



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 1 OF 2013
ONESMUS KALI MULANDIAPPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 124 of 2012 in the Principal Magistrate's Court at Kyuso – B M Mararo (PM) on 27th November, 2012)

JUDGEMENT

The Appellant, Onesmus Kali Mulandi appeals against both conviction and sentence for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. It had been alleged that on 20th September, 2010 at Kanzoaka village in Kyuso District within Kitui County the Appellant while armed with a dangerous weapon namely a panga robbed Wilson Mbevo Muthangya of a bicycle and mobile phone all valued at Kshs.7,500/= and immediately after the said robbery killed the said Wilson Mbevo.

The Appellant filed an amended petition of appeal on 14th October, 2013 in which he listed nine grounds of appeal. When the appeal came up for hearing before us on 14th October, 2013 he informed us that he was also relying on the original petition of appeal filed on 2nd January, 2013 and the written submissions filed together with the already identified amended petition of appeal.

We have considered this matter and our view is that it is in order to allow the appellant to use both sets of petitions and grounds of appeal in the interest of substantive justice. We have note that the grounds of appeal in the original petition and those in the amended petition of appeal are not different at all and

they all boil to one ground namely that he was convicted on unsubstantiated, unreliable, uncorroborated and contradictory evidence.

The state counsel opposed the appeal and insisted that the conviction of the Appellant was based on sound evidence.

Ours being the first appellate court, we have a duty to reconsider, evaluate and arrive at our own conclusion on the evidence tendered before the trial court. In doing so we will remember that we neither saw nor heard the witnesses testify – see **OGETO V REPUBLIC [2004] 2 KLR 14**.

After perusing the evidence of the witnesses who testified before the trial court, we have flagged the evidence of the following witnesses for reconsideration and evaluation:-

- a. PW1 Justus Syengo Muthni;

- b. PW2 Beatrice Muindi;
- c. PW4 Martha Simon;
- d. PW5 Lydia Mbathi Mbeba;
- e. PW8 Corporal Bobby Nyariba;
- f. PW9 Corporal Francis Mulai;
- g. PW11 Corporal Patrick Maina;
- h. PW12 Doctor Nyambati Philomen Ogetto;
- i. The Appellant who testified as DW1;
- j. DW2 Joseph Maluki; and
- k. DW3 Mwasia Mwaduma.

A perusal of the trial court's record shows that no prosecution witness testified as PW10.

PW1 testified that the deceased Wilson Mbevo was his brother and on 20th September, 2010 they proceeded to Mitamisi. At Mitamisi they parted ways after sometime. PW1 proceeded home and the deceased went to the tribunal where he was a member. In the evening at around 5.00 p.m. his nephew informed him that he had seen a body like that of the deceased along the way. PW1 mobilized businessman and together with PW2 the wife of the deceased they proceeded to the scene where they confirmed that the body was that of the deceased. He noted that the body had cuts on the right ankle, wrists and forehead. The matter was reported to the authorities who came to collect the body from the scene. Two days later he was informed that the person who had killed his brother had been arrested with a bicycle, a mobile phone and Kshs. 400/= . He proceeded to the police station where he found the Appellant. He knew the Appellant who was a relative. He also identified his brother's bicycle and mobile phone which he was familiar with. When cross-examined, PW2 told the court that from the scene they followed marks made by the tyres of a bicycle which led them to a place called Tseikuru. He admitted that he did not see the person who killed the deceased.

PW2 told the court that on the material day at around 5.00 p.m. she saw school children from school using a route that was different from their usual one and inquired from them why they were doing so. They told her that they had found a body with blood on the road. She proceeded to the scene between Kamaruli and Mitamisi and identified the body of her husband which had cut wounds. The body was lying near the home of the Appellant. Later she learned that the Appellant had been arrested. She identified her husband's bicycle and mobile phone. During cross-examination she told the court that one Kivungu had taken to her the sim card of her husband's mobile phone on 21st September, 2010. She took the sim card to the police at Mwingi.

PW5, another wife of the deceased, identified the deceased's bicycle at the police station. She told the court that she had been told by the assistant chief from Kimola that her husband's killer had been arrested at Usueni with a bicycle.

PW8 told the court that at the time of the incident he was based at the GSU M-Company Camp at Usueni. On 21st September, 2010 he was directed by his superior to go and arrest a suspect at Usueni market. PW8 contacted his informer and he was given the description of the clothes the suspect was wearing. He proceeded to Useuni market where he arrested the Appellant with a bicycle. He then relayed the information of the arrest to Tseikuru Police Post and one Corporal Maina was sent to collect the suspect. During cross-examination, PW8 insisted that he had indeed arrested the Appellant with a bicycle.

PW9 told the court that on 21st September, 2010 he was instructed by the D.C.I.O., Mwingi to investigate an offence that had been committed at Mitamisi. On 22nd September, 2010 he learned that a suspect was being held at Mwingi Police Station. He set about conducting investigations and on 23rd September, 2010 he interrogated the suspect who is the Appellant herein. The suspect directed him to Mitamisi where he recovered a panga which was used to commit the crime. He also recorded statements of other witnesses including PW11 who informed him that he had collected the Appellant from Usueni with a phone, a bicycle and kshs. 400/= . He produced all the recovered items as exhibits. In cross-examination,

the investigating officer told the court that he recovered the panga from the house of the Appellant's grandfather. He stated that the panga had been washed but not very well. He also told the court that the money recovered from the Appellant was in a pouch belonging to the deceased.

PW11 told the court that on 21st September, 2010 he was instructed by the officer in charge of Tseikuru Police Post to go and collect a suspect from Usueni G.S.U. camp. He proceeded, with his colleagues, to Usueni from where they collected the Appellant and escorted him to Tseikuru and later to Mwingi Police Station. He told the court that they were given a bicycle, a Nokia 1200 mobile phone and Kshs.400/= at Usueni and informed that the items had been recovered from the suspect at the time of his arrest.

The Appellant gave a lengthy statement in his defence and denied robbing the deceased. He told the court that on the date of the alleged offence he was at his grandfather's farm, where he lived, for the better part of the day. He briefly went to Mitamisyi and came back home. Thereafter he proceeded to a den selling local brew (karubu) where he entertained himself until 11.00 p.m. On his way home he saw two government vehicles and thought they were carrying out raids on karubu dens. The following day at 7.30 a.m. he proceeded to Usueni. He was visiting his aunt. He arrived at Usueni at around 3.00 p.m. and when disembarking from the matatu, the conductor informed members of the public that he was suspected to have murdered somebody at Mitamisyi. He was arrested by members of the public who later handed him over to G.S.U. officers. He told the court that nothing was recovered from him at the time of his arrest.

On the claim that he led PW9 to the recovery of a panga allegedly used in killing the deceased, the Appellant told the court that on 23rd September, 2010 he was handcuffed and put in a vehicle. He led police officers to his home where they recovered nothing. The officer then asked him to show them the house of his grandfather. They went and found him and the officers told his grandfather to give them his pangas. The officer was given two pangas and he picked one of them and put it in the police vehicle. They then proceeded back to the police station. When confronted with an entry of 21st September, 2010 in the Occurrence Book showing that he had been arrested with a bicycle, a phone and Kshs.400/= the Appellant told the court that the entry was false.

DW2 told the court that he is the chairman of the market at Usueni. He told the court that on 21st September, 2010 at about 4.00 p.m. he was at Usueni Market when a matatu christened Safari Njema arrived. One Mr. Musembi who was the conductor of the matatu called him and informed him that a passenger in the matatu, who turned out to be the Appellant, was suspected to have committed a crime at Usueni. DW2 organized for the arrest of the Appellant by members of the public and called officers from Usueni G.S.U. Camp who came and took him away. He told the court no bicycle or phone was recovered from the Appellant at the time of his arrest.

DW3 is the grandfather of the Appellant. He stated that on 20th September, 2010 he had gone to the chief's camp to fill a bursary form. When he arrived at Mitamisyi on his way back home he heard that somebody had been killed on the edge of his pathway. He went home and slept. The following day the Appellant went to visit his aunt at Usueni as earlier planned. On 23rd September, 2010 police officers went to his home and asked him for a panga that was allegedly used to commit murder. He gave out two pangas. One of the officers took the one which had a wooden handle and left him with the one which had a rubber handle. The officer then told him he would return the panga. He also asked him what he knew about the murder but he told them he knew nothing since he was not present when the deceased was killed.

Looking at the evidence adduced, it is clear that not a single witness saw the Appellant either at the scene of crime or with the deceased. The only evidence that appears to connect the Appellant with the death of the deceased are a bicycle, a phone and Kshs.400/= allegedly recovered from him at the time of his arrest.

The doctrine of recent possession can be used to prove an offence of robbery with violence as was confirmed by the Court of Appeal at Nakuru in **MURKIRIA & ANOTHER v REPUBLIC [2005] eKLR** when it stated that:-

“The submission by Mr. Githui to the effect that the doctrine of recent possession could not be a basis for a conviction on a charge of robbery with violence was novel but lacking in merit. The doctrine of recent possession may be relied upon not only to prove a charge of theft but other offences like robbery with violence, manslaughter, murder etc.”

We agree with the position taken by the Court of Appeal. The possession of items recently stolen from somebody can, unless explained, easily lead to the conclusion that the person found with the items is the thief.

The question we would be asking ourselves therefore is whether the Appellant was found in possession of the property of the deceased and if so, whether a reasonable explanation was offered for such possession. We have reproduced at length the evidence of the witnesses touching on the recovery of the deceased's items from the Appellant. PW8 told the court that he arrested the Appellant and recovered a bicycle from him. He did not mention recovery of any other item. PW11 told the court that he collected the Appellant from Usueni G.S.U. Camp and among the items handed over to him, as having been recovered from the Appellant, were a bicycle, a phone and Kshs.400/=. This evidence was confirmed by the investigating officer (PW9). PW1, PW2 and PW5 all stated that they identified the deceased's phone and bicycle at the police station.

There are some inconsistencies as to whether a pouch and sim card holder belonging to the deceased were also recovered. PW9 talked of the recovery of these items. PW2 introduced another inconsistency when she told the court that she took the deceased's sim card to the police station after it was recovered by one Kivulundi. These inconsistencies do not however blur the big picture namely that the deceased's bicycle which was clearly identified by PW1, PW2 and PW5 was recovered from the Appellant. There is evidence on record that on the date of the arrest of the Appellant the entry in the Occurrence Book clearly showed that certain items including a bicycle had been recovered from the Appellant. Although PW1, PW2 and PW3 did not directly mention that the deceased had his bicycle on the material day, their testimony implies that the deceased had his bicycle at the time he was killed. In fact PW1 talked of following bicycle tyre marks from the scene towards Tseikuru.

We are therefore satisfied that the bicycle that was taken from the deceased at the time of his death was the same bicycle found with the Appellant when he was arrested the next day. The period was too short for the bicycle to have changed hands. We do not believe the Appellant when he gives the impression that the police officers conspired with the relatives of the deceased and fabricated the evidence of the bicycle having been recovered from him. We may doubt the recovery of other items from the Appellant but we are fully convinced that the bicycle was recovered from him. The Appellant who opted to deny the fact that he was found in possession of the deceased's property did not offer any explanation as to how he came by the deceased's items.

We have considered the evidence of DW2 and we cannot understand how the Appellant who was new in Usueni could have identified him as the chairman of the market. We suspect that the Appellant was leveraging the relationship that he had forged with DW2 in remand to tilt the scales in his favour. We highly doubt the genuineness of DW2's evidence.

Apart from the recoveries made from the Appellant, there is the issue of the weapon allegedly used to kill the deceased. PW9 told the court that the Appellant led him to the recovery of the panga. The Appellant and his witness (DW3) claimed that PW9 just went and told DW2 to give him a panga. This is strange considering that PW9 went for a specific panga. The Appellant, in his own admission, was present during the recovery. DW3 appears to give the impression that the Appellant was not present during the recovery. We therefore concur with the trial court that there was sufficient connection between the Appellant and the crime.

The Appellant also appears to argue that the crime committed was murder and not robbery with violence. This argument does not hold water. The evidence adduced, as we have shown, points to the fact that the deceased's property was stolen at the time he was killed. The ingredients of the offence of robbery with violence as per Section 296(2) of the Penal Code were therefore established and proved.

In our view therefore we find that the Appellant was properly convicted and we confirm the conviction by the trial court.

There is the issue of sentence. As was recently stated by the Court of Appeal in the case of **JOSEPH NJUGUNA MWAURA & TWO OTHERS v REPUBLIC Criminal Appeal No. 5 of 2008**, the only sentence provided by the law for the offence committed by the Appellant is death. We therefore set aside the sentence of life imprisonment imposed by the trial court and sentence the Appellant to suffer death in the manner provided by the law.

Otherwise we find the appeal has no merit and we dismiss it. We make orders accordingly.

Signed and dated this 22nd day November 2013

S. N. MUTUKU,

W. KORIR,

JUDGE

JUDGE

Dated and delivered this 29th November 2013

S. N. MUTUKU,

JUDGE