



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII.

CRIMINAL APPEAL NO. 186 OF 2007

**JUSTUS MUGANDA MACHIRA..... APPELLANT
VERSUS**

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence in Migori Criminal Case No. 891 of 2006 passed on 7/11/2007 by Hon. ezra O. Awino, Principal Magistrate)

JUDGMENT

1. This appeal arises from the original conviction and sentence in Migori Principal Magistrate's Criminal Case Number 891 of 2006 passed by Hon. Ezra O. Awino, Principal Magistrate on the 7th November 2007.
2. The appellant was convicted on one count of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 4th day of June, 2006 at Muhuru Bay area Migori District in Nyanza Province, the appellant as 1st accused and one Silvery Ouma Onune, jointly with others not before the court, while armed with offensive weapons namely pangas, rungun and torches robbed **David Ochieng Okombo** of his Motor Vehicle Registration **No. KAV 639 L** Toyota Corolla Station Wagon valued at Kshs. 650,000/= and at or immediately before or immediately after the time of such robbery killed the said David Ochieng Okombo.
3. The facts of the case are that on the 4/7/2006, the deceased who was a matatu driver, left his home driving his motor vehicle Registration Number KAV 659L. The deceased was not seen again until his body was seen at Onger with multiple injuries on the shoulders and neck. Investigations were mounted leading to the arrest of the appellant and his co-accused in Tanzania. The two were jointly charged with the offence of which the appellant was convicted. The 2nd accused in the lower court was acquitted due to lack of evidence.
4. The evidence of the prosecution came from 11 witnesses. PW1 was Lilian Kadogo the wife of David Ochieng, the victim of the robbery and who is deceased. She is the one who identified the deceased's body at the Kisii mortuary during the post mortem examination. She testified that she did not know how the deceased died though she confirmed that the deceased owned a motor vehicle and also worked as a mechanic and puncture repair at BP Petrol Station.
5. PW2 was Benta Oketch Okumu a sister of the deceased. She testified that the deceased owned a motor vehicle Registration Number KAV 659 L, a Toyota Corolla. PW2 testified that in search for the deceased,

they were informed that the deceased's motor vehicle had been seen at Tarime in Tanzania and that with the help of police from Migori Police Station, the motor vehicle was recovered and the appellant arrested. PW2 stated that she did not know how her deceased brother met his death but confirmed that the motor vehicle that was recovered in Tanzania after investigations belonged to her brother.

6. PW3 was Grace Atieno Okombo, another sibling of the deceased, David Ochieng. She testified that the deceased bought and owned motor vehicle Registration Number KAV 695L a Turging (**sic**) wagon. She testified that she was not able to identify the deceased body at the Kisii but that she could identify the clothes which she (PW3) had bought for the deceased.

7. PW4 was Enock Otieno Olungo, a brother-in-law to the deceased. His testimony was that after his brother-in-law went missing, he joined other family members in the search for the deceased. That he was one of those family members who transported the deceased's body to Migori for post mortem examination. PW4 also testified that after the appellant was arrested, he (appellant) took the family members and police to the scene and later to Muhuru Bay where the deceased was said to have been hired to. PW4 was also able to identify the deceased's motor vehicle though the same had no number plates. He also said that the body of the deceased was positively identified by family members.

8. PW5 was Number 07207 Det. Corp Mpenda of Tarime-Mara Police Station in Tanzania. He was the investigating officer into the disappearance of the deceased and the deceased's motor vehicle. Following leads given to him by the OCS, Tarime, PW5 stated he proceeded to Manira where he found the motor vehicle in question but the suspects were said to have gone to Sirati for fuel. That further inquiries with Sirati confirmed the arrest of the appellant who was found with the ignition key of the motor vehicle. MFI-1. The appellant was later escorted to Manira on the following day and at Manira, the ignition key found in the applicant's possession was used to start the motor vehicle. On searching the vehicle, PW5 said they recovered a service card dated 14th June, 2006 for Motor vehicle KAV 659 L. The key and the service card were marked as P. Exhibit – 2 and P. exhibit – 3 respectively.

9. PW5 further stated that on the 10th July, 2006, police officers from Migori Police Station, accompanied by relatives of the deceased, namely Benta (PW3) and George Okongo, travelled to Manira with documents for the motor vehicle. At that time PW5 testified that the appellant told them that he was the conductor of the motor vehicle. Thereafter, the appellant was transferred to Kenya. The certificate of service and sales agreement in respect of the motor vehicle were produced as P. Exhibits 5 and 6.

10. In his further evidence, PW5 stated that he was the one who arrested the appellant and that at time of recovery, the subject motor vehicle had no number plate.

11. PW6 was George Odhiambo, a farmer from Nyakwere. He recalled a Tuesday the 4th July, 2006 at about 9.00 pm, when one vehicle passed him from Muhuru towards Sori. He stated that because it was dark, he could not see the number plate, but he saw it drive on for a while make a U-turn and then take a "panya: route then switched off the lights. PW6 stated that at the material time, he was bathing and saw 2 people, one of whom was dressed in white. After a while PW6 saw the motor vehicle move away. On the Friday of the same week, PW6 said a body was discovered nearby. He then reported the matter to the area chief.

12. PW7 was George Otieno Okomo, a brother of the deceased. He was one of the family members who went to Tarime and identified the deceased's motor vehicle and also met the appellant there. PW7 also stated that the appellant took the police to the place where he (appellant) had allegedly dumped the deceased's body and that he (appellant) was the one found with the ignition key of the deceased's motor vehicle.

13. Dr. Daniel Otieno Agulo was PW8. He is the one who carried out post mortem examination on the body of the deceased, David Ochieng Okombo about 10 days after the date of death. PW8 stated that the body had no obvious external injuries but it had a cracked chest cavity filled with 2 litres of blood: That the skull and spine were intact. PW8 produced the post mortem report as **P. Exhibit 7**, in which he had formed an opinion that the cause of death of the deceased was due to cardiopulmonary failure secondary

to internal haemorrhage.

13. PW9 was Number 53654 Police Constable Chandai, the investigating officer of the case. Armed with documents provided by the deceased's family for motor vehicle KAV 695 L (7), PW9, Inspector Lyambilla and the deceased's family members they travelled to Tarime in Tanzania where an inspection of the recovered motor vehicle was conducted. He confirmed that the chassis Number of the motor vehicle namely No. EE102 – 0063160 and the Engine Number 4E-2824494 tallied with the information contained in the documents provided by the deceased's family.

14. PW9 also testified that the Tanzania police handed over a suspect and the exhibits. That on the way back to Kenya, the appellant who was the suspect voluntarily gave details of his accomplices to the police namely, Ambros Amin Ouma Fundi and Onune, all of Muhuru Bay. It was also PW9's testimony that the appellant led the police to the homes of all these people he had named, though none of them could be found. Pw9 produced the photographs, the death certificate and copy of Id as exhibits.

15. In further testimony, PW9 stated that the deceased's motor vehicle and the ignition key were found at a home in Sirati and that it was at the same place that the appellant was found and arrested.

16. Odime Okere testified as PW10. He is a resident of Tarime-Sirati in Tanzania. He confirmed that he saw the subject motor vehicle parked at the compound of his brother on the 5th July, 2006 at about 7.30 am and that it was the appellant herein who had the said motor vehicle which at the time had no number plates.

17. PW11 was Number 58544 Sergeant John Samanda, O.C.S Muhuru Police Station. He saw the appellant at the police post in connection with a robbery case in which a person had been killed. PW11 also testified that he arrested the appellant's co-accused in the lower court.

18. In his defence, the appellant gave sworn evidence, stating that his parents sent him to Musema on 2nd July, 2006. That on 4th July, 2006 he went fishing in an effort to find enough money for himself and for his brother. On the 5th July, 2006 the appellant stated, he boarded a vehicle at Tarime for Sirare, but at about 3.00 pm the motor vehicle was stopped at a road block where all the passengers were interrogated and that because he had no entry visa on him, he was arrested and taken to Tarime Police Post from where he was transferred to Migori Police Station and interrogated further. The appellant stated that he did not know why he was before the court.

19. The appellant called Kennedy Opiyo Maemira who testified as DW1. His testimony was that the appellant had visited him on 3rd July, 2006 with news of the death of the latter's son. That the appellant traveled back on 5th July, 2006 while DW1 travelled back on the 7th July, 2006. When questioned by the prosecution, DW1 could not produce his ID or the death certificate for the son who allegedly died.

20. In the judgment delivered on 7/11/2007, the trial court (Hon. Ezra O. Owino) based his conviction of the appellant on the doctrine of recent possession of a stolen item, namely that the appellant who was arrested some days after the deceased disappeared from home was found in possession of the ignition key of the stolen motor vehicle. The trial court relied on the case of **Mania & 3 others Vs – Republic [1986] KLR 301**. On conviction, the appellant was sentenced to death as by law provided.

21. Being aggrieved by both the conviction and the sentence, the appellant preferred this appeal which raises 6 home made grounds of appeal. These are 4 major complaints raised by the appellant against the judgment of the trial court:

- **That the trial court failed to consider the fact that the appellant was absent from Kenya when the alleged crime was committed.**
- **That the trial court failed to take into account the evidence of the appellant's witness, DW1.**

· **That there was no identification parade conducted so as to connect the appellant with the alleged offence.**

· **That the sentence of death imposed on the appellant is harsh and heavy.**

22. At the hearing of this appeal, we heard arguments from both the appellant and the Senior Principal State Counsel, Mr. Mutuku for the state. The appellant also put in well written submissions in which he argued that he was not properly identified and connected with the offence which was allegedly committed on 4th July, 2006 when he was away in Tanzania. The appellant also submitted that there was no sufficient evidence to demonstrate that he was found in possession of the deceased's motor vehicle.

23. Secondly, the appellant contended that the testimony of his arrest is contradictory and that the same should be resolved in his favour.

24. Thirdly, the appellant submitted that the trial court completely ignored the appellant defence of alibi. The appellant thus urged the court to allow his appeal, quash the conviction and set aside the evidence of death.

25. In response, Mr. Mutuku for the state submitted that the conviction of the appellant was well founded, the doctrine of recent possession was also properly applied after the motor vehicle was recovered in Tanzania and its ignition key found hidden in the appellant's underpants. Counsel also submitted that a service card found in the unnumbered motor vehicle without number plates confirmed that the vehicle was the same vehicle which the deceased had left home with on 4th July, 2006, never to be seen alive again. Counsel maintained that whoever killed the deceased was the one who stole the motor vehicle whose ignition key was found on the appellant. Counsel urged this court to dismiss the appeal.

26. In reply to the respondent's submissions, the appellant submitted that no statement was recorded with regard to the recovery of the car keys. He also submitted that the persons in whose home the motor vehicle was allegedly recovered were never called to testify thus making it doubtful that the appellant is the one who had both the car and the ignition keys.

27. As the first appellate court we have reconsidered and evaluated all the evidence afresh. This is what is expected of us, to give a fresh and exhaustive examination of all the evidence with a view to determining whether the conclusions drawn by the trial court were well founded. See **Kiilu & Another - Vs- Republic [2005] 1KLR 174**. This is the reason why we have set out the whole evidence in full; that of the respondent as well as the appellant's. It is a scrutiny of this evidence that will assist us as the first appellate court to make our own findings in this appeal and to decide whether the trial magistrate's findings should be supported. **Kiilu & another -vs.- republic** (supra). Also see **Okeno -Vs- republic[1972] EA 32**.

28. From our analysis of the evidence that was placed before the trial court, the thread that runs through that evidence from beginning to finish is as follows :- The deceased, David Ochieng Okombo who was a matatu operator owned Motor vehicle Registration Number KAV 659L. In addition to working as a mechanic and puncture repairer at BP Petrol station, the deceased is said to have operated the matatu between Sori and Muhuru Bay.

29. On the 4th July, 2006, the deceased left with his said motor vehicle for work and he was never seen alive again. At about 9.00 pm on 4th July, 2006, a motor vehicle which was moving in a suspicious manner was seen around Nyakwere area travelling from Muhuru to Sori. The vehicle made a U-turn, disappeared into a "panya" route and switched off the light. Two people came out of the vehicle into the bush. Then the vehicle drove away. That was on a Tuesday.

30. On the Friday of the same week 7th July, 2006 or, a body was found near the scene where the suspicious motor vehicle had been seen at about 9.00 pm. on 4th July, 2006. Reports about the deceased

were made to the police at Migori. On the 5th July, 2006, a motor vehicle, without number plates and showing signs of efforts to hide its identity by rubbing, was found at Manira in Tanzania. Around the same time, the appellant herein was arrested in Sirati area. An ignition key was found on the appellant and when he was taken to Manira where the unidentified motor vehicle was, he used the same key that had been found on him to start the vehicle. When the vehicle was searched, a service card recovered therefrom revealed that the unidentified motor vehicle was Registration Number KAV 659L the very same vehicle that belonged to the deceased. The appellant said he was the conductor of the said vehicle.

31. This was the chain of events upon which the trial court relied in holding that having been found in possession of the key that started the motor vehicle then the appellant who failed to give an acceptable explanation how he came to be in possession of the vehicle and the key, must have been the one who stole and also murdered the vehicle owner, the deceased in this case. The trial court rejected the appellant's evidence saying the same could not be believed as there was no document to support the appellant's contention that he had travelled to Musoma on 3rd July, 2006 and was returning to Sirare on 5th July, 2006 when he was arrested at a road block for lack of travel documents.

32. In our considered view, the findings of the trial magistrate based on the doctrine of recent possession were well founded. That doctrine has now walked a well-beaten path in this jurisdiction. In the case of **Matu Vs- Republic [2004] 1KLR 510** there was a time lag of some twenty days between the date of the robbery and the discovery of the goods found in the appellant's possession. The court held, *inter alia*, that such a time lag was not such that it would be unreasonable to hold that the appellant had participated in the robbery, and that it could safely be said that the stolen goods were found in the appellant's possession shortly afterwards.

33. In the instant case, the deceased's motor vehicle was found hardly 24 hours after the deceased left home for work in the same vehicle. On the following day too the appellant was found in possession of an ignition key that started the deceased's motor vehicle whose particulars were found on a service card found inside the vehicle. Although it was stated by PW5 that the appellant had mentioned that he was the conductor of the said motor vehicle, that issue was carefully avoided during the Appellant's cross-examination of PW5.

34. We have ourselves also scrutinized the appellant's sworn evidence. Our view of the evidence is that that piece of evidence was concocted by the appellant, first to raise the defence of *alibi* and second to explain his arrest on 5th June, 2006. In our considered view, the appellant miserably failed to convince us that his story could be believed. That piece of evidence depicts the appellant as seasoned story teller who is also economical with the truth. We equally find the testimony of DW1 to be devoid of any evidential value and reject it together with the appellant's testimony.

35. We have also carefully considered the grounds of appeal raised by the appellant and all we can say is that the prosecution discharged its duty of disapproving the defence of *alibi* raised by the appellant. The appellant being found in possession of the ignition key of a vehicle that had been stolen from the deceased hardly 24 hours before was sufficient to link the appellant to the robbery. As we have said, the evidence of DW1 fell short of helping the appellant in this case, the trial court rejected that evidence and we also reject it. As to the sentence, the trial court had no option but to pass the death sentence upon convicting the appellant.

36. In the circumstances and upon consideration of all the evidence that was placed before the trial court we find no merit in the appellant's appeal. The same is accordingly dismissed.

37. It is so ordered.

Dated and delivered at Kisii this 24th day of February, 2011

ASIKE MAKHANDIA
JUDGE

RUTH NEKOYE SITATI
JUDGE

24/02/2011

Coram: R.N. Sitati, J.
c/c – Bibu/Kasera
Appellant present in person
Language: English into Dholuo

Court: Judgment read and delivered today in the presence of the appellant and Mr. Mutai for the Respondent.

RUTH NEKOYE SITATI
JUDGE.