REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: D. K Kemei, J)

CRIMINAL APPEAL NO. 120 OF 2018

JACKSON MUTUA KIMANZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal against the conviction and sentence Hon. Mwaniki J. (SPM) in Criminal case No. 37 of 2018 in the Senior Principal Magistrate's court at Makueni, judgement dated 5th July 2018***)**

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MUTUA KIMANZI.....ACCUSED

JUDGEMENT

1. The Appellant was charged, tried and later convicted by ***Hon. Mwaniki J., Senior Principal Magistrate*** at Makueni for the offence of robbery with violence contrary to section ***295*** as read with section ***296(2)*** of the Penal Code**,** and was accordingly sentenced to life imprisonment.

2. The particulars of the offence were that the Appellant on *the 19th day of December 2015 at Emali Township in Nzaui Sub- County within Makueni County jointly with others not before court, robbed VM of a motor cycle registration number KMDR xxxx Sky go valued at Kshs. 91,000/=(Ninety One Thousand shillings) and Tecno mobile serial numbers 860xxxx and 860xxxx valued at Kshs.3000(Three Thousands Shillings) and at the time of such robbery killed the said VM*. The Appellant also faced two alternative charges of handling stolen goods contrary to section ***322(1) (2)*** of the Penal Code. The particulars of offence on the alternative counts *were that on the 21st day of December 2015, the accused at Nguluni in Matungulu Sub County within Machakos, otherwise in the course of stealing, dishonestly undertook the retention of the motor cycle registration number KMDR xxxx make Skygo valued at Kshs.91, 000/= and Tecno mobile serial number 860xxxx respectively knowing or having reason to believe them to be stolen goods*.

3. The Appellant pleaded not guilty to the charges and the case went for trial. Before the conclusion of the trial at Makindu law courts, the Appellant issued death threats to the police officers and the trial magistrate. The trial magistrate at Makindu law courts declined to continue hearing the case hence the High Court at Makueni transferred the case to Makueni law courts where it proceeded up to conclusion.

4. The hearing started afresh on the 5th April 2018 when ***Boniface Muthini Ndotia (Pw1)*** testified. He stated that he resides at Makueni and work as a Catechist at Makueni Prison. He stated that he knows VM aged 17 years who was killed on 19th December 2015. He testified that he was at Emali when his wife GMM called him at 11.00 pm to inform him that the deceased had not gone back home at 8.00 pm and that their motor cycle had not been traced. He stated that he called the deceased's phone but it was off and he thus directed his wife to report the disappearance to the police the next day if the deceased had not returned back home. He testified that the deceased operated as a boda boda rider of his (PW1's) motor cycle number KMDR xxxx Sky go blue in colour and produced photographs of the said motor cycle as *PMFI 1(a)-(c),* a copy of the logbook as *PMFI 2* and purchase receipt as *PMFI 3*. According to him, on 21st December 2015, he was informed by Lawrence Wambua that the appellant had been arrested by AP Officers in possession of the motor cycle. He stated that he went at Nguluni AP Post where he found the motor cycle. According to him, the deceased had been killed that day and his body was found at a certain farm and he identified the body at Kilome Nursing Home. He produced postmortem report as *PMF1 4* which showed that the body of the deceased had injuries on the back of the head, stab wound on the hand, mouth and face. According to him, the deceased owned a Tecno phone with a bright orange back which was recovered from the appellant. He identified the phone as *PMF1 5*. He was not cross-examined as the appellant

indicated that he had no questions for him.

5. ***PW2, VMM*** stated that VM (deceased) was his young brother. According to PW2, on 19th December 2015 he was with Joshua Mwanthi at Shell Petrol Station Emali when at 7.30 pm, the deceased had a passenger aboard motor cycle registration number KMDR xxxx before he left. He stated that the passenger was tall, slim and wore a maroon shirt and he was black in complexion. According to him, he saw the passenger well since there was light at the Shell Petrol Station. He testified that the deceased used to carry him home when he closed his business but on that day the deceased never came to pick him. He stated that the next day he went to his parents' home whereby he found their mother angry since the deceased had not gone back home. According to him, they enquired from the deceased's fellow boda boda riders and he also tried to call the deceased's mobile number 0723xxxx which he had bought for the deceased but the phone was off air. They reported to the police who informed them to wait for 24 hours. Again, they reported on 21st December 2015 since the deceased had not been traced. On the same day they received a report that suspects had been arrested in possession of the deceased's phone. He stated that the deceased's body was found later which he identified at Kilome Nursing Home and according to him, the deceased had a blunt injury on the back of the head and stab wounds on the face and other places. At the police station, he stated that he identified the motor cycle and the passenger who was the appellant herein. According to him, the appellant was slim at that time but has now grown fat. He was not cross-examined as the appellant had no questions for him.

6. ***PW3, Joshua Mwanthe Nzioki*** stated that on 19th December 2015 at 7.00 pm he was at the Shell Petrol station with PW2 when he saw V (deceased) who had aboard motor cycle registration number KMDR xxxx blue in colour a tall, black and slim passenger who had beards but did not have any luggage. According to him, there was enough light at the petrol station. He added that the appellant had grown fat. He was not cross-examined as the appellant had no questions for him.

7. ***PW4, Lawrence Munyao*** testified that on 20th December 2015 at about 4.00 pm he was ta Kilunguni market when he heard someone selling a motor cycle at Kshs. 20,000/= and he had a chance to view it. He stated that it was motor cycle registration number KMDR xxxx blue in colour. He stated that the next day there was a report that the motor cycle had been stolen and the seller was arrested. He confirmed that seller was the appellant on the dock. On being cross-examined by the appellant, he responded that the appellant person was the seller he seen attempting to sell the motor cycle.

8. ***PW5, No.227300 Corporal Simon Ngugi Kihara*** based at Matungulu AP Camp testified that on 20th December 2015 he was on duty at Nguluni AP Camp when members of the public informed him that there was someone who was selling a motor cycle at Kshs. 20,000/= which they suspect might have been stolen. According to him, the seller was the appellant herein whom they found had no ownership documents. He stated that they released the Appellant after he gave them a small piece of paper from Kamukunji police station which he claimed was an OB number for a loss of motor cycle and that he was calling someone to avail a police abstract. He testified that they later re-arrested the appellant after they received a report that a rider had gone missing from Email while riding motor cycle registration number KMDR xxxx which was the same one in possession of the appellant who had the time still did not have ownership documents. He positively identified the appellant on the dock. He was not cross-examined as the appellant did not have questions for him.

9. ***PW6, No.809075 Corporal Edward Mwaura*** based at Emali police station stated that he was on duty at the station on 20th December 2015 when the appellant made a report that he had lost a motor cycle and wanted an abstract. According to him, he interrogated the appellant and directed him to bring a photocopy of the logbook for motor cycle KMDR xxxx and he left to collect photocopies. He testified that on 21st December 2015 he was informed that a suspect of robbery had been arrested in possession of a motor cycle whose owner had been killed. The suspect was at Nguluni AP Camp. According to him, the appellant was the one who had claimed that he had lost a motor cycle. Further the Tecno phone found with the appellant belonged to VM (deceased). He stated that he also received the motor cycle number KMDR xxxx. He produced photographs of the motor cycle, log book, postmortem report, phone and receipts as *Ex 1 – 7*. He was not cross-examined as the appellant did not have questions for him.

10. The trial court established that a prima facie case had been made out against the appellant and he was thus placed on his defence. He indicated that he would give sworn evidence and call two witnesses. However, on 9th May 2018, the appellant pleaded informed the court that he had no evidence to offer and closed his case.

11. According to the learned trial magistrate, he found that from the totality of the evidence by prosecution witnesses, there was no doubt that the deceased's motor cycle and phone were recovered from the appellant a few days after the deceased went missing. The learned trial magistrate was of the view that the appellant never offered any contrary explanation as to how he came to be in possession of recently stolen property. According to the learned trial magistrate since at the time of theft the deceased was killed then ingredients for the offence of robbery with violence have been proved. The trial court convicted the appellant for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. Upon being asked to mitigate, the accused person stated that he had nothing in mitigation and uttered the words *''Korti inimalizie niende'' (court to conclude his case as he needs to go)* despite the court taking the appellant as a first offender. The court sentenced the Appellant herein to life imprisonment.

12. Aggrieved by both conviction and sentence, the Appellant appealed citing the following grounds:-

> ***(1) <u>THAT</u> the learned trial magistrate erred both in law and in fact by convicting the Appellant but failing to consider that the Appellant was not accorded a fair trial as is enshrined in our Constitution of Kenya. Articles 50(2) (a) (g) (h) (k).***
>
> ***(2) <u>THAT</u> the learned trial magistrate erred both in law and in fact by convicting me on contradictory and uncorroborated evidence and prosecution witness's testimonies.***
>
> ***(3) <u>THAT</u> the learned trial magistrate erred both in law and fact by failing to consider that there was bad blood relationship between the Appellant and the complainant's family.***

(4) <u>THAT</u> he wishes to be furnished with trial records for more grounds before the hearing of this appeal.

13. The Appellant has urged the court to re-evaluate the evidence afresh and reach an independent decision by setting the Appellant at liberty.

14. In this appeal, the Respondent's counsel submitted that the two issues for consideration are *whether the conviction and sentence were proper*. On whether the conviction was proper, counsel placed reliance in the case of ***Johana Ndungu vs. Republic (Criminal Appeal No.116 of 1995 (UR)*** where ingredients of robbery with violence were succinctly set out. According to learned counsel, PW2 and PW3 positively identified the appellant who was aboard the deceased's motor cycle. He added that PW4's evidence clearly shows that the appellant was in possession of the motor cycle and was the person who had tried to sell the same. The appellant failed to forward a copy of the logbook. It was pointed out that Pw5 re-arrested the appellant after being tipped that a motor cycle rider had been killed. Counsel submitted that the appellant chose to remain silent hence he cannot claim that the prosecution failed to prove the case against him. Reliance was placed on the case of ***John Wakabiu Cini vs. Republic (2016) eKLR***. According to the learned counsel the doctrine of recent possession is applicable in this case. As regards whether the sentence was proper, it was submitted that the sentence of life imprisonment for robbery with violence was proper since the conviction was proper. The court was urged to uphold the conviction and sentence.

<u>Determination</u>

15. I have considered the evidence adduced before the trial court and submissions filed in this appeal. The Appellant's written submissions are not on court record despite the court orders that the same be filed within seven days.

16. This being the first appellate court, I am therefore required to re-evaluate and subject the evidence before trial court to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same as observed by the EA Court of Appeal in ***Okeno vs. Republic (1972) EA 32*** at page 36.

17. However, in ***M'Riungu vs. Republic [1983] KLR 455*** the court held:

> ***"Where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.."***

18. Based on the grounds of appeal, the issues that fall for determination are as follows:-

> ***(a) Whether the Appellant was accorded a fair trial by the trial court.***
>
> ***(b) Whether the Appellant was convicted based on contradictory and uncorroborated prosecution witnesses evidence.***
>
> ***(d) Whether there was any evidence of bad blood or bad relationship between the Appellant and the complainant's family adduced in court.***

19. The Appellant contends that he was not accorded fair trial as enshrined under Articles 50(2) (a) (g) (h) (k) of the Constitution, 2010.

20. Article 50 of the Constitution,2010 provides as follows:-

> ***(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(a) to be presumed innocent until the contrary is proved;***
>
> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
>
> ***(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***
>
> ***(k) to adduce and challenge evidence;.."***

21. The Supreme Court of India in the case of ***Natasha Singh vs. CBI {2013} 5 SCC 741*** expressed itself as follows:-

> ***"Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized."***

22. Indeed, the burden of proof in criminal cases lies with the prosecution to prove the case beyond reasonable doubt against the accused person as held in ***DPP vs. Woolmington (1935) UKHL.***

23. It is submitted by the Respondent that the Appellant was accorded a chance to defend himself by cross-examining the prosecution witnesses but the Appellant chose to remain silent. Indeed, the Appellant stated that he had no evidence to offer during the defence case and proceeded to close his case. I note that the Appellant did not cross-examine the prosecution witnesses.

24. In the case of John ***Wakabiu Cini vs Republic (2016) eKLR Limo J.*** held that:-

> ***"The Appellant chose to remain silent willingly and he had the right to do so. However, the fact that he chose to remain silent in my view had no bearing in the case because the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt and not to perhaps leave some gaps to be filled by the defence. An accused person does not assume any burden to prove his innocence. He is of course obliged in situations where strong evidence is laid against him to if he wishes given an explanation or raise defence to defend himself."***

25. The Appellant was arraigned before the Makindu law court where he pleaded not guilty to the charges. The trial was conducted but at some point he threatened the police officers and the trial court which led the trial magistrate at Makindu to decline to continue hearing the case. Consequently, on 23rd January 2018, the High Court transferred the case to the Senior Principal Magistrate at Makueni. On 21st May 2018 before the trial magistrate at Makueni, the trial magistrate took directions under Section 200(3) of the Criminal Procedure Code whereby the provision was explained to the Appellant in Kiswahili and the Appellant chose to start the case afresh since he did not have the documents that he had complained about. The trial magistrate directed the case to proceed from where it had stopped but prosecution witnesses who had testified be recalled for further cross-examination by the Appellant. All the witnesses turned up and gave their evidence afresh. During the hearing the Appellant stated that he didn't have questions to ask the witnesses. Upon the Appellant being placed on his defence, he chose to give sworn evidence and call two witnesses. The trial magistrate was of the view that due to pressure of work, the Appellant's case would proceed the next day on 8th September 2018 but I note that the Appellant did not object to the date. On 9th May 2018 when the matter came up for hearing, the Appellant stated that he did not have any evidence to offer and closed his case. The trial magistrate retired to write the judgement whereby the Appellant was found guilty of the offence. He was also given an opportunity to mitigate before the sentence is handed down but stated that he did not have any mitigation and told the trial magistrate in Kiswahili *"Korti inimalizie niende"* (court to conclude for him so that he could go). In my view there was a fair trial accorded to the appellant right from taking plea to sentencing.

26. The Appellant asserts that there was no fair trial since he didn't have an advocate representing him in the trial. It will be noted that the Appellant represented himself in the proceedings and at no point did he ask or intimate to court of the need for legal representation. Indeed, the right to legal representation is fundamental that the absence of which may result in injustice on the part of an accused person.

27. In ***Macharia vs. Republic HCCRA 12 of 2012, {2014} eKLR the*** court held that:-

> ***"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

28. According to ***Mativo J.*** in the case of ***Joseph Ndungu Kagiri vs. Republic [2016] eKLR***: -

> ***"[In my view] the basic test from the wording of article 50 is that the right is dependent on "substantial injustice" test. That in cases where substantial injustice would not occur, then there would be no basis for an accused person to insist on being granted legal representation at the state expense.***

29. The learned judge further held that:-

> ***"Not every accused person is entitled to legal representation at states expense. Each case is considered on the basis of its own merit. The nature of the offence that an accused person has been charged with is instrumental in deciding whether an accused person qualifies or not.***
>
> ***A reading to the provisions of the constitution on the right to legal representation reveal that an accused person's entitlement to legal representation at the expense of the state is not automatic but qualified. In other words, an accused person must prove that unless he or she is assigned an advocate by the State, substantial injustice would occur…"***

30. It therefore follows that the right to legal representation is not automatic. Each case has to be considered on its own circumstances. In ***Dominic Kamau Macharia vs Republic [2014] eKLR*** the court explained that *substantive injustice* would occur in cases such as where there are *complex issues of law or fact, where the accused is unable to conduct his own defence,* or *where public interest requires that representation be provided.*

31. I note in the proceedings that the Appellant did not face any difficulties during the trial. He declined to cross-examine prosecution witnesses despite that opportunity being accorded to him. At one point he even asked for the OCS in Emali to appear in court to explain the whereabouts of motor cycle ownership documents. The Appellant issued death threats to the police officers and the trial magistrate. In my view this conduct is of a person who understood the entire proceedings. No complaints were raised by the Appellant that the trial proceedings would lead to miscarriage justice. The Appellant simply did not see the need to defend himself in the trial. He did not challenge the evidence adduced by the prosecution witnesses. During the conclusion of the matter before the trial court, the appellant on being asked to mitigate

requested the court to finalize the matter so that he could go. Such sentiments left no doubt that the appellant actually knew the nature of the case he faced. He simply cared less about the case he faced. It is thus surprising for him to turn around quite late in the day and accuse the trial court that it did not give him a fair trial when he in fact declined to cross examine the witnesses.

32. In ***Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998*** the Court of Appeal held that:

> ***"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."***

33. The Appellant contends that he was convicted based on contradictory and uncorroborated evidence. In my view, I find that the assertions to be in the negative noting that the Appellant closed his case without challenging the prosecution witnesses' evidence. I have re-evaluated the evidence adduced by prosecution witnesses. I find no inconsistencies or uncorroborated evidence. PW2 and PW3's evidence as to the description of the Appellant was consistent. PW4 and PW5's evidence corroborated each other. The Appellant wanted to sell the motor cycle but the mission aborted after PW5 was notified by members of the public. The Appellant has never tendered a copy of the log book for the motor cycle. No submissions have been filed to shed light on the inconsistences. I am fortified by the decision in ***John Wakabiu Cini vs. Republic (supra)*** that the Appellant cannot claim the conviction and sentence was improper when he chose not to cross-examine the witnesses and mitigate the sentence.

34. It was needless for the trial magistrate to consider the Appellants allegations of bad blood relationship between the Appellant and the complainant's family when no evidence was led in court on the same. *Section 107 of the Evidence Act* is clear that he who alleges must prove. The Appellant failed to cross-examine on the same and no written submissions have been filed by the Appellant to shed light on the same.

35. In my view ground 4 of appeal is overtaken by events noting that directions on the disposal of this appeal had been given by the court in the presence of the Appellant and parties agreed to canvass the appeal by way of written submissions. Indeed, the appellant has been participating in the issuance of those directions but has not even complied with the same by filing and serving his submissions.

36. A careful analysis of the evidence presented before the trial court leaves no doubt that indeed the finding on conviction by the trial court was sound and I see no reason to interfere with it. The appellant was arrested a day after the robbery while in possession of the deceased's motorcycle and which he purported to dispose at a throw away price which raised suspicion. The doctrine of recent possession is applicable in the circumstances. A gain, the appellant was positively identified by Pw2 and Pw3 who saw him aboard the deceased's motor cycle thus placing him as the last person with the deceased. I am therefore satisfied by the evidence tendered by the respondent that the same proved the charge of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code against the appellant beyond reasonable doubt.

37. As regards the issue of sentence, it is noted that the penalty for the offence with which the appellant had been charged is death sentence. However, following the **Supreme Court decision in Francis Karioko Muruatetu and Another Vs Republic [2017] eKLR** mandatory death sentence was declared unconstitutional and that courts have been given the opportunity to consider mitigating circumstances of offenders before passing an appropriate sentence. In the present case, the appellant was sentenced to life imprisonment and not ordered to suffer death. The trial court duly considered the circumstances of the case and the fact that the Appellant was a first offender and settled on the impugned sentence. I have considered the circumstances of the offence and note that the deceased was a young man aged 17 years and who was brutally killed. His life was cut short. He was just hustling for his family and did not deserve to die. I find the sentence imposed to be commensurate with the nature of the offence as it was aggravated. I therefore find no merit on the appeal against sentence.

38. In the upshot, I find that the appeal herein lacks merit. The same is dismissed. The trial court's finding on conviction and sentence is upheld.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE

DELIVERED AT MACHAKOS THIS 5TH DAY OF OCTOBER, 2021.

M. MUIGAI

JUDGE