



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 48 OF 2017

ELIZABETH NEKESA MAKOMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. D.O. Onyango, SPM, delivered on 21/3/2013 in the Senior Principal Magistrate's Court at Kimilili in Criminal Case No. 246 of 2017, R v. Elizabeth Nekesa Makoma)

JUDGEMENT

[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]

1. The appellant has appealed against her conviction and sentence of death in respect of the offence of robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya
2. Ms. Koech, counsel for the respondent has supported both the conviction and sentence.
3. In this court the appellant has raised four grounds in his petition of appeal.
4. In ground 1, the appellant has stated the unchallengeable fact the she did not plead guilty.
5. In ground 6 the appellant has faulted the trial court for convicting her in the absence of the evidence of an eye witness. In this regard, the evidence of Moses Wamukoya (Pw 2) was that on 29/1/2016 at 7.30 pm, he was at Kimilili bus stage. Pw 2 testified that the appellant whom she knew before approached him that he carries them on his boda boda as pillion passengers to a funeral at Kuywa and back to Kimilili market. The agreed cost was kshs 200/= Pw 2 did not know the male passenger. He proceeded as agreed.
6. While en route they reached a place called Lutonyi. At that place the man told Pw 2 to stop as he wanted to pick a jacket from his house. Pw 2 drove 50 metres off from the tarmac road to a house as directed by the man. Pw 2 stopped and told them he would not go further. The man then kicked him and Pw 2 fell to the ground. Pw 2 screamed and he managed to grab the appellant, as the man drove away the motor cycle. The motor cycle had a tracking device. Pw 2 told Geoffrey Wanjala of the incident. Police arrived at the scene and found Pw 2 still holding the appellant. The appellant was then escorted to Kimilili police station.
7. Furthermore, through the tracking device, the motor cycle was tracked to Miruri, while being led by the tracker. Upon arrival at the house where the motor cycle was, they broke into the house. They recovered the motor cycle registration No. KMDN 9975. The man who had robbed the motor cycle from Pw 2 was arrested, after Pw 2 identified him.
8. While under cross examination, Pw 2 testified that it was the appellant who brought the man, who was a co-accused in the lower court. Pw 2 denied that he willingly gave the keys of the motor cycle to the appellant's accomplice.
9. The appellant was arrested in the process of robbing Pw 2 of his motor cycle. Pw 2 was the eyewitness to the robbery. In the circumstances, I find no merit in ground 6 which I hereby dismiss.
10. In her submissions the appellant has submitted that she was not supplied with witness statements for trial purposes. I have perused the record of the proceedings. There is no indication that the appellant ever made an application to be supplied with those statements. This point is being raised for the first time in this appeal. I find this to be an afterthought and I hereby dismiss it for lacking in merit.
11. The appellant has also submitted that she was not charged in court within twenty-four hours as required by law. The charge sheet shows that he was arrested on 29/01/2016. She was taken to court on 8/2/2016. It seems she was in custody for one week. In the absence of any explanation, it seems the rights of the appellant were violated, but this is a matter for redress by a civil court and not a court exercising

criminal jurisdiction.

12. The appellant has also submitted that no weapon was used in the course of the robbery. The evidence of Pw 2 is that the appellant's co-accused in the lower court kicked him and he fell on the ground. It is true that no weapon was used but the appellant's co-accused in the trial court used violence. By virtue of the doctrine of common intention in terms of section 21 of the Penal Code (Cap 63) Laws of Kenya, the usage of violence by the co-accused was in furtherance of the common intention on the part of both the appellant and the co-accused in the lower court to rob Pw 2 of his motor cycle. I therefore find no merit in this ground which I hereby dismiss.

13. The unsworn defence of the appellant was that she was a prostitute. She went to Kimilili and met the co-accused in the lower court, and both went to Sirikwa and had sex before parting ways. He paid her shs 300/= As she was heading home some motor cyclists went to her demanding for the whereabouts of the co-accused. She denied knowing his whereabouts. They called policemen who came and arrested her. Thereafter she was charged in court.

14. I have independently re-assessed the entire evidence as a first appeal court. As a result, I find that the defence of the appellant was rightly rejected for being incredible. I find that the appellant was convicted on sound evidence.

15. The appellant's appeal against conviction fails and is hereby dismissed.

16. The appellant was sentenced to death. Her mitigation was that she left children at home, who were suffering. She was a first offender. The motor cycle was recovered. She has been in custody since 29/1/2016, which translates to a period of over four years.

17. The aggravating factors are as follows. She committed robbery by luring the complainant to the scene of crime.

18 After taking into account both the mitigating factors and the aggravating factors, I find that the injuries inflicted were not very serious. I also find that the motor cycle was recovered. In the circumstances, I find that the sentence of death was not warranted. I hereby quash it. In its place I hereby impose a sentence of fifteen years' imprisonment, which will run from the date of this judgement.

Judgement signed and dated at Narok this 19th day of December, 2019

J. M. Bwonwong'a

Judge

And

Judgement signed, dated and delivered in open court at Bungoma this 13th day of February. 2020.

S. N. Riechi

Judge

12/2/2020