



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.84 OF 2016

ERICK IMBUGUA SALIMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

An appeal arising from conviction and sentence

by E.A. Obina (SRM) in Kapsabet SPMCrC No. 80 of 2016)

JUDGMENT

1. The appellant (**ERICK IMBUGUA SALIMU**) was convicted on a charge of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to life imprisonment. The particulars being that on 24th day of May 2014 at **Sirwa Yala** village within **NANDI** County jointly with others before court and others not before the court robbed **MARY SIAHI MUSANGA** and at or immediately before or after of such robbery killed the said **MARY SIAHI MUSANGA (deceased)** He denied the charge.

2. **JULIUS BUSENA AYODI (PW1)**, who worked in Kisumu called his wife (deceased), on 24/05/2014 at 7.30pm that she had been attacked by robbers who were still inside the house. Someone who he did not know then took the phone from her and demanded that he sends to them Kshs. 5000/- or they would kill his wife. He called his neighbour **BRIAN** to go to his house and see what was the problem, and whether he could help. **BRIAN** called back to say that his wife was dead. He travelled to his home the next day and found the house in a mess and there was blood in the bedroom. He realized that the following items had been taken:

1 leather jacket long sleeved

2 Safari boots

1 Butterfly sewing machine

CD changer Panasonic

Over Sony

10 chicken

1mattress

1 barbed wire

3 mosquito net

2 window curtains

2 mats

1 blue mattress

1 headscarf

2 bedcovers
2 blankets
1 mattress cover
2 pillow cases
2 towels
9 shirts
2 pairs of scissors
4 pairs of trousers
2 shirts
1 side mirror
2 belts
1 table cloth
1 steel box
1 steel basin
A bunch of keys and padlock
Cash Kshs 20,000/-

The total value of the property was Kshs 94950/-

3. Later on, police called him to say they had recovered a phone, which upon seeing, PW1 recognized as the Nokia phone belonging to his wife, as he is the one who had bought it. Eventually other items including a mattress, barbed wire, 3 mosquito nets, 2 window curtains, and wall mat, a head scarf, 2 bed covers, 2 blankets, 1 mattress, 2 pillow cases, 4 pairs of trousers, 2 T-shirts, a Steel basin, 1 side mirror, 2 belts, 1 table cloth, a bunch of keys and a padlock.

4. ENOS KIVIO (PW2) confirmed receiving a call from PW1 on the date in question, at about 9.00pm, requesting him to go and see what was happening in his house as his wife had said she was under attack. When he got there he found the door open and the room was dark, He called out the deceased, but there was no response. He used a torch to light up the place, and noticed that things were scattered all over the place, a small three-year old child was seated on the sofa, and the deceased lay dead. He also notices that the mattress was missing from the bed, the TV, solar charger, sewing machine were missing. He called out loudly to the neighbours to come.

5. Meanwhile, **DAVID SIVA (PW3)** was on his way to **YALA** from **SIRWA**, when he heard screams and noise from the house belonging to PW1, so he went to the home. Upon arrival, he found neighbours gathered, and the deceased lying dead, having been stabbed with a knife through the mouth, and penetrating to the neck. Items were scattered all over the house, and he noticed that a sewing machine head was missing, and there was no mattress on the bed.

6. On 14/08/2014 at 10.00am, PW2 was called by the village elder (**ABDALLA OGEMBO**), who informed him that some items had been recovered in **KAPTIS** area. This was confirmed by **ABDALLA (PW 4)** had been called by another village elder known as **WYCLIFFE** and informed that some suspected stolen property had been recovered in the house belonging to the appellant's co-accused **DEDRUS MLIMANI**. This act of recovery was also confirmed by **RISPER (PW6)**.

7. A post-mortem conducted by **DYABEI ISMAEL** opined that cause of death was as a result of severe bleeding following deep wounds at the back of the neck.

8. Investigations led to the recovery of the deceased's phone from **ELIZABETH KEZIAH WANYAMA** (the 1st accused at the trial), who in turn led police to the appellant as the seller of the phone.

9. In his unsworn defence, the appellant said he was stopped by three strangers while on his way from the shops on 9/7/2014 at about 6.30am, and a lady who was in their company confirmed that the appellant was the one. He was then arrested and charged. The appellant maintained that the 1st accused was a stranger, prompting the court to visit their homes, which confirmed that they were neighbours, separated by a 5 metre path. The trial court thus rejected his claim that his co-accused was a stranger and accepted the evidence of his co-accused as credible.

10. **DW4 (JOSEPH LIVAYO)** confirmed to the trial court that the appellant (who was known to him as a neighbour) had approached him with a phone which he wanted to sell, and his son wanted it, but they did not buy it as they did not have the money.

11. The trial court noted that barely one week after the robbery, the appellant approached the 1st accused, offering the phone for sale, and that the deceased's phone was traced to the appellant. The trial court pointed out that the attackers killed the deceased in a cruel manner, then made away with an assortment of household goods, and thereafter the appellant begun to dispose part of what they had stolen in the form of selling the deceased's phone to the 1st accused. The trial court invoked the doctrine of recent possession

12. The appellant being aggrieved by the outcome has challenged the same on grounds that;

- a) no identification parade was conducted
- b) the evidence was contradictory and uncorroborated
- c) the phone was not recovered from him
- d) his defence was not considered.

13. The appellant canvassed this appeal through written submissions where he complained that the evidence presented was not strong enough to sustain a conviction, and there was no evidence that directly placed him at the scene, and no identification parade was conducted.

14. That since no parade form, inventory or first report was presented, the court ought to have found that the investigation was very shoddy and the entire prosecution case lacked credibility. That the phone ought to have been dusted to establish whether he had come into contact with the same.

15. He also lamented that his plea in mitigation was not considered, pointing out that at the time of sentence he was a first offender only 26 years old, has acquired technical skills and done courses in theology, and the court ought to be lenient.

16. In opposing the appeal, Miss Okok on behalf of the DPP submits that the appellant and his colleagues robbed and killed the complainant, and the fact of the attack was confirmed by the telephone conversation her husband PW1 (who was away in Kisumu) engaged in with her and one of the attackers who demanded Kshs. 5000/- as a condition to spare her life.

17. That the fact of the appellant having the phone, and being keen to dispose of it as confirmed not only by the 1st accused to whom he sold the phone, but also DW4 to whom the appellant had made the initial sale offer. It is argued that the appellant is linked to the deceased's phone and that evidence placed him at the scene, so the conviction was safe.

18. On sentence, while acknowledging the emerging jurisprudence on the nature of mandatory sentences visa vis the independent discretion of the court, the DPP urges this court not to interfere with the same saying in this instance the sentence was appropriate because not only did the accused steal the deceased's property, but he also killed her.

19. I have considered the arguments raised by the appellant and indeed from the evidence the incident took place in the presence of the victim who did not live to tel. Perhaps the only other witness was the three-year old child (but that is speculative). I agree that there was no direct evidence or eye witness [placing him at the scene which then renders his argument about need for an identification parade and a parade form, superfluous

20. The issue about the investigations being shoddy because no dusting of the phone has no leg to stand because at the point when the phone was recovered it was already in the hands of a third party. The evidence that linked the appellant to the scene was circumstantial and emanated from his conduct in attempting to quickly dispose of the phone belonging to the deceased not too long after the incident. His undoing was borne by his indifference in not even making an attempt to explain how he got to have that phone, and why he was keen on quickly disposing of it. The doctrine of recent possession was discussed in the case of **Hassan v R [225] 1KLR** as follows:

“Where a person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for the possession, a presumption of fact arises that he is either the thief or the receiver”

In this instance the only rational inference in the absence of any explanation from him, is that he was the thief/robber and the trial court properly invoked the doctrine of recent possession.

21. As regards the sentence, I am keenly aware of the decision in **Francis Karioko Muruatetu & Anor v R [2017]eKLR** regarding the mandatory death sentence. I also pay regard to the very traumatic circumstances surrounding this case, that they invade a home, talk to the deceased's spouse demanding money was a condition for sparing his wife's life, and before the sound can fade off from the airwaves, the appellant and his company brutally drive a knife through her mouth right upto the back of her neck. And all this in aid of what? To take away what someone else worked hard for- they took away both life and property, and in my view he does not deserve mercy. I find that the sentence meted was most appropriate and I decline to interfere with it.

22. The upshot is that the appeal lacks merit and is dismissed in its entirety.

Virtually Delivered and dated this 10th day of March 2021

H. A. OMONDI

JUDGE