



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT LODWAR**

**CRIMINAL APPEAL NO. 4 OF 2018**

**GIDEON NGALA LOMULEN..... 1<sup>ST</sup> APPELLANT**

**SUNDAY JUMA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence in criminal case No.311 of 2016 by the Senior Resident Magistrate – Hon C M Wekesa delivered on 21<sup>st</sup> December, 2017 at Lodwar)*

**JUDGMENT**

1. The appellants were charged with two counts of robbery with violence contrary to section 295 as read with section 296(2) of the penal code; the particulars of which were as follows

**COUNT 1:** that on the night of 13<sup>th</sup> May, 2016 at Lodwar town in Turkana Central Sub-county of Turkana County jointly robbed **PETER ELIM AKUDINYAN** of motor cycle registration number **KMDP 289F** make TVS Star valued at Kshs.92,000/= and immediately before the time of such robbery threatened to use actual violence to the said **PETER ELMKUNDINYAN**

**COUNT 2:**

On the 20<sup>th</sup> day of May, 2016 at around 2300hours at Nabute village in Turkana Central Sub-county of Turkana County jointly robbed **KAKA KORUBE** of motor cycle registration number **KMDV 550C** make Honda Red in colour valued at Kshs.110,000/= and immediately before the time of such robbery threatened to use actual violence to the said **KAKA KORUBE**

2. They both face alternative charges of handling stolen goods contrary to section **322(1) (2)** of the penal code; the particulars of which were that on 22<sup>nd</sup> day of May, 2016 at Kalokol area in Turkana sub-county, Turkana County otherwise than in the course of stealing dishonestly retained a motor cycle Registration number **KMDV 550C** make Honda Red in colour knowing it to be stolen good.

3. The 2<sup>nd</sup> appellant faced an alternative charge of handling stolen goods contrary to section **322 (1) (2)**; the particulars of which were that on 22<sup>nd</sup> day May, 2016 at Napetet village in Turkana Central sub-county otherwise than in the court of stealing dishonestly received and retained motor cycle Registration number **KMDP 289F** make TVS Star having reason to believe it to be stolen goods.

4. They pleaded not guilty to the said charges, were tried and convicted on both the main and alternative charge but sentenced to suffer death on the offence of robbery with violence.

5. Being dissatisfied with the conviction and sentence, the 1<sup>st</sup> appellant through the law firm of **KIMATHI MUTHURI & CO ADVOCATES** filed this appeal and raised the following grounds therein:-

**i. The learned magistrate erred in law and in fact in holding that the appellant used or threatened to use actual violence in order to obtain or retain the thing stolen in the absence of any evidence to support use of or threat to use actual violence.**

**ii. The learned magistrate erred in law and in fact in holding that the appellant stole as charged in the absence of any evidence to support theft.**

**iii. The learned magistrate erred in law and in fact in holding that the appellant was found in possession of motor cycle registration number KMDP 289F in the absence of any evidence to support the same.**

6. The 2<sup>nd</sup> appellant on 12/2/2018 filed criminal appeal No.3 of 2018 in person and raised the grounds for appeal which I summarise as follows:-

a) **He was convicted on flawed fabricated, contradicting and unreliable evidence.**

b) **Vital prosecution witness were not called to testify**

7. On 6/4/2018 both appellants appeared before Riechi J when the hearing date was fixed for 10/4/2018 and on 2/10/2018 they appeared before me when the 1<sup>st</sup> appellant informed the court that he had an advocate in Nairobi on record who had not turned up in court and the matter was adjourned to 8/11/2018 when the 1<sup>st</sup> appellant applied for adjournment on the ground that his advocate was not present while the 2<sup>nd</sup> appellant indicated that he was ready to proceed since he did not know the first appellant. I allowed the application for adjournment and since the main appeals arose from the same proceedings I consolidated the appeals and ordered that proceedings be recorded in Criminal Appeal No.4 of 2018 with the appellants appearing as they were before the Lower Court

8. On 4/12/2018 when the matter came up for hearing both appellants indicated that they were ready to proceed with both filing written submissions and amended grounds of appeal which they relied upon while Mr. Wanga the learned State Prosecutor opposed the appeal.

### **SUBMISSIONS**

9. On behalf of the first appellant it was submitted that his case before the lower court was unlawfully consolidated with his co-accused **ERUPE CHRISTOPHER JOSEPH** (who was acquitted) against his evidence in defence having been charged in both **CR Case No. 308/2011** and **311 of 2011** thereby creating confusion. It was stated further that the prosecution informed the trial court that the appellants had several files including CR. Case **No.305/2016** and **307/2016**, it was therefore submitted that the prosecution case was defective under section **214(i) of CPC** – as every element of the charge sheet was wrong and offended section **182(1)** and **162 of CPC**.

10. It was submitted that PW1 to PW3 gave false testimony against him. He submitted that the conditions prevailing were not suitable for his identification as the corridor where the complainant was attacked at was dark. It was stated that PW1 never gave the name of the 1<sup>st</sup> appellant to police as his testimony was that he only knew the second appellant and one Giddy who was with him and his testimony was full of contradiction.

11. It was finally submitted that vital prosecution witnesses were not called by the prosecution to testify and the court was therefore urged to make adverse inference on their evidence as per the holding in **BUKENYA – VS – UGANDA [1972] EA 549** and section 150 of CPC.

12. On behalf of the 2<sup>nd</sup> appellant it was submitted that there was a possibility of mistaken identity as regards himself as PW1 was a total stranger to himself as they live in two different areas. It was stated that the complainant did not give his name in the initial report despite the fact that he knew him and therefore there was a need to conduct an identification parade.

13. It was submitted that his identification was not safe as PW1 did not give an account for the distance where he was and the nature of lighting at the scene. It was finally submitted that the prosecution case was full of incurable contradictions and that the burden of proof was shifted to him.

14. This being a first appeal, the court is under statutory duty to re-evaluate the evidence tendered before the lower court while giving allowance to the fact that unlike the trial court, it did not have the advantage of seeing and hearing witnesses, see **OKENO –V – R [1972] EA 32**.

### **PROSECUTION CASE**

15. The prosecution case was that on 13/5/2016 at 10.00pm while **PW1 PETER ELIM AKUDINYANG** was aboard motorcycle Registration No. **KMD 289F make TVA Star** while talking to one Nasin the 2<sup>nd</sup> appellant approached him and asked for lift which he gave him. It was his evidence that there were adequate lights from the security lights of Sansscale and Salama hotel. It was his evidence that after twenty meters the 2<sup>nd</sup> appellant stopped him so that the first appellant known as ‘Giddy’ would board which he did. On reaching the Cathedral Catholic Church they told him to pass through “crime” area where the 1<sup>st</sup> appellant jumped out holding a knife while the 2<sup>nd</sup> appellant grabbed his hand. PW1 then jumped from the motor cycle and ran away with the 2<sup>nd</sup> appellant running after him, through the assistance of a Good Samaritan they went back to the scene where he picked his shoe and reported to the police.

16. It was his further evidence that on 22/5/2016 he received a report on the recovery of the said motor cycle and on 23/5/2016 identified the same whereas its registration number had been changed from KMDP 189B to KMDR 189B using cello tape. He confirmed under cross-examination that he initially knew only the 2<sup>nd</sup> appellant but heard him call the 1<sup>st</sup> appellant ‘Giddy’. He stated that the 1<sup>st</sup> appellant had small dreadlocks at that time.

17. **PW2 CORPORAL PETERSON ESINYEN** received the 1<sup>st</sup> appellant and one **Christopher Erupe** who were brought to the station by the Boda Boda chairman from Kalokol having traced a stolen motor cycle Registration No. **KMDV 550C** in their possession. As he was interrogating the said chairman he noticed that the 1<sup>st</sup> appellant was an escapee from Lodwar Police station. **PW3 CORPORAL BENARD MOROKO** confirmed having received the initial report from PW1 and booked the report. On 21/5/2016 he received a further report from one **ZACHALUS KAKO** on the theft of his motor cycle Reg No **KMDV 550V** and on 22/5/2016 the 1<sup>st</sup> appellant with another was brought to the station with the said stolen motor cycle while the 2<sup>nd</sup> appellant was also brought by the chairman of Boda boda Turkana with recovered motor cycle Reg No. KMDP 289F.

**APPELLANTS DEFENCE**

18. When put on their defence the 1<sup>st</sup> appellant gave unsworn statement in his defence that on 22/5/2018 he was at Kalokol when boda boda operator confronted him and the accused who was acquitted and escorted them to the police station where they brought motor cycle Reg. No. KMDV550C before being taken to Lodwar and subsequently arraigned in court where he denied the charges. The 2<sup>nd</sup> appellant stated that on 21/5/2016 at 11.00am while on his way home from Huduma Centre he was arrested by a corp Maroko and on 25<sup>th</sup> charged together with people he did not know.

**ANALYSIS AND DETERMINATION**

19. From the records of proceedings the memorandum of appeal and the submissions herein I have identified the following issues for determination.

- a) Whether the trial court was right in convicting the appellants on both the main and alternative charges.
- b) Whether the appellants were properly identified
- c) Whether the prosecution case was proved beyond reasonable doubt.

20. I will start with the issue of whether the court was right in convicting the appellants on both the main and the alternative charge as this is a legal issue that goes to the foundation of the decision appealed against. In her judgment the trial court had this to say;

**“In conclusion I find that the prosecution has proved its case against both the 1<sup>st</sup> and 3<sup>rd</sup> accused persons herein in the main and the alternative charge. I find them guilty as charged”.**

21. In so holding the trial court fell into error as it is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the court of Appeal at Nyeri in **Criminal Appeal No.272 of 2012 reported in[2013] eKLR** thus:-

**“On the issue of the alternative charge we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In M.B.O – VS – REPUBLIC, CRIMINAL APPEAL NO.342 OF 2008, this court held,**

**“The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge”**

22. The charge is alternative to and not addition to and therefore once the trial court had found that the prosecution had proved the main charge of robbery with violence she had no business in proceeding to convict the appellant on the alternative charge and for that reason I would have allowed the appeal herein but I have noted that in sentencing the appellant the court had this to say:-

I have considered mitigation tendered herein, the accused persons having been found guilty of the offence of robbery with violence the penalty provided for the above offence is death”

23. I would therefore set aside the trial courts conviction of the appellants on the alternative charge and affirm the conviction on the main charge based on the fact that the appellants were properly identified by the complainant. The 2<sup>nd</sup> appellant was known to the complainant PW1 who agreed to give him a lift and it is the second appellant who called the 1<sup>st</sup> appellant who in return attacked the complainant. The complainant was with the appellants for an adequate time and he was in a position to identify them. The 2<sup>nd</sup> appellant was identified by recognition and therefore find that there was no mistaken identity.

24. Whereas those who arrested the appellants were not called to testify against them I am satisfied that the appellants were properly convicted based on the doctrine of recent possession as they were found in possession of recently stolen motor cycles and the complainant PW1 was able to identify his said motor cycle. The 1<sup>st</sup> appellant put himself at the scene of his arrest at Kalokol and the second appellant corroborated the evidence of **PW3 Corp Benard Maroko** on how he was arrested and having been put together at the scene by PW1. They were part of a joint enterprise with common intention. I am satisfied that their conviction was safe and therefore find no merit on the appeal herein which I hereby dismiss and affirm the conviction and sentence by the

25. The appellants have right of appeal.

**Dated, delivered and signed at Lodwar this 15<sup>th</sup> day of January, 2019.**

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**J WAKIAGA**

**JUDGE**

**In the presence of:-**

\_\_\_\_\_ for the Respondent

\_\_\_\_\_ for the Appellant

**Accused** \_\_\_\_\_

\_\_\_\_\_ Court assistant