



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 12 OF 2019

ROBINSON MARTIN SEME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE DECISION OF HON. KHATAMBI (SRM))

DATED 15TH FEBRUARY 2019 IN CRIMINAL CASE NO. 1129 OF 2018)

JUDGEMENT

1. The appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 18th day of April 2018 at Industrial area within Nakuru west district of Nakuru county jointly with others not before court robbed Samuel Mwangi Saidi a motor bike registration number KMEJ O65V make boxer red in colour valued at Kshs. 107,000 and immediately after the time of such robbery used actual violence to the said Samuel Mwangi Saidi.

2. The alternative count was handling stolen property contrary to Section 322(2) of the Penal Code. The particulars of the offence were that on the 18th day of April 2018 at Industrial area in Nakuru west district within Nakuru County otherwise than in the cause of stealing dishonestly retained a motorbike make boxer registration number KMEJ 065V knowing or having reason to believe it to be a stolen good.

3. The appellant was convicted and sentence to life imprisonment hence this appeal. **He has raised several grounds of appeal in his petition notably that the identification was improper; identification parade ought to have been conducted; recovery of the motorbike was not proved, critical witnesses were not called and that the trial court failed to consider his defence.**

4. Before looking at the submissions as directed by the court when the same came up for hearing it is necessary to summarise the evidence as presented during trial.

5. **PW1 ALEXIA BURACHE YAKHAMA** testified that she was the owner of the motorbike and she had employed the complainant to operate a boda boda business and that she had employed him for only two days. She was called by the complainant who informed her that he had been attacked and the motorbike stolen. They reported the matter at Kaptembwo police station. The complainant was however arrested and locked in the cells as the police took him to be a suspect.

6. She was however later in the day called by the police and told that it had been recovered. She went the following day and identified the same. The appellant was also shown to her but she could not recognise him. She also identified the receipts she was given when she purchased the said motorbike.

7. **PW2 SAMUEL MWANGI SAIDI** the complainant testified that he had been employed by pw1 for two days as a boda boda rider and he was being paid ksh.300 per day. That on the 17th April 2018 he had ferried two men early in the morning to Langa Langa area. The following day on the 18th at the stage the same two persons came and requested that he ferries them to Eveready area.

8. As they were on the way they told him to join a murrum road as they wanted to fetch some store keys. One of them called someone to bring the keys and they stopped to wait for him. Suddenly the appellant hit him on the right eye and he became confused. They strangled him and the person who had arrived hit him on the head using the blunt side of a panga. He was told to lie down and not wake up. They left with the motorbike.

9. He went to Kaptembwo police station where he reported the matter. He also called pw1 and were referred to the same police station. He

was incarcerated at the said police station as he was considered a suspect. At 8pm the same day he was informed by the OCS that the motorbike had been recovered at Njoro and the same was brought. He was then released and went to seek medication. He identified the p3 form which was filled at the hospital.

10. He said that he was able to identify the appellant at the station because he had carried him twice and had spoken to him. He however did not know how the motorbike was recovered and neither did he know how the appellant was assaulted.

11. On cross examination by the appellant he insisted that it was him who hit him on the eye and that it was the second time he was carrying him.

12. **PW3 PATRICK OGETO MOKEYE** a clinical officer from Nakuru hospital examined the complainant and filled the p3 form. He found that he had a headache due to the injuries and had a swelling on the left eye which was caused by a blunt object. He produced the p3 form as exhibit 3.

13. **PW4 P. C. HASSAN SAID** from Kaptembwo police station testified that he received a report from the OCS concerning a robbery incident and that he had been informed by Njoro police station that an individual had been arrested with the motor cycle. Together with one Chirchir Kiplimo they went to Njoro police station where they found the appellant who had injuries on the head after being beaten by boda boda riders.

14. He was taken to Njoro hospital where he was treated. He was later identified by the complainant who had said that he was wearing a black suit. They took the appellant to Kaptembwo police station and handed him over to the investigation officer. He also identified the photos of the motorbike which was red in colour.

15. Upon cross examination by the appellant he said that the complainant had identified him at Njoro police station.

16. **PW5 CPL DAVID GESEKE** was the investigating officer. He said that a complaint was lodged at the station on 18th April 2018 by pw2 and he explained how he was attacked by one of the passengers he was ferrying. That they received a report that the motorbike had been found and recovered at Njoro and the appellant had been arrested. He said that the complainant positively identified the appellant and thus he charged him.

17. The scene of crime officers took photos of the motorbike and he produced the same. He as well produced the ownership documents of the said motorbike which was a receipt of purchase.

18. On cross examination he said that he did not conduct an identification parade neither did he carry any finger print dusting on the motorcycle.

19. **PW6 INSP. EVELYN CHEMELI** processed the photographs of the motorcycle which had been given to her by pw5. She went ahead to produce the same as exhibits.

20. When placed on his defence the appellant gave sworn evidence denying the charge and stated that he works at Menengai as a casual and that on 18th April 2018 he was with his wife who was unwell till 2pm when he left for his place of work. He left work at 10pm in the company of 10 people. They were arrested and taken to Kaptembwo police station and placed in custody till the following day when his colleagues were released and he was left behind as the police had taken away his money without any inventory.

21. He was on 24th April 2018 arraigned in court for an offence which he never committed. He denied being found with the motorcycle as well as being arrested at Njoro.

22. When cross examined he said that he was a packer at Menengai refineries and they worked between 2pm to 10pm. He said that he could not recall the names of people he worked with before his arrest except one Gideon.

23. The court directed the matter to be disposed by way of written submissions which the parties complied.

APPELLANTS SUBMISSIONS.

24. The appellant's submissions essentially aligned itself on the grounds of appeal. He submitted that identification was not corroborated and he relied on the case of **KARIUKI NJIRI & 7 OTHERS V. REPUBLIC** which set out the parameters on identification.

25. He went ahead and submitted that the respondent ought to have conducted a parade identification as provide under Section 46 of the Police Standing Orders for the simple reason that the complainant was not able to identify his assailants given the circumstances. He further stressed that there was no evidence that the appellant had been treated after being arrested neither was there evidence that he had been assaulted.

26. Further that there was no evidence that he had been found with the stolen motorbike neither was he booked at Njoro police station.

27. On the issue of key witnesses not being called he submitted that one Chirchir Kiplimo who accompanied pw4 to Njoro ought to have been called as well as the Njoro OCS and the arresting officer.

28. He also submitted that his defence which he considered plausible was not taken into consideration by the trial court. In essence he stated

that the offence was not proved beyond any shadow of doubt and hence this appeal ought to be allowed. According to him the sentence was excessive in the circumstances and run contrary to the tenets governing the purpose of retributive justice.

RESPONDENTS SUBMISSIONS

29. The learned state counsel on behalf of the respondent submitted that the appeal has no merit at all. She stated on the question of identification that the appellant had been properly identified by the complainant having carried him for two consecutive days which was done during daytime. That there was no in fact need to have undertaken any identification parade. The complainant easily identified and or recognised his attacker at the police station after being apprehended.

30. The injuries sustained by the complainant were proved by the clinical officer who examined the complainant and produced the p3 form. The said injuries were consistent with what he had suffered. In essence the facts from the attack to his eventual arrest at Njoro while having the stolen motor cycle were clearly consistent and the chain unbroken.

31. She further submitted that the trial court contrary to the appellant's submissions did not rely on the evidence of a single witness in reaching out its verdict but was later corroborated by the evidence of the other witnesses. She relied on the case of **MAITANYI V. REP. (1986) KLR 198.**

32. On the issue of not calling key witnesses the respondent submitted that Section 143 of the Evidence Act was clear and that those witnesses who testified were sufficient to have their evidence convict the appellant which it eventually did. There was therefore no need to have called the other witnesses.

33. The learned state counsel dismissed the defence raised by the appellant on the grounds that the same did not raise any doubt to warrant the trial court take it into consideration. What the appellant did was to merely deny the offence and that he could not even recall his workmates whom he allegedly was arrested with.

ANALYSIS AND DETERMINATION.

34. The courts role at this level was well spelled out in the case of **OKENO V. REP, (1972) EA 32** where it was stated that;

35. ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.***

36. There are at least three issues for determination herein **namely identification which includes whether there was need to conduct identification parade; arrest of the appellant; whether key witnesses were left out; the appellants defence and finally whether the sentence was excessive in the circumstances.**

37. On identification pw2 the complainant stated that he had ferried the appellant with another person on 17th and 18th April 2018. All the trips were done early in the morning. In light of the above evidence it is true therefore to conclude that he was able to recognise all his passengers as there was nothing inhibiting him.

38. During the time of the robbery he testified that he was directed to take a murrum road which he complied and was stopped and directed to stop as they waited for a key which was being brought by some third party. During this period, it was possible for the complainant to see and converse with his passengers. It was only when the third person arrived that he was attacked and he sustained injuries on his head and on the left eye.

39. He testified that he was able to see the appellant attacking him and used the blunt side of the panga to hit him. The injuries were confirmed by the clinical officer. In my view therefore i find that the complainant managed to identify his attackers as there was no concealment on their part or at all.

40. It is not true as submitted by the appellant that the complainant failed to describe to the police his attackers. There was an explanation by pw4 that he told the officer that the attacker wore a black suit, a fact not counteracted by the appellant.

41. These chain of events were not broken as the appellant was arrested by boda boda riders the same day. Although there was no evidence of how he was arrested, one would find it difficult to believe that the appellant would simply be apprehended by civilians roughed up without any cause. The fact that he was picked up at Njoro police station while having the stolen motorbike was in my view sufficient reason to conclude that he was among the assailants who had attacked pw2 that morning.

42. There was therefore no reason to carry out an identification parade for the simple reason that the complainant was able to recognise his assailants very well. At the same time although there was no evidence that the appellant had been treated at Njoro hospital, this does not lessen the fact that he had been arrested after being found with a recently stolen item.

43. The defence he tendered was not plausible. He was unable to prove that he was not arrested at Njoro. All that he did was to explain that he was arrested with other 10 workmates. There was nothing to suggest that he worked for Menengai refineries.

44. The case of **BUKENYA & ANOTHER V. UGANDA (1972) E A 549** on the issue of failing to call key witnesses and relied upon by the appellant does not aid him. The witnesses whom he allegedly were left out in my view would not have altered the circumstances of the case. The witnesses called already had proved how the robbery took place, the injuries sustained by the complainant, the prove of ownership of the motorbike among others. The arresting officer as well as Njoro police station OCS would only perhaps have reiterated what the rest had said. As stated above it would have been appropriate to establish how he was arrested but the facts as presented were overwhelming and totally against the appellant's defence.

45. The sentencing was appropriate. He cannot benefit from the Muruatetu decision as the Supreme court clearly directed on 6th July 2021 that the same only applied to murder cases.

46. The appeal is unmeritorious and the same is hereby dismissed.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 11TH DAY OF NOVEMBER 2021.

H.K. CHEMITEI.

JUDGE.