



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.282 OF 2011

*(Arising from conviction and sentence in Nyahururu Criminal Case No.1237 of 2011 by A.B. Mongare
– Principal Magistrate)*

SIMON LETENYO ETHELE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

SIMON LOTENYO ETHELI (the appellant) was convicted on a charge of robbery with violence contrary to **section 296(2)** and sentenced to death. The charge, which he denied, was that on 9th June 2011 at WARUKIRA village, SHAMATA Location in NYANDARUA County, he, jointly with another not before court, robbed JEREMIAH MBURU WAITITU of motor cycle, registration No.KMCQ 713A, make FOCIN, blue in colour, valued at Kshs.72,000/=, the property of **JOSEPH MUGONGO KARANJA**, and at the time of such robbery, killed **JEREMIAH MBURU WAITITU** (deceased).

SYLVESTER GITAU MUHOHO (PW2) owned motorcycle registration No.KMCQ 713A, make Focin, which he'd bought from King's Hardware shop, in Nyahururu at Kshs.72,000/= as per the receipt which was produced in court. He had employed the deceased to ride the motorcycle for boda boda business. On 9/06/2011, he gave the deceased the motorcycle as well as money for fuel; and the deceased said he would be back in a while. However, by the close of business, the deceased had not returned, and efforts to reach him on phone yielded nought, nor was he at his home.

A search which was mounted, led to a homestead which had three houses and at one house, the search party (which included PW2) noticed blood at the doorstep. The door was kicked open, and the lifeless body of JEREMIAH MBURU was found lying on the floor with a slit throat, and multiple stab wounds. On the wall of the house hang photographs of the appellant, and one Nganga. The owner of the house, KAMAU, said he had rented out the house to one NGANGA who was living with the appellant. Information was obtained to the effect that the appellant was in SIPILI, so PW2 and others proceeded there, and found the appellant digging. A quick body search on him recovered keys from his pocket, which PW2 immediately recognized as those for his motorcycle. The appellant said the motorcycle was at Rumuruti, and the motorcycle was traced to Rumuruti police station. PW2 identified it by its registration number and colour, and the recovered keys on being inserted, actually ignited the motorcycle. On cross-examination PW2 said he used to see the appellant in SHAMATA area.

ETHRON LOLINYOK (PW3) was at home on 10/06/2011, when two men, whom he described as a SAMBURU and KIKUYU went to his home with the motorcycle KMCQ 703, which they parked behind

his house saying they were going to get a mechanic, but they did not return. He identified the appellant (who was known to him prior to that day) as one of the people who had the motorcycle, saying he was the one who did the talking.

PW3 then informed the village elder (**FRANCIS WANJOHI KARIUKI**) about the “*abandoned*” motorcycle and indeed PW3 went and saw it, and relayed information to police, who went and collected the motorcycle.

PW8 (MUKURURI MWANGI alias KAMAU) was the landlord of the house where the deceased’s body was recovered. He confirmed that he had rented the house to one Nganga who lived with the appellant. When the emotionally charged search party approached him, he went to get a hammer to force open the door. However upon noticing blood at the doorstep, the charged group begun beating him, before handing him over to police. He was certain that Nganga and the appellant had been at that house the day before the incident.

PC GEOFFREY NDEGWA (PW9) visited the scene where deceased’s body lay, and he confirmed that the appellant’s photos were among those hanged on the wall and they were produced in court as exhibit. Eventually he arrested and charged appellant and took possession of the recovered keys which ignited the motorcycle.

The keys were recovered by **AP SGT. PETER NDUNGU (PW7)** of SIPILI DIVISION.

The deceased’s father, **WAITATHU NDUNGU KAMAU (PW1)** who was in search party, was present and identified the body when it was recovered lying on the floor inside a house.

DR. WAITE KARIUKI (PW6) who conducted a post mortem on the deceased noted the multiple stab wounds on the body, and marks of neck strangulation and bleeding in the abdomen. The cause of death was shock from excessive bleeding caused by multiple stab wounds inflicted using a sharp object.

In his unsworn testimony, the appellant narrated how he was arrested by a group of people, while working at Sipili. They assaulted him yet he didn’t even know what he was alleged to have done. He was shocked to hear the allegations because he had worked for the deceased family for two years then left. He felt that he was being charged simply because he had refused to work for that family.

In her judgment, the trial magistrate noted that the evidence was purely circumstantial, because no one saw the appellant committing the offence. She noted the chain of events, from the time the deceased left on an errand using the motorcycle, to the recovery of his lifeless body in a house which had been occupied by the appellant and one Nganga, to the tracing of the abandoned motorcycle and its keys which were found inside the appellant’s pockets and held that the evidence could lead to no other co-existing circumstance which could weaken or destroy the influence that the appellant violently robbed the deceased of the motorcycle and killed him.

The appellant has challenged these findings on grounds that:-

1. The case against him was not proved.
2. The charge sheet was incurably defective.
3. The purported identification by PW3 and recovery of exhibits was unreliable and did not support the circumstantial evidence.
4. Some of the key witnesses were not called.
5. His defence was not considered.

In his written submissions, the appellant argues that the evidence on record is at variance with the particulars stated in the charge sheet. He points out that whereas the charge sheet refers to the motorcycle registration as KMCQ 713A, PW1 gave the number as KMCQ 713E and PW3 gave it as KMCQ 703. He urges the court to resolve this variance in his favour.

It is also his contention that, the evidence did not sufficiently link him to the offence saying PW3 referred to 18/06/2011 as the day he and another parked the motorcycle behind his house, yet by that date, the appellant had already been arraigned in court. The appellant faults the manner in which the search party, searched and removed photographs from the wall, then gave them to police, saying this was just collusion with law enforcement officers.

Although the key was recovered from the appellant, he says since the motorcycle was not found in his possession, then he cannot be held liable for it and this creates a weak link in the chain of circumstantial events intended to incriminate him.

He also wondered why despite the evidence that two suspects had been arrested, he was the only one charged.

In opposing the appeal, Mr. Marete submits that the evidence was consistent and overwhelming. Further that there was no defect on the charge and he urged the court not to interfere with the trial court's decision.

We have noted the inconsistencies mentioned by the appellant regarding the motorcycle's registration number. Whereas PW1 stated it was KMCQ 713E, PW2 (who was the owner of the motorcycle) gave evidence which was consistent with the contents of the charge sheet. The receipt he produced showed registration as KMCQ 713A. PW3 did not give the complete registration number; he mentioned KMCQ 703 but left the last letter. PW4 (the village elder) and **PW5 (JOHN GACHARIA)** who also saw the motorcycle gave its registration as KMCQ 713A and identified the motorcycle whose photographs were produced in court and identified. This was confirmed by the court's own record where the trial magistrate at pg 7 recorded as follows:-

“Court: KMCQ 713E identified MFI-2(a) and (b) the photographs showing the said motorcycle. . . .”

We think that to resolve this, since the witnesses were certain regarding the physical appearance of the motorcycle and even identified it in court in the photographs taken, then we must examine these photographs. The photos clearly show the registration as KMCQ 713A. Our view is that this consistent error was made not by the witnesses but the trial magistrate who appears mixed up letter **E** and **A**, probably from the sounds in vowels versus alphabet.

We have perused the handwritten record and confirm that despite the photograph No.1 clearly showing the motorcycle registration as KMCQ 713A, yet the trial magistrate recorded it as KMCQ 713E.

The inconsistency therefore was not from the evidence, but the trial magistrate recording. The incomplete citation of the registration and reference to 703 instead of 713 is cured by the physical identification made by the particular witness i.e. PW3. We resolve the anomaly in favour of the prosecution.

Admittedly the evidence was circumstantial, with perhaps the strongest chain being the evidence of **PW3 (ETHRON)** who knew both the appellant and his companion and saw him pushing the motorcycle and parking it behind his (PW3) house. The appellant faults his evidence saying 18/06/2011 which he refers to, found him already in custody. Again we have compared the typed proceedings with the handwritten record of the trial court which shows that date, yet all other witnesses refer to dates prior to 18/06/2011. We note that that **PW4, FRANCIS WANJOHI**, to whom the appellant reported about the abandoned motorcycle, says PW3 gave that information to him on 10/06/2011. The same information about the incident was passed on to **PW5 John Kinyanjui Gachara** on 10/6/2011, and certainly by 13/06/2011, the appellant was already arrested.

We recognize that this very witness is the one who referred to the motorcycle registration as KMCQ 703, and dates when he spotted the appellant with the motorcycle as 18/06/2011. Did he make up that evidence or was he mixed up on issues to do with figures? We doubt that this was a frame up, because of the evidence by PW4 and **PW8 (MUKURURI MWANGI)** regarding the presence of the motorcycle

within the vicinity where it was recovered on 10/06/2011.

The other factor we must consider is whether this variation in the evidence of PW3 creates a weak chain in the circumstantial evidence, to the extent that it should be to the benefit of the appellant.

The principles to be considered with regard to circumstantial evidence were examined in the case of **R V KIPKERING arap KOSKE and Another (1949) 16 EACA pg 13** to the effect that:-

“Such evidence is sometimes compared to a chain with its links as a rope with several strands, each link or strand must be carefully tested and if in the end, it does not lead to the irresistible conclusion of the accused’s guilt, the whole chain or rope must be rejected. If it passes the test, it is as good as any direct evidence.”

The trial magistrate analyzed the chain of events, we have re-examined and analyzed the same from the beginning where the appellant left on motorcycle KMCQ 713A and never returned, to the search, leading to the recovery of his lifeless wounded body in a house rented by the appellant and another, the sighting of the appellant by PW3, the arrest of the appellant and recovery of keys from him, which ignited the motorcycle – surely, there are no other co-existing circumstances or evidence which would weaken or destroy the inculpatory facts, and the inference and conclusion reached by the trial magistrate was reasonable.

We make a finding that the conviction was safe and we uphold it. The sentence was legal and we confirm the same. Consequently the appeal is dismissed.

Delivered and dated this 21st day of February, 2014 at Nakuru.

M.J.ANYARA EMUKULE

H.A. OMONDI

JUDGE

JUDGE