REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 2 (C) OF 2015

WILSON NJOROGE KANGATU..……...……APPELLANT

VERSUS

REPUBLIC…….…….…….....RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case No.1192 of 2011 by Judgement of Hon. P.A. Olengo dated 19/7/2013)

JUDGEMENT

WILSON NJOROGE KANGATU hereinafter referred to as the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code; and the second count of stealing motor vehicle contrary to section 278 of the Penal Code.

The background:

The case for the prosecution was based on the following facts:

The appellant and others not before court on the 16th July 2010 at Kitengela township within Rift Valley Province while armed with a dangerous weapons namely pistol robbed James Kinyanjui Murage of a motor vehicle registration KAN 542G make Toyota valued at Ksh.300,000/=, and immediately after such robbery killed the said James Kinyanjui Murage. And that further between 17/6/2010 and 19/6/2010 at Kitengela township within Kajiado County jointly with others not before court stole a motor bike registration KMCB 388H make Boxer valued at Ksh.80,000 the property of the late James Kinyanjui Murage.

At the trial the appellant denied both counts. He was tried and convicted on both counts. On the first count of robbery with violence he was sentenced to suffer death and on the 2nd offence of stealing; to serve 5 years imprisonment. In view of the capital sentence on count 1 the trial magistrate put on hold 5 years imprisonment.

Being dissatisfied with the judgement of the lower court the appellant who was represented by Mr. Njiraini Advocate, appealed to this court. The respondent was represented by Mr. Akula Senior Prosecution Counsel. The appellant counsel crafted nine grounds of appeal which in summary are:

(1) That the learned trial magistrate erred in both law and fact in convicting on contradictory uncorroborated evidence.

(2) That the learned trial magistrate erred in law and fact by convicting on extraneous

evidence not raised by either parties.

(3) That the learned trial magistrate erred in law and fact by failing to summon essential witnesses.

(4) That the learned trial magistrate erred in law and fact by admitting and relying on an irregularly produced postmortem report.

(5) That the learned trial magistrate erred in law and fact in that the prosecution case was not proved beyond reasonable doubt.

(6) That the learned trial magistrate dismissed the plausible defence by the appellant.

(7) That the learned trial magistrate failed to apply the provisions of Section 25(a) of the Evidence Act.

(8) That the realms of a fair trial were infringed by failure to be provided with a legal counsel at the hearing.

(9) That the learned trial magistrate based his conviction on circumstantial evidence which fell below the required standard.

The state opposed this appeal. Directions were taken where both counsels filed written submissions with a time allocation to highlight the key issues arising thereto.

Appellant's counsel submissions:

Mr. Njiraini learned counsel for the appellant submitted in relation to the contradictions and variance in the testimonies by prosecution's witnesses on the disappearance of the deceased. Mr. Njiraini submitted that the trial magistrate wrongly relied on the evidence of PW2 and PW7 to conclude as to how the deceased met his death.

These witnesses, according to Counsel Mr. Njiraini did not identify the last people who were with the decease nor knew the person who was involved in the murder of the deceased. He further challenged the testimony of PW7 who relied on the occurrence book to link the appellant as one of the passengers on the material day in motor vehicle KAN 542G. Mr. Njiraini argued that the respondent tendered no evidence that appellant was staying with the deceased. He referred to the findings by the learned magistrate that the prosecution proved that appellant was living with the deceased and he was with him when he went to Thika as not supported by any iota of evidence. Counsel submitted that PW8 testimony on a confession statement made by the appellant did not assist the prosecution for failure to comply with Section 25(A) of the Evidence Act Cap 80 of the Laws of Kenya. The learned magistrate treated the statement as one that could not be relied upon for reason that it was made by a co-accused and that it cannot be used to find the maker guilty.

Learned counsel Mr. Njiraini further submitted that whereas Dr. Murage conducted a postmortem on the body of the deceased, the prosecution failed to summon him as a witness. He argued that production of the postmortem in evidence by the investigating officer was unacceptable as no basis was laid by the prosecution under Section 77 of the Evidence Act. That the evidence went unchallenged as the appellant was not accorded an opportunity to cross examine the maker. Mr. Njiraini further submitted that the SMS evidence by PW1 regarding a message received from deceased phone was unsatisfactory.

Last but not least counsel argued that the prosecution failed to summon one Mkono as a witness. Secondly the investigating officer sought no assistance from Safaricom Service Provider to clarify the evidence on origin of the SMS messages. That bearing in mind the importance of the key witnesses in the sequence of events, failure to summon them dealt a blow to the prosecution case. In his submissions Mr. Njiraini argued that there was no evidence to prove that the appellant was the author of the SMS used to

implicate him with the offence.

Mr. Njiraini in his submissions queried the learned trial magistrate's finding that appellant did not possess evidence of purchase of motor cycle from the deceased. Mr. Njiraini invited the court to find that appellant sold the motor cycle and passed on the following documents to the new buyer; the log book, copy of the ID of the previous owner, copy of PIN of the previous owner and a copy of his own identity card. Mr. Njiraini argued further that the conflict in the evidence by the prosecution witnesses was difficult to resolve save for in favour of the appellant. Mr. Njiraini submitted that Mkono and a witness from Safaricom Company would have been material witnesses for the prosecution who ought to have been called at the trial. He relied on the case of **Bukenya & Others v Uganda [1972] EA pg. 549**. In summary Mr. Njiraini for the appellant submitted that the entire prosecution case was based on circumstantial evidence which failed the test and legal principles as held in the following cases:

(1) Sawe v Republic [2003] KLR pg 375 – 376

(2) Republic v Kepkerong Arap Koskei & another [1952] (16 EACA 135).

(3) Mary Wanjiku v republic cr. appeal no. 17 of 1998

The legal proposition in these authorities being that for circumstantial evidence to justify the inference of guilt, the culputory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. Learned counsel asserted that no such circumstantial evidence was alluded to by the trial magistrate in reaching a verdict of guilty and convicting the appellant. He prayed for the appeal to be allowed and conviction and sentence be set aside.

The Respondent's Submissions:

Mr. Akula for the state in reply opposed the appeal stating that the prosecution through the nine (9) witnesses proved their case beyond reasonable doubt. He reiterated the testimony of PW1, PW2 and PW6 regarding the events of 16/6/2010 and 20/6/2010. According to learned prosecution counsel submissions, the deceased left Kitengela for Thika driving motor vehicle registration No. KAN 541G. The deceased was never to be seen until 30/6/2010 when his body was positively identified at Thika Hospital Mortuary. According to PW7 communication from Kiruara Police Station indicated that a body had been collected within the area and escorted to Thika Mortuary. Mr. Akula further argued that the appellant besides being the last person seen with the deceased, also participated in selling off a motor cycle Reg. KMCB 388H belonging to deceased.

It was submitted by learned counsel for the respondent that the sale of motor cycle took place on 20/6/2010 when the deceased was already reported missing. The chain of events which occurred on 16/6/2010 till 23/6/2010 when the appellant was arrested forms a sequence that establishes the ingredients of the offence of robbery and placing him at the scene positively.

Mr. Akula further contended that the failure to call one Mkono and a witness from Safaricom Mobile Provider did not weaken the case for the prosecution. The learned counsel for the respondent further submitted that the case for the prosecution was based on credibility of the witnesses who testified at the trial. There is no evidence from the appellant to rebut any of the testimony by witnesses called to give evidence against the appellant. It was the respondent's counsel contention that the appellant was properly convicted and sentenced by the learned trial magistrate. He urged this court o affirm the lower court judgment and dismiss the appeal.

ANALYSIS AND RESOLUTION:

I have set out the charge, the argument and submissions as canvassed on behalf of the appellant and the respondent in this appeal. This is a first appellate court. It has a duty to relate to the evidence at the trial and make its own finding on the facts and the law. This duty was bestowed upon the court way back in 1957 in the case of **Shantilal M. Ruwala v Republic EA [1957] Pg 570**. The court stated as follows:

"On first appeal from a conviction by a judge or magistrate sitting without a jury, the appellant is entitled to have the appellate court own consideration and view of the evidence as a whole and its own decision thereon:

It has the duty to rehear the case and reconsider the materials before the judge or magistrate with such other materials as it may have decided to admit.

The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it.

When the question arises which witness is to be believed rather than another and the question turns on a manner and demeanor the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses, but there may be either circumstances quite a part from manner and demeanor which may show whether a statement is credible or not which may warrant a court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court had not seen."

From the memorandum and grounds of appeal formulated by the appellant counsel the following key issues arise for determination of this appeal:

(a) Whether in view of the evidence adduced at the trial court, the charge of robbery with violence and stealing was proved beyond reasonable doubt.

(b) Was one Mr. Mkono and Safaricom Mobile Provider vital witness who ought to have been called by the prosecution?

(c) Are there material discrepancies in the evidence for the prosecution which ought to have created a reasonable doubt in the mind of the trial court with a view to resolve that doubt in favour of the appellant?

The burden of proof in criminal cases is as provided for under Section 107 - 109 of the Evidence Act. It is a principle of law that the prosecution must establish the ingredients of the offence against an accused person beyond reasonable doubt.

Did the prosecution discharge the burden of proof beyond reasonable doubt before the trial court? It is now established that the essential ingredients of the offence of robbery with violence constitutes the following as set out by the court of appeal in the case of ***Oluoch v Republic [1985] KLR*** where the court held interalia:

"Robbery with violence is committed in any of the following circumstances:

(1) The offender is armed with any dangerous and offensive weapon or instrument; or

(2) The offender is in company with one or more person or persons; or

(3) 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 use of the word ***OR*** in this definition means that proof of existence of ***any one*** of the above circumstances is sufficient to establish an offence under Section 296 (2) of the Penal Code.

The general definition of robbery is to be found under Section 295 where the elements of use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. It is existence of any of these elements as provided for under Section 296 (2) which constitutes what is commonly referred to as ***"capital robbery"***. Under Section 295 of the Penal Code there can be no robbery without an act which amounts to stealing. Stealing is defined

under Section 268 of the Penal Code as making a fraudulent, and without claim of right to take or convert to ones use or the use of any other person anything other than immovable property with any of the following elements:

> **(a) An intent permanently to deprive the owner of the thing of it;**
>
> **(b) An intent permanently to deprive any person who has any special properly in the thing of such property.**
>
> **(c) An intent to use the thing as a pledge or security;**
>
> **(d) An intent to part with the thing on condition as to its return which the person taking or converting it may be unable to perform;**
>
> **(e) An intent to deal with the thing in such a manner that it cannot be returned in the condition in which it was at the time of taking or conversion**.

Thus evaluating the prosecution case any existence of the above set of facts once proved the offence of robbery with violence as charged against the appellant is proved beyond reasonable doubt.

From the record it reveals that the deceased was on 16/6/2010 driving motor vehicle KAN 542G owned by PW2, Norman Ngure. According to PW1, he was with the deceased on the material day at Kitengela. The deceased had informed PW1 that he will be travelling to Thika town with a return journey later in the day. PW1 told the court that he made attempts of calling the deceased through his mobile phone but same ended up on voice mail. It was only at 1.45 am in the night according to PW1 testimony that an SMS from the mobile No. 0724 - 546715 belonging to the deceased was received through his number 0725 – 982976. In his testimony the message had the following instructions in Swahili: ***"Utampeleka 'Wili' kwa***

> ***'Mkono' achukue bike nilimuuzia alafu uwe ukinipee pesa nilienda tukashikwa na bangi". (He was to take 'Wili' to 'Mkono' to take a motorbike he sold to him so that he is given money. He went and was arrested with bhang.)***

PW2 further testified that appellant in company of two other people followed him regarding the SMS from the deceased and the sale of the motorbike. It was PW2 testimony that he complied and took appellant to one Mkono in whose custody the motorcycle belonging to the deceased was at the time. PW1 and PW2 testified that the search for the whereabouts of the deceased continued including a report made to the police station.

PW6 testified that appellant sold motorcycle registration No. KMCB 388H at Ksh.58,000 on 20/6/2010. According to PW6 and PW7 the appellant had in his possession supporting documents; i.e. copy of ID, PIN and log book in the names of the deceased. The appellant also provided his own copy of identity card and PIN to authenticate the sale. PW6 and PW7 on further inquiry whether appellant had a sale agreement with the deceased, were informed that what they had been supplied with was sufficient to finalize the sale. It was further their testimony that no transfer documents from the deceased to the appellant were given by them. The sale agreement between the PW6 and PW7 and appellant was not reduced into writing despite demands made to that effect.

There is undisputed evidence that the deceased drove motor vehicle registration KAN 542G from Kitengela to Thika town on 16/6/2010. The deceased went missing soon thereafter and could not even be reached on phone or physically. According to PW4 the deceased was found dead on the roadside at Kiruara road, Gatanga District many kilometers away from Kitengela. The body was taken to Thika District Hospital Mortuary and investigations commenced as to the cause of death. A postmortem conducted by Dr. Murage opined the cause of death as severe head injury with fracture skull and subdural haematoma secondary to assault. The motor vehicle registration KAN 542G was never recovered. The appellant was staying in the same house with the deceased at Kitengela before he passed on.

The deceased prior to his death owned a motorcycle KMCB 388H. PW1 received a text message at 1.45 am on 17/6/2010 to take appellant to Mkono to release the motorcycle to the appellant. This was the same period the deceased had gone missing on or after 11.30 pm of 16/6/2010 when he last communicated with PW1. There is ample evidence that appellant sold the deceased motorcycle on 20/6/2010. It was PW1's testimony that appellant was aware of existence of an SMS message regarding a motorcycle. The appellant according to PW1 had been sent by the deceased to take the motorcycle from one Mkono. It was acting on the SMS shown to Mkono that the motorcycle was released to the appellant in the presence of PW1.

It emerges from the evidence that by this time the deceased was not alive to have communicated with the appellant. PW1 had not also communicated with the appellant about an SMS on a motorcycle from the deceased. The appellant as per the evidence on record seems to have known that a particular message had been sent to PW1's mobile number. The documents in possession of the appellant prove ownership to that of the deceased. The appellant, there is no dispute, lived together with the deceased. He had the opportunity of access and knowledge of existence of a motorcycle and the location of the supporting documents on ownership. The appellant came into possession of the deceased identify card, PIN and logbook which he used to pass title to PW6 and PW7 as genuine from the original owner. The original owner as at the time this transaction was taking place as evidenced showed had already gone to meet his maker.

There is no credible evidence that the deceased sold his motorcycle KMCB 388H to the appellant prior to his death. The same motorcycle ownership had not changed hands from the deceased to the appellant. There is evidence of PW9 who received the statement from the appellant. In the statement admitted in evidence appellant gave an analysis of the events on the night of 16/6/2010 while in company of the deceased. During cross-examination the appellant who was represented by counsel makes no claim that he was coerced, beaten or forced in anyway to record the statement before PW9. Regarding the evidential value of the statement by the appellant it does demonstrate and give weight to the fact he was with the deceased on the fateful night. That piece of evidence contradicts the defence testimony by appellant which tries to distance himself from the scene of the robbery. The appellant's defence did nothing to shake the prosecution testimony of PW1, PW2, PW6, PW7 and PW9. The appellant's interaction with PW1 denotes knowledge that deceased was not alive. He went to PW1 to inquire of the message on a motorcycle after admitting in his statement regarding the robbery but took no steps to report to the police. The purported sale of deceased motorcycle under the pretext that consent had been obtained was a lie. Although the deceased phone was not recovered there is consistent evidence that the source of the SMS was known to the appellant well in advance before approaching PW1. The evidence by the prosecution proves that the deceased was fatally beaten by a group of people. He was robbed of his motor vehicle registration KAN 542G. The prosecution evidence of PW1, PW2, PW6, PW7 and PW9 places the appellant at the scene of the robbery. In the statement recorded by PW9 appellant admits being with the deceased on the fateful night. The appellant secured the deceased motorcycle and sold it to PW6 and PW7 on 20/6/2010. That positively identifies the accused and places him at the scene of the robbery.

It can be derived from the evidence appellant relocated from Kitengela to Thika. There is no iota of evidence that despite knowing what had befallen the deceased he made no report to the police. There is no credible evidence that deceased even transferred ownership of motorcycle to the appellant, which in turn he sold on 20/6/2010 as his own property to PW6 and PW7.

In this case it can be observed that appellant contradicted himself in two key instances. The first instance was on 15/7/2010 when he recorded the statement under inquiry. The chain of events as given in the statement places appellant at the scene. In the second instance the appellant in his statement on oath told the trial court that the deceased left for Thika as he remained at Kitengela. It was appellant's defence that following an SMS message to PW1 from the deceased he collected a motorcycle from one Mkono which he sold on 20/6/2010. The various contradictory evidence led by appellant as to the actual time and place he was on 16/6/2010 cast doubt on the credibility of the alibi raised. The learned trial magistrate who saw and heard the witnesses was in a better position to assess the demeanor and credibility of witnesses.

On evaluation of the evidence raised by the appellant weighed alongside the prosecution I am of the holding that prosecution witnesses squarely place him at the scene of the crime. The appellant had not reported to the family nor the police that deceased had gone missing. In my view the trial court demonstrates a nexus between the disappearance of the deceased and commission of the offence of robbery and stealing by the accused that evidence on circumstantial evidence is such that it establishes the case beyond reasonable doubt against the appellant.

The law applicable in this case is well illustrated in the case of **Tuper v Republic [1952] AC 480 at 489** where it was held:

> **"It is also necessary before deciding inference of the accused's guilt form circumstantial evidence to be sure there are no other co-existing circumstances which could weaken or destroy the inference."**

And also in the case of **Simon Musoke v Republic EA 775**. The East African Court of Appeal held thus:

> **"In a case depending exclusively on circumstantial evidence the judge must find before deciding upon a conviction, that the inculpatory facts were in consistence with the innocent of the accused and incapable of explanation upon any other reasonable hypothesis other than that of guilty."**

Applying the above principles to the facts of the case, I am of the following conceded view:

The deceased was a resident of Kitengela where he operated a taxi business employed by PW2. PW2 testified that he went to look for the deceased whom he had not seen on the 16/6/2010. It was his testimony that since he knew the deceased was staying with someone he decided to go and make inquiries. According to his testimony, appellant informed him that deceased had been arrested with cannabis sativa along Thika road as per the message received from his phone. PW2 and other family members continued to search for the whereabouts of the deceased whose body was finally discovered on 17/6/2010 alongside Kiruara area in Thika District.

The second chain of events involving the appellant is set out in the testimony of PW6. According to PW6 the appellant sold a motorcycle registration KMCB 388H belonging to the deceased on 20/6/2010. PW6 testified that during the conclusion of the agreement, the appellant surrendered logbook of the motorcycle in the name of deceased, copy of an identification card, copy of the PIN as evidence that the motorcycle he was selling came into his possession lawfully.

It is also confirmed from PW6's testimony that on requesting appellant to draft an agreement of sale, the same was declined on the basis that the exchange of documents on ownership was sufficient. The purchase of the motorcycle from the appellant was further corroborated by the testimony of PW7. The logical conclusion to be drawn from the set of circumstances are that the appellant had no title to the motorcycle capable of being transferred to the purchaser PW6 and PW7 on 20/6/2010. The prosecution evidence establishes that appellant had not acquired ownership of the motorcycle from the deceased. It is not disputed that the appellant and deceased lived in the same house at Kitengela prior to his death. The appellant had the opportunity to access the deceased's documents pertaining the ownership of the motorcycle and personal identification and identity card.

Apart from the evidence of PW6 and PW7, the other testimony which implicates the appellant with the robbery is that of PW1. PW1 told the trial court that on 17/6/2010 at 1.45 am (in the night he received a message apparently from the deceased mobile phone requesting him to take appellant to one Mkono in the following Swahili context:

> **"Utampeleka lini kwa mkono achukue bike nikimuuzia alafu uwe ukimpee pesa nilienda tukashikwa na bhangi."**

This message sent to PW1 personally from the deceased phone, known the appellant was in the known of

existence of such message with PW7. This is confirmed by PW1's evidence that the appellant in company of two people went to him and demanded that the witness accompanies them to Mkono's house to drive away the motorcycle. PW1 further testified that on the strength of the message, the motorcycle was released into physical possession of the appellant.

It is not in despute that the same motorcycle taken into possession by the appellant on 19/6/2010 at Ksh.58,000/= paid by the particulars PW6 and PW7 to the appellant. There is no evidence that the message which appellant used to convert the motorcycle of the deceased into his own and effected the sale and transfer did not originate from the deceased. The testimony of PW2, PW3, PW5 and PW8 confirms that the deceased body was discovered at Kiruara area in Thika District. The import of this being appellant went about disposing the property of the deceased, he was no more to be able to communicate thorough his mobile phone.

The other piece of evidence by the prosecution positively placing the appellant at the scene is the testimony of PW9. According to PW9, a superintendant of police who recorded the statement from the appellant under inquiry described the chronology of events involving the movement of the appellant between the night of 16/6/2010 and 17/6/2010.

The key elements deduced from the statement by the appellant as placed before the trial court in evidence involves the following: the appellant and deceased drove together in the motor vehicle registration No. KAN 542G; their journey commenced at Kitengela at about 11.30 pm; on 16/6/2010 or thereabout terminated at a night club in Thika town. The appellant, the deceased spent some time with friends in a social club within the township. In the course of the night some of the people they were with hired the deceased vehicle to be dropped at Kandara area.

According to PW9 who recorded the statement under inquiry from the appellant on arrival at a particular scene, the people who hired the motor vehicle started to fight with the deceased occasioning fatal injuries. As for the appellant he was driven by the people while having suffered confusion upto Dandora area in Nairobi. On regaining consciousness he was warned not to say anything or report the incident to the police.

The question of importance on this aspect of the appeal is whether the evidence led at the trial was such to justify a conclusion that the accused was one of the robbers who committed the offence against the deceased. On my part I think the evidence from the statement under inquiry by PW9, the proximity in time in which the appellant disposed of the property of the deceased in relation to the robbery reached such a degree of certainty to link the appellant with the offence.

The set of circumstances from the evidence pinpoint that the appellant was one of the persons who participated in the robbery with others who are not before the court. That inference I draw is consistent with the legal principle on circumstantial evidence as elucidated in the case of ***Simon Musoke v Republic (Supra).*** The offence of robbery with violence contrary to section 296 (2) of the Penal Code was therefore proved by the prosecution beyond reasonable doubt.

The appellant was also charged and convicted of the offence of stealing a motorcycle contrary to section 278 of the Penal Code Cap 63 of the Laws of Kenya. I take cognizance that the evidence falls under section 278 (A) of the Penal Code and not 278. This issue does not seem to have arisen at the trial court nor in this appeal. As a general rule where there is an offensive and sufficient charge of a substantive offence and the prosecution leads evidence to proof it and at the end of it no prejudice or miscarriage of justice the charge would not been arrived as defective. This legal position is well illustrated by section 382 of the Criminal Procedure Code which provides:

> **"No finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings before or during the trial or in any inquiry or other proceedings under this code unless the error, omission or irregularity has occasioned a failure of justice."**

From the record at the hearing there is clear evidence to support the charge under section 278 (A) of the Penal Code. The appellant had the opportunity to cross-examine and test the evidence on theft of a motorcycle. My take therefore is that the appellant knew which offence the prosecution led evidence against him at the trial. The essential ingredients of the offence were the ones used by the learned trial magistrate to convict and sentence the appellant. I am therefore satisfied that no prejudice or miscarriage of justice was occasioned on the part of the appellant regarding the typographical error in reference to section 278 instead of the correct section 278 (A) of the Penal Code.

The question which court ought to consider is whether the prosecution proved the offence of stealing under section 278 (A) of the Penal Code. The prosecution presented the chain of evidence that prior to the deceased death he owned a motorcycle registration number KMCB 388H. PW8 the investigating officer retrieved an ID Card, PIN, passport photos, logbook and the motorcycle all in the name of the deceased from PW6. The sale of the motorcycle occurred on 20/6/2010 where the appellant passed as the owner to PW6 in the presence of PW7. The testimony of PW6, PW7 and PW8 reveals that the appellant did not have a transfer indicative of the deceased having sold the motorcycle to him during his lifetime. The appellant did not demonstrate that he had come into possession of the motorcycle lawfully to enable him pass a clean title to PW6 and PW7. The actions by the appellant are elements provided for under section 268 of the Penal Code Cap 63 of the Laws of Kenya. Section 268 (1) provides:

> **"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.**
>
> **(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say:**
>
> **(a) An intent permanently to deprive the general or special owner of the thing of it……..."**

The evidence on record shows that the appellant in stealing the motorcycle created a scenario that he had been sent by the deceased to sell it in order to obtain money to assist the deceased be released from police custody. What can be deduced from the testimony of PW1, PW6 and PW7 the sale of the motorcycle was for the benefit of the appellant and not the deceased person. The appellant seemed to have the knowledge that the deceased was no more and therefore it was time he takes advantage of making some money from the sale of the property left by his demise. The entire evidence as considered by the trial court and reviewed by this court establishes overwhelming evidence for the offence of stealing contrary to section 278 (A) of the Penal Code against the appellant. I find no reason to disturb the finding by the learned trial magistrate on this charge.

The second aspect of the case is whether failure to call certain witnesses was fatal to the prosecution case? The argument by the appellant before this court was the failure by the prosecution to call one Mkono who gave out the motorcycle and the Safaricom officer to verify the SMS data used by the appellant as originating from the deceased. The general principle of law on this issue is whether the trial court or the defence can attribute as to the number of witnesses to be called to establish the ingredients of an offence preferred against an accused person. The burden of proof is always on the prosecution to call such evidence as to proof the ingredients of the offence beyond reasonable doubt.

The question therefore of calling witnesses or not to call to present evidence before a trial court is placed upon the prosecution at all times unless it is shown that the prosecutor has through acts of omission or commission failed to summon a crucial witness to the case. This proposition was well discussed in the case of ***Mwangi v Republic [2008] 1KLR 1134*** where the Court of Appeal held:

> **"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and a court will not interfere with the discretion unless it may be shown that the prosecutor was influenced by some oblique motive."**

Applying the above principle to this appeal; the prosecution evidence against the appellant is that on 19/8/2010 they went to PW1 regarding the motorcycle. The motorcycle was released to the appellant. On 20/8/2010 the appellant sold the motorcycle to PW6 in the presence of PW7. It can be safely held that the fact of conversion of the motorcycle registered in the name of the deceased and sold off by the appellant as a new owner in absence of a transfer from the deceased was proved beyond reasonable doubt. With or without the testimony of Mkono and Safaricom provider this court cannot draw adverse inference that the uncalled witnesses possessed evidence which could have aided the offence. This ground of appeal therefore fails.

Thirdly the appellant raised the issue of the trial court relying on contradictory and inconsistent evidence by the prosecution. The learned counsel on this point invited the court to appraise the evidence of PW1, PW2 and PW7. Learned counsel took issue with a report on missing person made at Kitengela Police Station. According to the learned counsel contention the people who hired the deceased are not known. Secondly PW2 never saw the deceased person on the material day he is said to have driven out of Kitengela town for Thika. Thirdly the identities of the persons in the motor vehicle the deceased drove on 16/6/2010 where not known and therefore placing the appellant at the scene is highly doubtful.

I have considered the record on this complaint raised by the appellant. It is clear that the evidence which the trial court mainly relied upon is that of PW1, PW6, PW7, PW8 and PW9. The direct and circumstantial evidence positively identified the appellant who sold the motorcycle to PW6 and PW7. All these transactions of sale were triggered by the appellant on 19/8/2010. It emerged that from the night of 16/6/2010 the deceased had gone missing the search to find the deceased was launched on 17/6/2010 as a missing person whose whereabouts are not known. In the course of that confusion the appellant was hatching a plan on how to fraudulently deal with any of the deceased property. One of such properties he dealt with being a motorcycle.

On my part an evaluation of the evidence reveals no discrepancies or inconsistencies to warrant this court interfere with the finding of the trial court. In the case of ***Pius Nyamweya Momanyi v Republic HCCRA No. 265 of 2009*** at Kisii the court highlighted the point in this way:

> **"Not every contradiction in a case must of necessarily raise doubt in the mind of the trial court as to the culpability or otherwise of an accused person. The contradiction if minor cannot affect the final finding of a trial court. It is trite that minor discrepancies and or contradictions should not affect a conviction."**

In that regard I am satisfied that the trial court considered and weighed the evidence to arrive at a conviction against the appellant.

Finally the appellant impugned the charge and caution statement recorded by PW9 as having failed to comply with section 25 (A) of the Evidence Act Cap 80 of the Laws of Kenya. The testimony of PW9 superintendent of police Mr. Ondego reveals that before administering and recording the statement he took steps to caution the appellant. During the recording of the statement PW9 gave an opportunity to explain his movements on the 16/6/2010 while in company of the deceased. The statement was admitted in evidence by the trial court as exhibit without any objection from the appellant. There is no evidence placed before this court that the law and procedure in recording the charge and caution statement was not followed by the prosecution witness PW9. I therefore find no material to impugn the velacity and truthfulness of the statement recorded by the appellant. That evidence considered alongside with the testimony of PW1, PW2, PW6 and PW7 places the appellant at the scene of the robbery.

Taking all facts into account and all the issues raised in challenging the judgement by the trial court I am satisfied that the appellant was properly convicted on both counts of robbery with violence contrary to section 296 (2) and stealing of a motorcycle contrary to section 278 (A) of the Penal Code (Cap 63 of the Laws of Kenya). There is no merit on the appeal both conviction and sentence.

It follows therefore that the entire appeal is dismissed. The judgement of the trial court delivered on 19/7/2013 affirmed.

Dated, delivered in open court at Kajiado on 14th day of October, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for the Director of Public Prosecutions

Appellant present

Mr. Mateli Court Assistant

Mr. Njiraini for the accused