviction and the sentence and preferred this appeal but before I consider the grounds of appeal I consider it prudent to look at the brief summary of the case against the appellant at the trial court.

5. The prosecution's case at the trial showed that the case against the appellant was majorly circumstantial in the sense that the complainant (PW1) was not able to identify his attackers when he was attacked on 23/10/2014 at around 9pm and robbed of his motorcycle Registration No. KMDK 892V make TIGER TG -150, said to be blue in colour. The complainant (Lawrence Mwiti Murugu) told the trial court that the two attackers pretended to be drunk but when he was closer enough, they pounced on him and one of them removed a panga and used it to slap him on his back and when he pleaded for his life, which he did and the robbers went with the motorcycle and his purse which contained Kshs.1000/- and an Afya Sacco ATM Card. Approximately eight months later and on 4th June 2015 an eagle eyed police officer known as Charles Kimonge (PW5) while on his duties stopped a motorcycle with Registration No. KMDJ 733H and suspected that the number appearing on the number plate was amiss due to the fact that some numbers appeared to have been superimposed on the initial figure with number '7' appearing to have been superimposed on where number '9' was. He told the trial court that he checked the number plate from the inside which revealed that the actual registration number was KMDC 900G. He then arrested the rider Francis Mugambi Kithure (PW4) and later handed the suspect plus the motorcycle to CPL Casper Ratemo (PW12) who carried out extensive investigations before charging the appellant herein together with a co-accused named **MARTIN MUTHOMI MWIKAMBA** alias **MARTIN MUTWIRI KINGORI**.

6. The evidence of **FRANCIS MUGAMBI KITHURE** (PW4) connected the motorcycle he was found with (P.Exh 4) to the appellant who had sold the said motorcycle to him at an agreed price of Kshs.65,000/-. He told the court that he sold his 2 cows and paid a downpayment of Kshs.40,000/- and later 15,000/- and finally 10,000/-. Patrick Nyaga Muechege (PW9) an Assistant Chief Mwanyari Sub-location testified and corroborated the evidence of PW4 and added that an agreement detailing the sale of the motorcycle was drafted by Marigo Geoffrey Mwiti (PW10). That witness (PW10) confirmed having drawn the agreement.

7. The investigating officer Cpl Casper Ratemo (PW12) gave a detailed evidence on how he carried out the investigations and able to piece together the evidence that pointed to the appellant and his co-accused. The number plate recovered at the scene by PW5, showed that the motorcycle Registration No. KMDC 900G was owned by Simon Kinoti (PW3) who was also a victim of another robbery (in respect of the second count) that involved his rider Alex Munene (PW2) on 11th May 2014 at around 23.30 hours where he was robbed by robbers who had pretended to be customers only to bounce on him and robbed him of the said motorcycle. That motorcycle has not been recovered but its number place was apparently used in an attempt to conceal the robbery in respect to the 1st count at the trial. The investigating officer was also able to establish that motorcycle Registration No. KMDJ 733 H whose particulars were produced as P.Exh 16 was operating in Kayole area in Nairobi and was never reported as having been lost or stolen.

8. In his defence the appellant conceded that Mugambi Kithure (PW4) had indeed paid him some money but defended the payment stating that the amount was for hire of his motorcycle which he had hired to Mr. Mugambi for a period of 30 days at the rate of Kshs.300/- per day. He further stated that the prosecution had failed to connect the robbery with him and denied selling the motorcycle to Mugambi.

9. In his judgment, the trial learned Magistrate found that the appellant disposed the motorcycle stolen from PW1 (Lawrence Mwiti Murugu) and Francis Mugambi Kithure (PW4) and because the appellant did not give a satisfactory account on how he came into possession of the motorcycle, he found that the doctrine of recent possession showed that he was one of the two robbers who robbed PW1 of his motorcycle and convicted him accordingly.

10. The appellant feeling aggrieved by that finding filed this petition of appeal and listed the following grounds namely:-

(i) That the Honourable Senior Resident Magistrate erred in law and fact by convicting the appellant for the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code when there was no sufficient evidence to support such a conviction.

(ii) That the Honourable Senior Resident Magistrate erred in law and fact by bounding a conviction on the evidence of the prosecution which was weak contradictory and completely unsafe.

(iii) That the Honourable Senior Resident Magistrate misdirected himself in law by shifting the burden of proving innocence on the appellant thereby prejudicing the appellant.

(iv) That the Honourable Senior Resident Magistrate erred in law by passing a sentence that is unconstitutional and illegal.

(v) That the Honourable Senior Resident Magistrate erred and misdirected himself properly and adequately analyse and evaluate the evidence on record and apply proper principles of law applicable in the circumstances of the case.

11. In his oral submissions before this court, the appellant through learned counsel Mr. Murango combined grounds 1 and 2 above and argued them contemporaneously. In his view there was not sufficient evidence to support the conviction and he termed the prosecution's case contradictory, weak and inconsistent. He had submitted that the complaint in, count 1 did not identify his attackers as they robbed him and that he was called eight months later to go and identify a motorcycle which had been recovered at Marimanti. He contends that there was no direct evidence linking him with the robbery and in his view direct evidence in criminal is important to found a conviction particularly in a serious offence carrying a mandatory death sentence.

12. The appellant has contended that the evidence tendered at the trial by the prosecution did not warrant a conviction and that the learned trial magistrate invoked the doctrine of recent possession of stolen property to found a conviction. In his view this was erroneous as he argues that for the doctrine to apply it must be established that; one, an accused person is found in physical possession of the stolen property and secondly that the property was recently stolen and third, there must be absence of an explanation on how the accused came into possession of it.

13. The appellant has contended that he was not found in possession of the stolen motorcycle and has pointed out that the motorcycle was recovered by PW5 (PC Charles Kimonge) on 4th June, 2015 in possession of PW10 (Mwiti) at Marimanti at Tharaka. The appellant has also pointed out that there was a contradiction between the evidence of PW5 and PW12 (Cpl Ratemo) on who was found in possession of the stolen motorcycle pointing out that PW12 testified that he was handed a stolen motorcycle together with its rider known as Mugambi Kithure. The appellant therefore poses question on to who was found in possession of the stolen motorcycle and submits that he was not the one found in possession besides the fact that the recovery was made eight months after the robbery and in his view that period cannot be termed as "**recent**".

14. The respondent through Machirah learned counsel for the state has opposed this appeal and specifically responded to the 1st and 2nd grounds of appeal in this appeal stating that the complainant in court was violently robbed as established by PW7 (Sepherina Kaimadeshi) the clinical officer who observed that Alex Munene (PW2) suffered injuries which he indicated in the P3 (P.Exh 8).

15. The respondent has also submitted that the doctrine of recent possession applied as in its view the relevant date was 26th October, 2014 and not the date the motorcycle was recovered. Mr Machirah counsel for the respondent contended that though there was an inadvertence in not producing the agreement detailing the sale of the stolen motorcycle, but the evidence adduced in his view was still

sufficient to found a conviction.

16. This court has considered the arguments advanced by both counsels in this appeal in regard to the application of the doctrine of recent possession by the trial court in its decision. There is no doubt going by the evidence tendered at the trial that there was no direct evidence linking the appellant here with the offence in count 1 simply because PW1 (Lawrence Mwiti Murugu) did not recognize the attackers who robbed him of his motorcycle and other valuables. The only evidence linking the appellant herein with the offence in count 1 was the fact that the stolen motorcycle was traced to him and the question for determination here is whether the evidence led was such as to justify an inference being made that the appellant was one of the gangs that robbed the complainant (PW1) on the night of 23rd October, 2014. It is a trite law that such evidence must have a high degree of certainty to sustain a conviction in criminal law. There are two critical issues in this appeal that answers the question whether the doctrine of recent possession applied. These are:-

- (i) Time of possession and
- (ii) if he was caught in possession.

17. In my considered view, what is pertinent here is the time when the appellant was found in possession of the stolen motorcycle if at all. The appellant has pointed out that the relevant time should be when the stolen motorcycle was recovered by the police officer (PW5) which was 4th June 2015 while the respondent says that the appellant was found in possession of the motorcycle on 26th October, 2014. There is no dispute or contest that PW1 was robbed of his motorcycle Registration No.KMDK 892V, Tiger blue in colour which was new at the time of the robbery since it was barely three weeks old from the time PW1 bought it from the dealers. The date of the robbery was 23rd October, 2014 at around 9pm at a place called Baptist Church along Makutano-Kinoru road in Maua, Meru County. The evidence adduced by the prosecution also shows that on 26th October, 2014 at Miomponi market Tharaka South, Tharaka Nithi County, PW4 (Francis Mugambi Kithure) was approached by the appellant with an offer to sell him a motorcycle with a Registration No.KMDH 733 H, a Tiger make blue in colour. This evidence was corroborated by the evidence of Marigo Geoffrey Mwiti (PW10) who testified that PW4, a close friend approached him and asked him to witness a purchase of a motorcycle at Tumbora market. The witness told the trial court that he agreed and accompanied PW4 to where the motorcycle was and while there;

"Joseph Mwangi (appellant) came with a new motorcycle. It had done about 582 Km".

This fact of the state of the motorcycle clearly corroborates the evidence of PW1 who had testified that the motorcycle was almost new because he had bought it and used it for only three weeks. After a test drive, the two were impressed and PW4 testified that he sold his two cows after settling for an agreed price of Kshs.65,000/- and paid a downpayment of 40,000/-. The material time in regard to when the appellant was found in possession of the motorcycle which later turned out to be stolen was 26th October, 2014. The trial magistrate properly directed himself in that regard when he found that the appellant was found in possession of the stolen, motorcycle hardly three days after the date of robbery (23/10/2014). I am not persuaded by the appellant's assertion that the material time of possession should be on 4th June, 2015 when PC Charles (PW5), the hawk-eyed police officer who was able to discern that the motor cycle number plate had been manipulated with different letters and figures to read KMDJ 733H instead of the correct Registration No. KMDK 892 V. The 4th June 2015 was the date of discovery of the fact that the motorcycle carrying the Registration No.KMDJ 733 H was stolen and the extensive investigations carried out by the investigating officer (PW12- Casper Ratemo) established that fact and the fact that the motorcycle was a subject of a violent robbery that had taken place on 23rd October 2014 at Maua, Meru County.

18. The appellant faulted the finding of the trial court that he was the person found in possession of the motorcycle particularly given that the agreement detailing the sale of the stolen motorcycle was not tendered in evidence. This court has considered the evidence tendered by the prosecution in its entirety

and I have come into the same conclusion with the trial court that notwithstanding the absence of the written agreement the evidence adduced showed that the appellant sold the stolen motorcycle to PW4 on 26th October, 2014. The evidence of PW4 that the appellant approached him with an offer to sell the stolen motorcycle is corroborated first as I have indicated above by Marigo Geoffrey Mwiti (PW10) and an assistant chief Patrick Nyaga Muchege who testified that the appellant was known to him well as he was a resident of his sub-location and that he had called him and asked him to witness the sale of the motorcycle. I have considered the evidence tendered by both PW9 and PW10 and I find that the facts presented to be a normal and an ordinary description of some course of events that one would find normal and usual in the locality that the transaction took place. The Assistant chief at first declined to endorse the agreement because of lack of the logbook which I find normal and usual for person of authority exercising some caution to ensure that the transaction was above board. There is no doubt that the witness (PW9) participated in the transaction. This is what he told the trial court:-

"The 2nd accused (appellant) told me that he was selling the motorcycle at Kshs.65,000/-..... the buyer gave the 2nd accused (appellant) Kshs.40,000/- and remained with a balance of Kshs.25,000/- to be paid upon production of the logbook....."

I saw the motorcycle they were selling it was blue in colour. The registration number was KMDJ 733 H".

The evidence of Marigo Geoffrey Mwiti (PW10) largely corroborates the evidence of PW4 and PW9 on what transpired in the transaction of the sale of the stolen motorcycle between the seller (appellant) and Francis Mugambi Kithure (PW4), the buyer. That evidence was given more credence by Jeremiah Karimi Mugambi (PW11) who testified that he witnessed the payment of the balance of Kshs.10,000/- made by PW4 to the appellant in December 2014 when the two went to his house to witness payment of the same. The witness was sure about what the balance was all about as he told the trial court that it was for a blue motorcycle although he could not remember the registration number.

19. When the above evidence is considered alongside the evidence of the investigation officer whose investigation I found to have been impressive and thorough one is left with no scintilla of doubt that the appellant was in possession of a stolen motorcycle whose registration number had been deliberately manipulated to cover up a crime that had been committed three days previously as I have observed above. The issue for determination herein is whether that possession was sufficient to sustain a conclusion that the appellant was one of the gangs that attacked and robbed PW1 of his motorcycle on 23rd October, 2014. How proximate in time in relation to the date of the robbery was the motorcycle found in his possession and does the principle of recent possession apply?. In the case of **Matu -vs Republic [2004] 1 KLR**, the Court of Appeal while restating the principle in **R- vs- LOUGHIN 35 CR. APPL. - R- 69** observed as follows:-

"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property that is certainly evidence from which the jury can infer that he is the homebreaker or shopbreaker."

In that cited case, (Loughin's) case drinks stolen from a pavilion in the dead of the night were found about 2 hours in the appellant's possession and he gave no **"acceptable explanation"** of how he came by them. Applying the above principle in this present instance, I have noted with satisfaction that the trial court found that,

"the 2nd accused did not give an account to the satisfaction of the court as to how he came into possession of the motorcycle stolen from PW1 which he sold to PW4."

I have re-evaluated the defence put forward by the appellant which was that the amount of money that were witnessed by the prosecution witness was for hire. This is what he stated in defence.

"Mugambi had hired the motorcycle for a period of 30 days at the rate of Kshs.300/- per day."

That statement in relation to the transaction between the appellant and PW4 and witnessed by PW9, PW10 and PW11 did not make sense in two respects.

(i) A simple calculation of Kshs.300 per day for 30 days gives you a total consideration of Kshs.9,000/- The appellant did not offer the explanation of basis of the other Kshs.54,000/- he received from Francis Mugambi Kithure (PW4).

(ii) The appellant did not give particulars of any other motorcycle he was referring to and therefore an inference can be made that he was referring to the same motorcycle Registration No. KMDH 733 H later found to be the stolen motorcycle Registration No. KMDK 892 V.

In view of my finding above in respect to the time the appellant was found in possession of the stolen motorcycle which was on 26th October, 2014, barely three days after it was violently robbed from PW1, this court finds that the trial magistrate made correct inference that the appellant was one of the gangsters that accosted the complainant. The principle of recent possession was correctly applied because again as I have observed above, the appellant's explanation on how he came into possession of a stolen motorcycle was wanting. His attempt to change the reading of the number plate (P.Exh 10) was an attempt to cover up the crime and were it not for the diligence of a police officer (PW5) perhaps the discovery could not have been made given the location the motorcycle was recovered.

20. The appellant faulted the trial court for misdirecting himself on the question of burden of proof. It is true that the prosecution always has the burden of proof but as conceded by the appellant's counsel, when it comes to recent possession of stolen property, the burden shifts once it is established that the accused person was found in possession of the stolen property. I do agree with the respondent's counsel that the explanation offered by the appellant on how and why he received some payments really did not displace the prosecution's case. I am also not persuaded that the conviction of the appellant was solely based on the weak defence offered by the appellant. In my view the conviction was based on the evidence tendered by prosecution. I have re-evaluated the same and I find that the same met the threshold. All the ingredients of the offence under **Section 296(2)** of the **Penal Code** were met. Although I agree with the appellant that the evidence of PW7 (clinical officer) did not relate to count 1, but the absence of actual violence or injury to a victim of robbery does not negate the offence of robbery with violence as defined under **Section 296 (2)** of the **Penal Code**. The cited Section provides as follows:-

"If the offender is armed with any dangerous or offensive weapon or instrument, or in the company with one or more other persons(s), or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person he shall be sentenced to death."

The use of the prefix "**or**" in the above section shows that any act described on its own is sufficient to found a conviction. The complainant in count 1 (PW1) testified at the trial and said;

"..... when I was close enough, one went to the left and other to my right. They used a wire to hold me. I fell off the motorcycle. They removed a panga which one of them used to slap me on the back....."

The evidence shows that the necessary ingredients of the offence of robbery with violence were at the play during the robbery and the absence of a medical report does not negate or alter that fact. The complainant was robbed by the appellant who was in the company of one other person.

21. On the question of the propriety of the sentence, the appellant has faulted the sentence imposed on him arguing that the sentence would deprive him of the right to life. The state on the other hand has responded that **Section 296(2)** of the **Penal Code** creates an offence called robbery with violence whose penalty is a death sentence. The state has argued that the right to life is not absolute as the same is limited by statute and cited the decision in the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS- VS-**

REPUBLIC [2013] eKLR to support the contention.

22. It is true that right to life is one of the fundamental rights enshrined in the Constitution of Kenya 2010. **Article 26(1)** thereof provides that every person has the right to life and that right cannot be deprived arbitrarily. The right to life is also protected by international instruments and by virtue of **Article 2(5) and 2(6)** of the **Constitution of Kenya**, international treaties and covenants to which Kenya is party to are applicable here in Kenya and one such provision is **Article 6** of the international covenant on civil and political rights which provide as follows:-

"Every human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrarily deprived of his life."

However, I agree with the respondent that that right is not absolute because under **Article 26(3)** of the **Constitution**, limitation is provided as follows:-

"A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law. (Emphasis added.)"

It is also important to note that apart from the above limitation, **Article 24** of the constitution also provides for limitation of the same right and it provides as follows:-

"A right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including

a. the nature of the right or fundamental freedom;

b. the importance of the purpose of the limitations

c. the nature and extent of the limitation

d. the need to ensure that enjoyment of rights and fundamental freedom by any individual does not prejudice the rights and fundamental freedoms of others....."

The robbery with violence is a serious crime and apart from that, the perpetrators of the crime clearly infringe on the rights of others to enjoy their right to life property and others. That is the reason why the statute (Penal Code) provides for a death penalty for the offence as a deterrent. So apart from limitation by the constitution a right to life is also limited by statute (Penal Code) and death penalty therefore is not unconstitutional as contended by the appellant. That contention in my view is not tenable in view of the above cited statutory and constitutional provisions. I am properly guided in that respect to the Court of Appeal decision cited by the respondent in the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS - VS- REPUBLIC [2013] eKLR**. Nonetheless, I am minded to agree that it is about time that Kenyans through Parliament decide whether there is still need to maintain a sentence that has for all practical purposes been overtaken by the events of the recent past in this country. Though courts continue to pass and uphold the death penalty, in practice the execution of the sentence by President of Kenya long ceased pecking the question as to the rationale of maintaining a sentence in the statutes that has lost its relevance. Having said that, as long as the death penalty remains in our statutes, courts hands will continue being tied and that is why death sentences will continue being meted out in accordance with the law.

The long and short of this court finds no merit in this appeal. The same is dismissed and the conviction and the sentence passed by the trial court are upheld.

Dated and delivered at Chuka this 23rd day of October, 2017.

R. K. LIMO

JUDGE

23/10/2017

Judgment signed, dated and delivered in the presence of Nehima holding brief for Mbaya & Murango Advocates for appellant and Ndombi for the state.

R. K. LIMO

JUDGE

23/10/2017