REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 65 OF 2020

MOSES WANJALA MPALIA....................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(*Being an appeal from the original conviction and sentence*

in criminal case number 169 of 2017 in the Chief Magistrate's

***Court at Bungoma – Hon. C. A. S. Mutai (SPM) on 20/02/2018*)**

JUDGMENT

1. Moses Wanjala Mpalia, the Appellant herein was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Criminal Procedure Code**. The particulars were that on the 29th day of December, 2016 at Muslim Estate within Bungoma County, jointly with others not before this court, being armed with a dangerous weapon namely a rungu robbed Daniel Nyongesa of his motorcycle registration number KMDW 217N make Star valued at Kshs. 100,000/= and at the time of the such robbery used actual violence on the said Daniel Nyongesa.

2. Following a full trial, in which the Prosecution presented nine (9) witnesses, the Appellant was convicted as charged and sentenced to suffer death by hanging. Aggrieved by the decision of the trial court, the Appellant preferred the present appeal on both sentence and conviction. He advanced eight grounds of appeal (8) the gist of which is that the prosecution evidence was speculative and was not watertight to warrant a death penalty. He admitted that he had not lodged the appeal in time but attributed this delay to his being moved to a different prison facility. He expressed his wish to be supplied with a copy of the lower court proceedings stating that this would enable him raise sufficient grounds during the determination of this appeal.

3. Later on 5th August, 2021 the Appellant filed four (4) supplementary grounds of appeal to the effect that the direct evidence did not place him at the locus in quo (scene of crime); he was convicted on circumstantial evidence that had many co-existing circumstances destroying their inference of guilt; the trial court failed to consider his defense and that the death sentence was manifestly excessive.

4. On 5th August, 2021, the Appellant in person filed undated written submissions in which he urged the court to quash the conviction, set aside the sentence and set him free. On identification, the Appellant submitted that whereas the direct evidence placed him at the scene of crime, no one identified him at the scene of crime or in an identification parade. He asserted that there was no tracing done by the Safaricom Mobile Service Provider to place him at the scene of crime on the material day and time, being 29th December, 2016.

5. The Appellant drew attention to the testimony of PW9 Police Inspector Linus Juma who stated that "*I wrote to Safaricom to confirm the registered owner of the phone. This sim card Imet Number 89254021004058117353. Safaricom sent me the details of the name MOSES MOPAYA identity card No. 30379751, mobile phone no. 0796066523.*" He stated that the identity number of the data did not tally with the information on his national Identification Card (I.D). He asserted that his I.D bears the name MOSES WANJALA MPALIA and not MOSES MOPAYA as depicted by both PW9 and the Safaricom data.

6. The Appellant stated that despite the prosecution claiming to have been in possession of his I.D, PW9 did not produce it in court as an exhibit for its content to be matched to that produced by Safaricom data. That in any event, the Safaricom data was not attested to and bore no stamps, signatures or certification from Safaricom. That PW9 was not an expert nor was he authorized to produce documents or testify on behalf of Safaricom pursuant to **section 63(d)** of the **Evidence Act**. Curiously, none of these arguments were raised before the trial court, despite the Appellant having had an opportunity to cross-examine all the prosecution witnesses. In fact, PW9 in his cross-examination maintained that the phone and sim card recovered at the scene were registered in the name of the Accused. PW9 however stated that he did not know if the Accused could have misplaced his I.D card.

7. It was the Appellant's further submission that there was no inventory duly filled and signed during the recovery of the alleged phone and exhibits. That without an inventory, it was difficult to tell whether the exhibits were collected from the crime scene, or from other anonymous people or places. This he stated was especially so since no other witnesses other than PW8 and PW9 testified about the exhibits being at the scene of crime. Further that the motorbike was not found in the constructive possession of the Appellant as required by the doctrine of recent possession.

8. According to the Appellant, the trial court did not diligently consider his defence. His defence was that the incident happened while he was in custody and he was only called in court on 7th February, 2017 to answer the charges of the allegations which he was not aware of. That at the time the allegations were leveled against him, he was pursuing another case while in custody. He drew attention to the Charge Sheet noting that it had avoided with an oblique motive to indicate when he had been arrested.

9. The State opposed the appeal in its entirety through learned State Counsel Ms. Wakibia who filed written submissions dated 13th July, 2021. On the issue of sentence, the State Counsel submitted that **section 296(2)** of the **Penal Code** provides that any person convicted of robbery with violence shall be sentenced to death which is the sentence that the court gave after being satisfied with the evidence adduced.

10. Ms. Wakibia contended that contrary to the allegations by the Appellant, the evidence adduced by the prosecution was in fact credible owing to the circumstances in which the complainant lost his life. The State Counsel asserted that the accused was placed at the scene of crime by the fact that his mobile phone was recovered at the scene of crime and he failed to justify why the mobile phone was at the scene of crime. She urged that despite the fact that the Complainant died and could not give his version of the story on what transpired, the circumstantial evidence adduced by the witnesses who testified pointed a direct finger at the Appellant as the perpetrator of the offence. Based on the foregoing, she urged the court to dismiss the appeal in its entirety and uphold the conviction and sentence of the trial court.

11. This being the first appeal, I am reminded of my primary role as the first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. I do also bear in mind that I did not have the advantage as did the trial court of seeing and hearing the witnesses. (See - **Abok James Odera t/a AJ. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** and **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**).

12. Whereas the Appellant took issue with PW9 producing the data from Safaricom, the record demonstrates that the testimony of PW9 in Examination in Chief was that he is an officer attached to the CID Headquarters Investigation Bureau, previously attached to the DCIO Bungoma South. He stated that he was trained on data analysis and tracking of mobile phones. This goes to show that he understood the intricacies of data analysis and could understand the details on the Safaricom Data Form. In any event, the Appellant never challenged the qualifications of PW9 in this respect on cross-examination.

13. PW9 testified to having written to Safaricom to confirm the registered owner of one of the mobile phones recovered at the scene of the crime. The details sent to him by Safaricom would reveal that the sim card was registered to one MOSES MOPAYA. The details also spoke to the movements of the sim card holder. The relevant part of PW9's testimony in this regard states thus:

> *Moses entered Bungoma on the 28th December, 2016 at 2311 hours. He entered straight into the Bungoma Cereal outlet from the Kimilili. He roamed within Bungoma town Musutu junction and Namachanja school areas. He left the same day at about 5.55 p.m through Namachanja while headed to Webuye. On this same day he came back at about 8:39 p.m. he left through the Sangallo out let, he went to the Musutu junction an estate next to Muslim Estate. He stayed here, he left through Namachanja and he left for Webuye. After some few days a similar incident took place at Mumias somebody was killed and motorbike stolen. This motorbike had a tracking device that had been fixed on it. The relatives of the deceased were able to track this motor bike among the suspect that was arrested at Webuye was among the suspect who is the accused.*

14. It is noteworthy that despite stating in exam in chief that the Appellant was among the suspects arrested, on cross-examination, PW9 stated that he was not there when the Appellant was arrested. He however maintained that he charged the Appellant because the Safaricom Data had linked the Appellant to the commission of the crime.

15. Additionally, the Appellant had stated that the trial court did not diligently consider his defence. The record however demonstrates that his defence did nothing to dent the evidence tendered by the prosecution. It appears that he gave an unsworn testimony in which he stated that he did not remember where he was on the material date, being 2nd December, 2016. He did not tender any evidence in respect of the mobile phone recovered at the scene of crime which had a sim card registered to his name to dispute that the sim card belonged to him or to explain why his mobile phone was at the scene of crime.

16. As such, this evidence remains uncontroverted. While the Appellant now claims to have been in prison pursuing a different case at the date of his arrest, his testimony as shown on record states differently. That he did not remember where he was on the material date. This explanation did not help his case but only served to cement the case of the prosecution.

17. In arriving at its decision, the trial court considered all the evidence before it and arrived at the decision that the prosecution evidence, in its entirety undoubtedly pointed to the Appellant as the perpetrator or one of the perpetrators of the crime. Additionally, the trial court found PW9 I.P Linus Juma a credible witness, noting that he stood firm even on cross-examination. The trial court was also cognizant of the fact that the evidence upon which the prosecution sought to secure a conviction against the Appellant was circumstantial before arriving at the decision to convict the Appellant.

18. The trial court gave an explanation in this respect and I find it to be convincing. The relevant part of the judgment states thus:

> *In a case depending exclusively on circumstantial evidence the trial Judge/Magistrate needs to establish that inculpatory facts are incompatible with the accused's innocence and incapable of explanation upon any other reasonable hypothesis than that of his guilt.*

It is also necessary that before inferring on the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. In this case the Accused did not give an explanation which would have helped his case in rebutting the Prosecution case. While the law is clear that the burden is on the Prosecution to prove a criminal case beyond reasonable doubt and the accused has no duty or burden of establishing his innocence, there are times when the law places a duty on an accused person to explain certain facts particularly those facts particularly within his own knowledge. Section 111 of the Evidence Act casts that burden on the accused in such instance. Failure by the accused to offer a reasonable explanation raises a reasonable presumption of fact that the accused committed the act complained of.

19. Indeed, the principle of law is that in order to base a conviction on circumstantial evidence, it must be demonstrated that the guilt of the accused person is the only rational inference that could be drawn in the circumstances. Speaking to this in **PON vs. Republic [2019] eKLR**, the Court of Appeal (Ouko,(P),Gatembu & Murgor, JJ.A.) opined thus:

> **"This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are <u>Rex V Kipkerring Arap Koske & 2 Others</u> [1949] EACA 135 and <u>Simon Musoke V R</u> [1958] EA 71. In <u>Rex V Kipkerring</u> (supra) the court explained that;**
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> > **"In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**
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> **<u>Simon Musoke V R</u> (supra) introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances of factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of <u>Omar Mzungu Chimera V. R</u> Criminal Appeal No. 56 of 1998, the Court stated that;**
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> **It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**
>
> > **(i) the circumstances from which an inference of guilt is to be drawn, must be cogently and firmly established;**
> >
> > **(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
> >
> > **(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

20. Since there was no direct evidence in respect of the circumstances leading up to the Victim's death, all there was to rely on was the exhibits recovered at the scene of crime which included the mobile phone which bore a sim card registered to one "Moses Mopaya" who was later established to be the Appellant herein. Further investigations revealed the movements of the mobile phone owner and placed the person at the scene where the Victim's body was recovered. It is there that the said mobile phone was also recovered.

21. The motorbike which the Victim was operating was also tracked to Webuye and it is there that the Appellant is said to have been arrested. The record further demonstrates that there were no other co-existing circumstances which weakened the chain of circumstances relied on. Indeed, this is a criminal case and the burden of proof rests entirely with the prosecution. Having established the above, it did not help that the Appellant in his defence stated that he did not know where he was on the material date. It is therefore my considered view that the trial court properly evaluated the evidence adduced before it before arriving at the conviction.

22. The Appellant also drew attention to the charge sheet noting that it did not bear the date of his arrest. This is however an issue that ought to have been brought before the trial court so that the Prosecution could be put to task. It is curious that the Appellant now states that he was in custody on the material date of the incident when the record shows that his unsworn testimony was that he did not remember where he was on the material date. I find this belated recollection rather convenient for the Appellant and is unconvincing. In any event, my duty as the first appellate court is to analyze and scrutinize the evidence on record as adduced before the Trial Court, and not new evidence to be produced on appeal.

23. On the sentence, the Appellant submitted that the death sentenced imposed against him was excessive and against the tenets of **Articles 26(1)**, **19(2)**, **29(e)** and **(f)** of the **Constitution**. While **Article 26** of the **Constitution** does in fact guarantee the right to life under its **sub-article 1**, it also does, under **sub-article 3** provide that a person can be deprived of life to the extent authorized by the Constitution or other written law.

24. Section 296(2) of the **Penal Code** provides that if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death. In this case, the victim of the robbery did lose his life.

25. The record demonstrates that before sentencing the Appellant was afforded an opportunity to air his sentiments in mitigation. All the Appellant did was state that he was an orphan without more. He did not offer any remorse. The record further shows that the Appellant had a previous record for the offence of creating disturbance in 2002. Before arriving at the sentence, the trial court noted that the offence was serious and that somebody had lost his life. Indeed, the record shows that the Victim of the offence was a young man in his prime, who met his death whilst trying to earn a living as a motorcycle rider. On the material date, the Victim was attacked and seriously injured, which injuries resulted in his death.

26. Section 292(2) of the **Penal Code** provides a mandatory death sentence upon conviction. On this basis, I find that the sentence imposed against the Appellant, namely to suffer death, was the proper sentence as provided by law.

27. Additionally, the Supreme Court in its recent decision in **Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR**, observed that the decision in Muruatetu did not invalidate mandatory sentences in the Penal Code or any other statute, but that the judgment was only in respect of **section 204** of the **Penal Code** which provides for the offence of murder. Therefore, where an accused person has been convicted of the offence of robbery with violence as in this case, the death penalty is still applicable.

28. In view of the foregoing, I find the appeal to be unmerited and consequently dismiss it in its entirety.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.…………………………….Appellant in Person.

In the presence of…………………………….State Counsel.