



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 14 OF 2018

LOKITO EPEYON.....1ST APPELLANT

ZACHARIAH EKIRU 2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case No.304 of 2016 by the Senior Resident Magistrate – Hon C M Wekesa delivered on 3rd May, 2017 at Lodwar)

JUDGMENT

1. The appellants **LOKITO EPEYON** and **ZACHARIAH EKIRU** were charged together with **ISAACK NYONGESA** alias **ISOO** with the offence of robbery with violence contrary to section 295 as read with section 296(1) of the penal code. The particulars of which were that on the 22nd day of March, 2016 at Loturerei area in Turkana Central Sub-county within Turkana County jointly robbed **PETER EKARAN** of his motor bike Reg. No. **KMDS 5963K TVS – Star make valued at Ksh. 130,000** and immediately before/after the time of such robbery used actual violence to the said **PETER EKARAN**.

2. The 3rd accused **ISAACK NYONGESA SUINI** alias “**Isoo**” faced an alternative charge of handling stolen goods contrary to section 322 (1) (2) of the penal code, the particulars of which were that on diverse dates between 20th March, 2016 and 20th April, 2016 at Kitale area in Tranzoia County otherwise that in the course of stealing arranged the retention disposal or removal of motor cycle Reg No. **KMDS 963K Tvs-star make by LOKITO EPEYON and ZACHARIAH EPUR EKIRU for the benefit of LOKITO EPEYON and ZACHARIAH EPUR EKIRU**

3. They pleaded not guilty, were tried convicted and sentenced to suffer death on 3/5/2017. Being dissatisfied with the sic conviction and sentence they each filed an appeal to this court and in their near identical grounds which for the purposes of this judgment I hereby summarize as follows:

a) **The prosecution case was marked by incurable irregularities**

b) **They were convicted on the basis of the evidence of a sole identifying witness which was not safe.**

c) **The fact of the death of the owner of the stolen motor cycle was not established through the use of X-ray, dusting and DNA on the dry books alleged to had been his taking on account the fact that his clothes recovered were very tidy.**

d) The prosecution case was not proved beyond reasonable doubt.

e) On the 2nd appellant it was stated that he was aged 15 years at the time of alleged commission of the offence and 17 years at the time of judgment and therefore his rights to be treated as a minor were violated.

f) Vital prosecution witnesses were not called.

4. When the appellants came up for hearing before me I considered them for purposes of trial with recording being done on criminal Appeal NO.14 of 2018.

SUBMISSIONS

5. The appellants who were unrepresented filed written submissions which they relied upon while Mr. Mongare for the Respondent opposed the appeals and made extensive oral submissions thereon. On behalf of the 1st appellant it was submitted in the written submission that he framed up due to a disagreement over a girl by PW1 an NPR officer and his defence thereon into that he was arrested for the offence of drunk and disorderly as confirmed by PW9 was not taken into account by the trial court

6. It was submitted that PW2 did not give to the court proper description of the assailants of the deceased so as to link the appellants to the same and that his evidence was based on hearsay. It was contended that there was material contradiction in the evidence of prosecution witness as regards the date of the occurrence of the incidence and the date of arrest. It was final stated that he was convicted based on mistaken identity since he had never been to Kitale for which this case of **NJONONI V R (2005) eKLR** (sic) was submitted.

7. On behalf of the 2nd appellant it was submitted that contrary to the evidence of PW1 and PW4 he did not make any confession to the police and that there was material contradiction in the prosecution case as regards how he was arrested and how the victims motor cycle was recovered. It was stated that police officer who recorded the alleged confessionary statement was not called to testify and to produce the same.

8. It was submitted that he was a minor at the time of the alleged commission of the offence; therefore his constitutional right were violated. It was contended that there was no recovery made in his possession and vital prosecution witnesses one Isaac Simiyu who was found with the stolen motor cycle were never called to testify.

9. This being a first appeal, this court is under legal duty to reevaluate the evidence tendered before the lower court and come to its own conclusion though giving allowance that unlike the trial court did not have the advantage of seeing and hearing witnesses see **OKENO – V – R [1972] EA 32, 36**

“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 Mruwala – V – R[1957] EA 570) it is not the function of a first appellate court to merely to scrutinize the evidence to see if there was some evidence to support the lower courts 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”

10. **PW1 JOSEPHAT EKAI EDUNG** brother of the deceased who was operating a boda boda at Lodwar town testified that on 22nd March, 2016 the same went missing and on 24/3/2016 one **CYNTHIA LOKICHAR** informed him that she had seen him carrying two people who had requested to be taken to Loturem and was to come back at 5.00pm. This information was further confirmed by one Ali Ahmed

who had seen them with the deceased being placed in the middle of the motor cycle. On 17th April 2017 the bones of the deceased and his clothes were recovered. The 1st appellant was later seen by Cynthia who informed the police and stated that when the 2nd appellant was arrested he confessed having killed the deceased and proceeded with the bike to Kitale from where the same was recovered.

11. This evidence was corroborated by **PW2 CYNTHIA LOKICHAR** who stated that the appellant went to her house and asked for the owner of the new motor cycle she knew both of the appellants. She called the deceased through one Omar who came with Ahmed whom they paid Kshs.1000/=. The 1st appellant then gave her Ksh.500 and asked for a cigarette for Ksh.200 which he was given. The three then left together at 10.55am with the deceased in the "middle" of the motor cycle. When they left her they said they were heading towards "Gold" towards Kitale. On 16th May, 2016 she saw the first appellant with a friend in police uniform and heard him say that his brother had killed someone and he was being suspected for it. She called the police who arrested him. She confirmed that this 1st appellant was her brother in-law.

12. **PW3 EPEM EWOI LOCHADA** stated that on 23rd March, 2016 the two appellants went to his home in Kitale and stated that he knew the 1st appellant as Epeyo son of Lokito and that they had a motor cycle with them. The following morning on their way to town he heard the 1st appellant say that he intended to sell the motor cycle to enable him go back to school. He then took them to ISAACK the 3rd accused. He later heard that the motor cycle had been stolen.

13. **PW4 FILEX IBUYA** the owner of the motor cycle gave it to the deceased on 20/3/2016 on an agreement that he would be giving him money after two days which he did not, so on 22/3/2016 he went looking for him. He was able to identify the motor cycle when it was recovered. **PW5 OMAR ALILA** corroborated the evidence of PW2 while **PW6 ROBERT LOKWAWI** confirmed the recovery of the remains of the deceased. **PW7 PC PATRICK NYAOKE** arrested the 3rd accused and confirmed having known the 1st appellant over another offence and with the assistance of the 2nd appellant who had been arrested over another offence and made a confession before chief inspector ROP arrested PW3 who linked the appellants to the offence and eventually recovered the subject motor cycle.

14. **PW8** Chief Inspector **SAFARI KATANA** confirmed having received a confession from the 2nd appellant who was approached by the 1st appellant to escort him to Kitale to collect his academic certificates and they approached the deceased to take them to Kitale when they got to Kangalita the 1st appellant strangled the deceased until he became unconscious and then dragged his body into a dry river bed. They then went to Locher Amoit and repaired the punctured tyre before proceeding to Kitale where they sold the motor cycle.

15. **PW9 PC GIBSON KURIA** the investigating officer confirmed receiving report on the missing motor cycle and that of the missing victim and on 15/5/2016 during an operation on illicit brews within Soweto area the 1st appellant was arrested and was identified by PW5 as the person last seen with the deceased.

16. when put on their defence the 1st appellant stated that on 9/5/2016 while at Home land Club PW1 wanted to take the girl he was with but the girl declined causing him to slap her, they left for another club and PW5 went there and took the drink the lady had leading into a fight. PW5 was thereafter beaten by the people and he promised to teach him a lesson. He was thereafter arrested and charged with the offence of robbery. He stated that he did not know the 2nd appellant.

17. 2nd appellant stated that he was 18 years old and a pupil at Nadis primary school. He further testified that he was at home on 30/6/2016 when PW1 asked him to do some work for him on 2/7/2016 he was taken to the OCS and wrote a statement that the 1st appellant had taken a motor cycle and was required as a witness.

18. From the proceedings, and submissions herein I have identified the following issues for determination

in this appeal.

- a) Whether the appellants were positively identified
- b) Whether the prosecution case against the appellant was proved to the required standard.
- c) Whether the appellant's conviction was safe

19. In convicting the appellants here the trial court had this to say.

“In the case of Oluoch v Republic [1985] KLR 549, the ingredients of Robbery with Violence under section 296 (1) of the penal code were set out as follows;

- a) Stealing anything and
- b) at or immediately before or immediately after the time of stealing,
- c) using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent to overcome resistance to its being stolen or retained.

I find that the same has not cast doubt on the prosecution's case. This is because the 1st accused narrated the events of 9/5/2016 yet the offence was committed on 22/3/2016. The 2nd accused testified on the events of 30/6/2016 which relate to his arrest.

Although the 1st accused has tried to demonstrate that PW1 had a grudge against him. The evidence on record is cogent and unshaken; it has placed both accused persons at the several scenes of the incidences.

In conclusion, I find that the prosecution has proved its case against both accused persons by demonstrating the ingredients of the charge. I therefore find them to be guilty as charged”.

20. Having reevaluated the evidence tendered before the trial court I find and hold that the appellants were positively identified and put together with the deceased who had the motor cycle the subject matter herein having been given the same by PW4 through the evidence of PW2 who knew both of them very well and her evidence was corroborated in material particular by PW5 Omar Alila who also knew both of the appellant. PW3 placed both appellants at Kitale together with the subject motor cycle and indeed assisted them in getting a buyer for their same. He knew the 1st appellant very well and therefore find that there was no mistaken identity of the appellants.

21. the 2nd appellant upon his arrest made a voluntarily confession which was admitted by court in which he confessed to taking part in the commission of the offence herein and therefore find that he was part of a joint enterprise with the 1st appellant. All the ingredients of the offence of robbery with violence were proved beyond reasonable doubt as analysed by the trial court herein above.

22. Whereas the appellants have not been charged with the offence of murder, this is a case where this doctrine of last seen is applicable as stated by this court in the case of R – V – **ELIZABETH ANYANGO OJWANG CRIMINAL NO. 11 of 2014[2018] eKLR** where the court stated as follows:-

“24 in this case the only circumstantial evidence linking the accused to the commission of the crime is the doctrine of last seen this doctrine has been discussed in the Supreme Court of India case of ANJAN KUMAR SARMA V STATE OF ASSAM CRIMINAL APPEAL NO. 560 of 2014 submitted by the defence in which the following principles were set out:-

“18 the circumstances of last seen cannot by itself FORMthe basis of holding the accused

guilty of the offence. There must be something more establishing connectively between the accused and the crime

“ 21 it is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilty of the accused, the circumstances of last seen together and absence of explanation could provide an additional link which complete the chain.”

23. In this case the appellants were last seen together with the deceased on the said motor cycle which had been linked with them at Kitale where they sold it. The remains of the deceased was thereafter found together with his clothes which aided in his identification, put together with the confession of the 2nd appellant, I am satisfied that the appellants conviction was very safe and would therefore dismiss their submission that no DNA test was done on the bones to confirm that they belonged to the deceased.

24. The appellants were two at the time of the alleged commission of the offence and as per the confession of the 2nd appellant physical force was used upon the deceased from whom they took away the motor cycle which they sold in Kitale as per the sales agreement produced before the trial court. In their defence though not required to do so they were very silent on what happened between the time they were last seen with the deceased and the motor cycle to the time when they appeared in Kitale and therefore the trial court was justified in dismissing their defence.

25. Whereas the appellants have raised the issue of contradiction on the evidence tendered, those contradictions if any were of very minor nature which did not go to the root of the prosecution case against them. The 2nd appellant has raised her issue of his age but I note that at the time of his trial, he confirmed being 18 years of age and therefore find no fault with this trial court in treating him as an adult which he was.

26. Whereas the trial court had discretion in the sentence herein having taken into account how the victim was killed, I am satisfied that death sentence issued against the appellants was justified noting that as per the evidence of the investigating officer they were not first offenders having been arrested in respect of other offences and removing them from society was justified.

27. I therefore find no merit on the appeal herein on both convict and sentence which I hereby dismiss and affirm the trial courts holding both on conviction and sentence. The appellants have right of appeal.

Dated and delivered at Lodwar this 3rd day of April, 2019

J WAKIAGA

JUDGE

In the presence of:-

Mongare state counsel - Respondent

Lokito Opeyon -1st appellant

Zachariah Ekiru - 2nd appellant

Richard - Court assistant