



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 14 OF 2010

ALEX MASINDE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. D. M. Ochenja - PM, in Kitale Chief Magistrate's Court in Criminal Case No. 530 of 2009)

J U D G M E N T

The Appellant, **Alex Masinde**, appeared before the Principal Magistrate at Kitale charged with robbery with violence contrary to Section 296 (2) of the Penal Code. He was the third accused in a group of four people said to have robbed Willy Isalano of his power saw and bicycle all valued at Kshs. 53,000 on the 3rd December, 2008 at Miti Jambazi Lessos Trans-Nzoia West District and during the offence used violence to the said Willy Isalano thereby causing his death.

After a full trial, the appellant was convicted and sentenced to death. His co-accused were all acquitted.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal on the basis of the grounds in the petition of appeal filed herein on 26th February 2010.

He appeared in person at the hearing of the appeal and relied on his written submissions in support of his case.

Mr. Onderi, the Learned Prosecution Counsel, appeared for the State Respondent and opposed the appeal by submitting that the appellant was found in possession of the bicycle which had been stolen from the deceased victim of the offence. This happened one and a half month after the offence but the appellant failed to account for his possession of the bicycle thereby rendering the doctrine of recent possession applicable to him.

The Learned Prosecution Counsel submitted further that the appellant fled to Moi's bridge when an attempt to arrest him was made thereby displaying the conduct of a guilty person.

Learned Prosecution Counsel urged this Court to dismiss the appeal.

Having considered the submissions by both sides, our duty is to re-consider the evidence and draw our own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

Briefly, the Prosecution case was that the late Willy Isalano (herein, the deceased) was attacked and

robbed on the material 3rd December 2008 while on his way home. The incident occurred during the night and on the following day, his wife **Esther Salano (Pw 1)**, was informed accordingly. She proceeded to the scene and found the deceased lying down in a thicket. He was seriously injured but was still alive. He was taken to Kitale District Hospital where he remained for four days before being transferred to the Moi Teaching & Referral Hospital in Eldoret where he died after four days having given to his wife (Pw 1) the names of his attackers i.e. Tony, Alikey and Man Kale. Alikey was said to be the appellant and was not previously known to the wife of the deceased who was further informed by the deceased that he (deceased) had been attacked with pangas and runguns and that his bicycle and power saw had been taken away by the assailants

The bicycle was later recovered from the appellant and was identified by the deceased's wife. This was after the arrest of the appellants and others.

Anthony Lumwachi (Pw 2), a neighbour to the deceased learnt of the incident and visited the deceased in hospital at Kitale. He was given the names of the suspects by the deceased's wife after the burial of the deceased. The suspects included the appellant and he (Pw 2) knew them. He reported them to the police and assisted in their arrest.

A brother to the deceased, **Josephat Shibichi (Pw 3)**, confirmed that his late brother wrote down and gave the name of his attackers to his wife (Pw 1) while the father to the deceased, **Elkanan Shikami (Pw 4)**, attended a post mortem conducted on the body of the deceased on 17th December 2008 at the Moi Teaching And Referral Hospital.

Dr. David Chumba (Pw 5), conducted the post mortem and later compiled a report indicating that the deceased died from a perforated duodenum ulcer.

Cpl. Cosmos Ngumbi (Pw 6), received the necessary report and carried out investigations. He visited the deceased at Kitale District Hospital and obtained the names of the suspect from him. The names included that of the appellant. He (Pw 6) and his colleagues traced the appellant to his house but he jumped through a window and escaped in darkness.

On 7th February 2009, Cpl. Ngumbi (Pw 6) arrested the appellant at the Moi's Bridge Trading Centre and recovered a bicycle said to belong to the deceased from his (appellant's) rented house. He (Pw 6) later charged the appellant and others with the present offence.

In his defence, the appellant denied the offence and stated that he was at his place of work on 7th February 2009 when he was confronted and arrested by two Police Officers. He was taken to Matunda Police Station and later to Kitale Police Station where he was beaten, interrogated and later arraigned in Court.

From all the foregoing evidence, we are satisfied that the ingredients of the offence of robbery with violence were duly established by the Prosecution through the deceased's wife (Pw 1), a neighbour (Pw 2), the deceased's brother (Pw 3), the doctor (Pw 5) and the Investigations Officer (Pw 6).

It was apparent that the deceased was on the material date attacked and robbed of his property by a group of armed people who inflicted serious injuries upon him and which injuries later proved to be fatal.

Indeed, there was no dispute from the defence that the offence did in fact occur.

The only dispute as was reflected in the trial and is herein reflected in the grounds of appeal, was the alleged involvement of the appellant in the offence. He vehemently denied responsibility and implied that he was arrested without good cause while innocently undertaking his job of excavating stones. However, the Learned Trial Magistrate convicted him on the basis of the deceased's dying declaration to his wife (Pw 1) and on the basis of the doctrine of recent possession prompted by the fact that the appellant was found in possession of the deceased's stolen bicycle and failed to properly account for his possession thereof.

The Learned Trial Magistrate was alive to the precaution that it would be unsafe to convict an accused person on the basis of an uncorroborated dying declaration.

Herein, the Learned Trial Magistrate found the necessary corroboration from the evidence that the appellant was found in possession of a bicycle recently stolen from the deceased victim of the offence.

In our view, the dying declaration was not sufficient for a safe conviction of the appellant. We say so because we do not think that the declaration was corroborated by the alleged possession of the deceased's stolen bicycle by the appellant. There was insufficient and contradictory evidence of the recovery of the bicycle. There was also insufficient evidence of ownership of the bicycle by the deceased.

The evidence by Anthony (Pw 2) indicate that the bicycle was recovered from another person (i.e. the 4th accused in the lower Court) while the Investigating Officer (Pw 6) indicated that it was recovered from the appellant. Such contradiction raised doubt as to whether the bicycle was indeed recovered from the appellant.

With regard to the ownership of the bicycle, there was no cogent and credible evidence to establish that the bicycle belonged to the deceased. The deceased's wife (Pw 1) simply indicated that she could identify the bicycle because it had been around for eight (8) years and that it was black in colour. There was nothing peculiar about the bicycle to establish the deceased's ownership thereof to the exclusion of any other person. So, it could not be said with certainty that the bicycle was the one which was stolen from the deceased at the material time of the offence.

There having been no substantial proof that the bicycle was recovered from the appellant, it could not be said that he was found in possession of the same. In the circumstances, the doctrine of recent possession was not applicable.

We must therefore hold that the appellant's conviction by the Learned Trial Magistrate was not safe and sound.

In the end result, we allow the appeal, quash the conviction and set aside the sentence.

The appellant shall be set at liberty unless otherwise lawfully held.

(Delivered and signed this ...26th..... day of ...November.. 2013)

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellant:

Respondent:

Court Clerk: