REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 18 OF 2011

(Appeal from the conviction and sentence by the Principal Magistrate Hon. J. K. Ng'arng'ar in Bungoma court in criminal case no.39 of 2009)

MOSES NGIGE...APPELLANT

VS

REPUBLIC...RESPONDENT

JUDGMENT

On 23/11/2008 at about 7.30 p.m the body of the deceased Ruth Ngige Kitoro was found lying on the floor of the sitting room in her residential room behind her Popular Self Selection Supermarket at Malaba Township in Teso District of the Western Province. The body was dressed and was facing upwards. Both legs were tied with a manila string. A manila string was attached to the neck and fastened with two pieces of wood from behind. The floor was covered with blood. The house was ransacked. The rear door had been unlocked and its padlock and keys were on the ground. 5, 10 and 20 shilling coins totaling Ksh.110/= had been dropped leading from the house to the corridor. When post mortem was eventually performed on the body at Webuye District Hospital mortuary on 24/11/2008 the cause of death was shown to be cardiopulmonary collapse due to strangulation and severe head injury (exhibit 11).

When the deceased's son Peter Ngige Chege (PW1) came to the house that night following the death he noted that her DVD, 4 amplifiers, Sony Radio, a purse with unknown amount of money and a Nokia cellphone were missing. His testimony was that he had bought this cellphone for her.

Eventually, the Appellant was on 30/12/2008 arrested at Sabasaba in Mombasa after PW1 traced him there. He was detained at Mtwapa Police Station who contacted the CID Teso. He was collected and charged in Bungoma Senior Resident Magistrate's Court with robbery with violence contrary to section*"196 (2) of the Penal Code"* whose particulars were that on 23/11/2008 at Popular Self Selection Shop in Malaba township in Teso District of the Western Province he jointly with others not before the court and while armed with dangerous weapons namely rungus and pieces of timber robbed the deceased of the named items and at or immediately before or immediately after the time of such robbery killed her. He was convicted following trial of robbery with violence contrary to section *"196 (2) of the Penal Code"* and sentenced to death. He was aggrieved by the conviction and sentence and preferred this appeal which was opposed by Mrs. Leting for the State.

The record shows that PW1 and the mother of the Appellant were brother and sister and were children of the deceased. The Appellant was therefore PW1's nephew and the deceased's grandchild. The unchallenged evidence of PW1 was that the Appellant was staying in a rented house at Malaba by the time of this death. The Appellant and the deceased had disagreed over money the Appellant had allegedly stolen from her. PW1 had on the fateful day in the morning seen the Appellant in Malaba. Following the

deceased's death, the Appellant did not attend the burial. In the Appellant's sworn defence he stated that there was bad blood between him and the deceased, and also with PW1. PW1 testified on oath that he had not differed with the Appellant prior to the incident. He was not cross-examined on that aspect of his evidence.

PW2 Nicolas Wanzele and PW3 Daniel Otwane were watchmen at Malaba town at the time of the incident. The evidence of PW2 was that he knew the deceased whose shop was behind the supermarket which he was guarding. He was on duty on this day at about 7.30 p.m. when he had heard the noise of something falling. He saw the Appellant whom he knew and another boy he did not know come from the direction of the deceased's house. It was a big bag that they had that had fallen. They were trying to fix it. He talked to them and he noticed that the Appellant was carrying a blood stained shirt in his hands. The boy with the Appellant told PW2 that the Appellant had fallen from a boda boda. The Appellant wanted to wash his hands. He washed his hands. A bicycle came and carried the big bag. The two went away. PW2 suspected what he had seen and went to tell PW3 about it. When he went behind the place he was guarding he saw street children collecting the coins. He chased them. He went and again informed PW3. The two watchmen noted coins had dropped. They followed the coins which led them to the residence of the deceased. They found the door to the residence open. They could see the deceased's body lying dead in the house. The legs were tied and the body was hanged using a stick and a rope at the neck. PW3 went to report to police. PW2 testified that he used security lights to see and recognize the Appellant. PW3 testified that at about 7.20 p.m PW2 called him and told him there were people carrying suitcases and two bags and that one of them had blood. PW3 went up to the stage and found the people. They were two. One of them was the Appellant whom he knew. He had two bags. The Appellant told him that he was going on safari. PW3 returned to where PW2 was. They saw coins scattered. They alerted other watchmen and that was when they went to the deceased's house. The door was open and padlock was down. The lights were on. PW3 knocked but there was no response. They entered and found the body of the deceased on the floor and there was blood on the floor. The body had stick and rope at the neck and appeared to have been strangled.

The other piece of evidence that the prosecution relied on was a cell phone that PW1 had bought for the deceased. The phone was one of the items stolen from the deceased's house when she was killed. It was recovered from Irungu Patrick Wairegi (PW6) in Mombasa. PW6's evidence was that the phone was given to him in Mombasa in November 2008 by the Appellant as security for Ksh.3500/= loan that was granted at the Appellant's request. PW1 produced a receipt (exhibit 2) to show that he had on 21/10/2008 bought the phone (Nokia 6085) for Ksh.3600/=. He then gave the phone (exhibit 1) to the deceased to use. It was serial number 353085023752037. PW9 police sergeant Andrew Mong'ere of CID Teso is the one who went for the Appellant in Mombasa after his arrest. It was PW1 who had traced the Appellant in Mombasa and caused his arrest. PW9 collected the Appellant who led him to PW6 from whom the phone was recovered. When PW9 was cross-examined he stated that he found the phone with one Peter Musau who had been given by PW6. It was the Appellant, he said, who had given the phone to PW6. PW6 was cross-examined to say he stays at Mwembe Tayari but that the phone was found at Kongowea. He led to the recovery of the phone which he said had been pledged by the Appellant for credit.

During the sworn defence by the Appellant he made no reference to PW6 and said he saw the phone in court. We appreciate that the burden to prove the charge beyond doubt always rested with the prosecution and did not shift at any stage.

The trial court accepted the prosecution evidence and rejected the defence. After our own independent consideration and scrutiny of the entire evidence, we accept that finding. We wish, however, to point out that the trial court was not alive to the fact that PW6 was an accomplice as he was the one found with the deceased's phone. The court should also have been alive to the need for independent and reliable evidence to corroborate that of the accomplice **(Munungi Njau v. Republic [1979] KLR 257).** The record shows PW6's evidence was not shaken on cross-examination. It was also material that it was the Appellant who led the police to PW6 from whom the phone was recovered. There was no evidence called to connect PW6 with the robbery, or theft of the phone.

No witness saw the Appellant attack the deceased or take her items, including the phone. However, soon after the attack the Appellant was seen by PW2 and PW3 while coming from the direction of the deceased's house with luggage. PW2 saw the Appellant with a bloodied shirt. The deceased had been strangled and left in a bloody sitting room. PW2 and PW3 knew the Appellant. He did not dispute this. They talked to him. He told PW3 he was going on safari. He disappeared after this and did not even attend the burial of the deceased who was his grandmother. He knew she had died. PW1 testified that he had seen the Appellant in Malaba in the morning on the material date. When he was next seen it was in Mombasa about a month later. The attack was on 23/11/2008 in Malaba. In the same month he pledged a cell phone, stolen during the robbery, to PW6 in Mombasa. There was bad blood between the deceased and the Appellant and that provided a motive.

We find, and agree with the trial court, that all these facts considered together lead to the irresistible conclusion that the Appellant had participated in the attack against the deceased on 23/11/2008 at Malaba and that in the attack she was killed and her property, including the cell phone, were stolen. We bear in mind that in a case dependant on circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt **(Kariuki Karanja v. Republic [1986] KLR 190).** We are satisfied that the prosecution put together evidence from which no other reasonable hypothesis could be drawn than the guilt of the Appellant.

However, the Appellant correctly pointed out during his written submissions (although this was not in the grounds of appeal) that he was charged and convicted under section 196 (2) of the Penal Code. The statement of offence in the charge sheet read:

"Robbery with violence contrary to section 196 (2) of the Penal Code."

The particulars were of robbery with violence. The judgment read that:

"I find the accused guilty and convict him of the offence of robbery with violence contrary to section 196 (2) of the Penal Code as charged."

Section 196 (2) of the Penal Code creates the offence of defamation. Robbery with violence is created under section 296 (2) of the Penal Code. The record shows that it was clear to the court, the prosecution and the Appellant that the charge at hand was robbery with violence. The evidence called showed that people went to the house of the deceased, took her property and killed her. The trial was around those facts. When the Appellant was found guilty he was sentenced to death. The sentence was for capital robbery. When the Appellant filed his Petition of Appeal he said:

"*Being dissatisfied with both the conviction and sentence of death as passed to me by Bungoma Chief Magistrate's Court on 8th February 2011 in the offence of robbery with violence contrary to section 296 (2) of the Penal Code."*

We find that the Appellant knew that he was facing a charge of robbery with violence, he was tried for the offence and convicted of the same. The reference to section 196 (2) of the Penal Code in the statement of offence and in the finding by the court was an error. We find that the error did not prejudice the Appellant or occasion a miscarriage of justice. We alter the statement of offence and the finding to read section 296 (2) of the Penal Code and confirm the conviction.

Regarding sentence, death penalty is the ultimate penalty for the offence of robbery with violence. It is the maximum penalty. When the circumstances of the case, the antecedents of the accused and his mitigation are considered, the court may order a sentence lesser than a death penalty. In this case, however, we find that, although the Appellant was a first offender and asked to be treated leniently, a death penalty was the most appropriate way to treat him. He tied the legs of his grandmother and strangled her to death before carrying away her goods. He was callous in the extreme.

In conclusion, the appeal by the Appellant is dismissed.

Dated and delivered at Bungoma this 28th day of March ,2012.

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A. O. MUCHELULE	**F. N. MUCHEMI**
JUDGE	**JUDGE**