REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 49 OF 2014

ANTHONY NDUNGU KINGORI……………..…………APPELLANT

VERSUS

REPUBLIC………………………………….……………RESPONDENT

(Being an appeal against original conviction and sentence in Nanyuki Chief Magistrates' Court Criminal Case No. 187 of 2012 (Hon. T.B. Nyangena) on 17th June, 2014)

JUDGMENT

The appellant together with one Boniface Mwangi Wachira were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. In the particulars of the offence, it was alleged that on the 13th day of February, 2012 at Ichuga area of the Laikipia County in the Republic of Kenya, the accused persons together with others not before court being armed with offensive weapons namely bars robbed Crispus Ngatia Wachira motor cycle registration number **KMCP 378A (Captain)** valued at **Kshs. 75,000/=** and at or immediately before or immediately after the time of such robbery they wounded the said **Crispus Ngatia Wachira**.

The charges against Boniface Mwangi Wachira were withdrawn but the trial against the appellant proceeded at the end of which he was convicted and sentenced to death. He has now appealed against the decision of the magistrates' court. In the petition which he filed in court on 20th June, 2014, we gather that the appellant raised the following grounds of appeal:-

1) The learned magistrate erred in law and in fact in relying upon the purported evidence of identification by recognition yet there was no evidence of such identification when the report of the robbery was first made;

2) The learned magistrate erred both in law and in fact in convicting the appellant based on the evidence of the complainant and his wife;

3) The learned magistrate erred both in law and in fact by "being impressed with the "my (appellant's)mode of arrest" without putting into consideration the evidence of PW3;

4) The learned magistrate erred both in law and in fact in relying on the evidence that was not credible and thereby contravening **section 150** of the **Criminal Procedure Code.**

5) The learned magistrate erred both in law and in fact in relying on the evidence of PW3 and

thereby contravened **section 163(1)** of the **Evidence Act**.

6) The learned magistrate erred in rejecting the appellant's defence which was not displaced by the prosecution and thereby contravened **section 212** of the **Criminal Procedure Code.**

As the first appellate court, it is incumbent upon us to revisit the evidence and analyse it afresh before coming to the conclusion whether the learned magistrate's verdict can be upheld. The decision of Court of Appeal in **Okeno versus Republic (1972) EA 32** reminds us that as we venture on this path, we must be conscious that it is only the trial court that had the advantage of seeing and hearing the witnesses and therefore we have to give due allowance for this advantage that the trial court enjoyed in our assessment of its decision.

The prosecution case was relatively brief; it was made up of five witnesses. The first of these witnesses was the complainant, **Chrispus Ngatia (PW1),** who testified that he owned a motorcycle registration number KMCP 378A which was his tool of trade in business of passenger transport at Nanyuki old market. On 12th February, 2012 at around 7.00 pm he was on his way home after the day's business when he met the appellant at Kenol Petrol station. The appellant asked him to take him to Kanyoni. The complainant obliged but while on the way, the appellant asked him to stop since he opted to take the rest of the journey on foot.

The appellant disembarked; as the complainant was waiting for his payment for the services rendered, the appellant unleashed an axe from his jacket and hit the complainant with it on the left side of the head. The blow was so severe that apart from sustaining a deep cut on the head, the complainant was also blacked out.

When he regained his consciousness, the appellant discovered that his money amounting to the sum of Kshs 2000/= , his phone and shoes were missing. Also gone was the motor cycle.

A Good Samaritan assisted the complainant and took him to the District hospital; he was admitted for two days but when his condition got worse he was transferred to Mathari hospital at Nyeri where he was admitted for two weeks. For all this period he had lost his power of speech and he could not talk until after a month since the attack.

The complainant testified that he knew the appellant well since both were in the same motorcycle transport business. He had known the appellant for one year prior to the incident and he recognised him well at the time he boarded his motorcycle since there was sufficient light at the petrol station.

He also testified that though he had a problem with talking for the time he was unwell he could still hear. The motor cycle was recovered at Timau and the complainant was able to identify its photographs in court.

The complainant's wife **Carolyne Wanjiru (PW2)(Wanjiru)** testified how she attempted to reach her husband on 12th February, 2012 at 8.00 pm without much success. His phone rung once but was disconnected and subsequently switched off.

Wanjiru got information the following day that her husband had been injured and hospitalised. She visited him at the hospital where he had been taken for treatment and thereafter made a report to the police. She later got information the day after that the motor cycle had been recovered and two arrests had been made. Of the arrested persons she knew the appellant because he was also in motorcycle transport business. She identified the motor cycle that had been recovered as theirs because they had its logbook.

Boniface Mwangi (PW3) who had initially been arrested as one of the suspects testified as a prosecution witness after the charges against him were withdrawn. He testified that he had a garage for repair of motor cycles and that on 13th December, 2012 he was in the course of his business when the appellant brought a motor cycle for some sort of repair. The witness testified the appellant initially came alone but he later came with two other people. These other people told him that the motor cycle was stolen from

Nanyuki and soon thereafter some other motor cycle operators came and started beating the appellant.

According to this witness the appellant asked to be taken to Nanyuki to show the members of the public who were beating him the person who had given him the motor cycle. He was instead taken to Timau police station and subsequently transferred to Nanyuki police station together with the recovered motor cycle.

The police officer who investigated the case against the appellant was police constable **Gabriel Njuguna (PW4);** it was his evidence that he was attached to Nanyuki police station crime branch and that on 13th February, 2012 he was on duty when the Officer in Charge, crime office, asked him to investigate a case of a person who had been robbed and admitted in hospital.

The officer proceeded to the hospital where the complainant was admitted but unfortunately he was not able to talk but wrote the name "Ndungu" on a piece of paper. On the same day at around 4.00 pm police constable Okusu brought in two suspects with a motor-cycle alleged to have been stolen. The two suspects had been beaten, apparently by members of the public.

Later when the complainant was able to talk, he identified his motor cycle and even brought its log-book. When the investigations officer established in the course of his investigations that it is the appellant who had taken the motor cycle to **Boniface Mwangi's (PW3's)** garage for repair, he withdrew the charges against the latter. The complainant told the officer that it was the appellant who had hired the motor cycle and that the two were familiar. He also informed him that it was the appellant who attacked him.

In the course of interrogations, the appellant had told the investigations officer that he was the owner of the motor cycle and infact his mother one Kabiro had the ownership documents; however, these documents were never availed.

The P3 form in respect of the complainant was filled and signed by one Kangogo, a medical officer attached to Nanyuki teaching and referral hospital. It was presented in court by **Ronald Mutai (PW5)** who was also a clinical officer at the same hospital. He testified that Kangogo was on study leave and therefore he produced the medical report on his behalf because he was familiar with his handwriting.

According to the evidence of this witness, the complainant was thirty years old at the time of examination. His clothes were blood stained. The patient was assaulted by a person he knew well. He had an injury on the head and there was a history of loss of consciousness. He was referred for CT-scan and admitted till 24th February, 2012 when he was discharged. The patient sustained a laceration on the left frontal part of the skull and the CT-Scan showed that he sustained a depressed frontal skull. The injury was approximately six hours old.

When put on his defence, the appellant opted to give a sworn testimony. He told the court that on 12th April, 2012 he travelled to Timau from Nanyuki to collect scrap metal. The following day his employer sent him money through M-pesa. While he was waiting outside an M-pesa agent shop he was arrested by members of the public together with a certain mechanic. They were taken to Timau police station. The Officer in charge of the station asked officers from the station to escort them to Nanyuki police station. The police officers took the appellant and the mechanic to their homes and made enquiries about them from their landlord and area chief.

That marked the conclusion of both the prosecution and the defence case.

The evidence is fairly clear that the offence of robbery with violence as understood under **section 296 (2)** of the **Penal Code** was committed on 12th February, 2012; the charge sheet, however, reads the 13th February, 2012 as the date of the offence. Looking at the evidence in its entirety, we do not think the variation in dates between what appears in the particulars of the offence and the evidence is such a fundamental disparity that would cast doubt on whether this offence was committed or not.

Again from where we sit we doubt this variation per se can be a reason enough to disturb any finding by the trial court; we think that is what **section 382** of the **Criminal Procedure Code** says. That section of the law provides:-

382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings

> ***Subject to the provisions hereinbefore contained, 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, judgment 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:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.***

Although the appellant took up this issue of variation of dates in his submissions, the record does not appear to show it is an issue he raised at any stage of the proceedings at the trial and if so how it prejudiced his case. The proviso to **section 382** of the Code is clear that in determining whether any sort of error, omission, or irregularity has occasioned failure of justice we have to consider whether the issue could and should have been raised at the earliest opportunity possible during the trial. We are of the humble view that since this is an issue that the appellant had the chance to raise at the trial it is a bit late in the day to raise it on appeal for the first time as something that prejudiced his case or occasioned failure of justice.

We are also aware that under **section 214 (2)** of the **Criminal Procedure Code** the variation in dates between the charge sheet and the evidence is an error that is considered immaterial; that section provides:-

214. Variance between charge and evidence, and amendment of charge

> ***(1) …***
>
> ***(i) …***
>
> ***(ii) …***
>
> ***(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof***

The evidence of the complainant, his wife **(PW2), Gabriel Njuguna (PW4)** and that of the medical officer **(PW5)** is consistent that the complainant was not only robbed of, at least, a motor cycle but that he was also attacked and injured at the time of the robbery. The necessary elements of the offence of robbery with violence as defined under **section 296(2)** of the **Penal Code** were, in our view, established beyond all reasonable doubt.

The only question to consider in this appeal is whether the learned magistrate was correct in coming to the conclusion that the appellant was the aggressor who attacked the complainant and stole his motor cycle, amongst other property.

The evidence of the complainant on this question was crucial. He testified that the appellant was somebody he had known for a year before the robbery incident. They were both in the same trade of

motor cycle transport. When, therefore, the appellant secured his services and boarded his motor cycle at Kenol service station to be taken to Kanyoni, he was under no illusion of who his passenger was.

The complainant’s identification of the appellant as the aggressor could not have been a mistaken identity as the appellant has suggested in his submissions. The complainant identified him by recognition since he was somebody he was always familiar with.

The evidence that the appellant must have been known to the complainant was corroborated by the complainant’s wife that the appellant was somebody she knew as being in motor cycle transport business just as her husband was.

The most crucial corroborative evidence of the case against the appellant, in humble our view, was that of **Boniface Mwangi (PW3).** He was a garage owner, dealing with repair of motor cycles at Timau. It is in his garage that the complainant’s motor cycle was found. According to the investigations officer **(PW4)** this witness informed him that the motor cycle had been brought to his garage by the appellant and that he received it in the course of his business. Although the witness had initially been suspected to have either participated in the robbery or was a handler, and there was every reason to entertain such suspicion, he gave an explanation, which in our view was satisfactory of how he came into possession of the motor cycle.

We hold that the learned magistrate was correct to find the complainant’s evidence that he was attacked by the appellant was consistent with the evidence of the garage owner that it is the same appellant who brought the complainant’s motor cycle to his garage. The logical conclusion that one could make, and we see no other conclusion that the learned magistrate could possibly have come to in these circumstances, was that after the appellant attacked the complainant he robbed him of his motor cycle.

That the motor cycle belonged to the complainant was not an issue; both the complaint and his wife produced the motor cycle’s ownership documents and identified it as their own property at the police station and also in court.

Before we conclude, we gather from the evidence on record that the appellant raised the defence of alibi which he submits was never properly considered. He alleged to have been at Timau where he had been tasked to undertake some duties by his employer on the same day that the robbery took place and thereby implying that he could not have been at the scene of crime at the same time.

We are aware that where one raises a defence of alibi, he has no obligation to explain it. The appellant himself alluded to this when he referred in his submissions to the Court of Appeal decision in **Wangombe versus R (1980) KLR 119** where it was held that if an accused person raises an alibi as an answer to a charge against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution.

We agree with this general statement of the law; however, we are also aware that not every alibi displaces what is otherwise a water tight prosecution case that has been proved to the required standard. To displace the prosecution case, an alibi must create some doubt that the appellant was at the locus in quo. In this instance, we find no such doubt and we would dismiss the appellant’s alibi just as the learned magistrate did.

For the reasons we have given we have come to the inevitable conclusion that the appellant’s appeal does not have any merit; we agree with the learned counsel for the state that the conviction and sentence should be upheld. The appeal is accordingly dismissed.

Signed, dated and delivered in open court this 15th day of December, 2015

Hedwig Imbosa Ong’udi Ngaah Jairus

JUDGE **JUDGE**