



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 47 OF 2018

PHILIP KIPKORIR SAMOEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Chief Magistrate Honourable C. Obulutsa

in Eldoret Chief Magistrate's court Criminal Case No. 1127 of 2016 dated 6th July, 2018)

JUDGMENT

In the lower court, the appellant herein was charged in the first count with the offence of Robbery with violence, contrary to *Section 295* as read with *Section 296 (2)* of the *Penal Code*.

The particulars of this offence are that on the 13th day of February, 2016 at Ziwa location within Eldoret West Sub County, the appellant jointly with others not before court, while armed with dangerous weapons namely pangas, metal bar, timbers and knives robbed *James Misoi* one tractor registration number KAK 201T make Massey Ferguson valued at Kshs. 1,000,000 (One million) and at the time of such robbery, wounded the said *James Misoi*. The appellant faced four other counts of causing grievous harm, contrary to *Section 234* of the *Penal Code*, of which particulars are that on the said date and time, jointly with others not before court, intentionally did grievous harm to *Emily Keino, Christine Masai, Caroline Chepkurui* and *Telvin Kibet*.

The prosecution case is that the appellant in this case had been employed by *Mr. and Mrs. James Misoi* at their home in Ziwa location, to look after the cows. By the time of the offence he was 9 days in the employment. On 13th February, 2016, PW-2 who was aged 12 years then was in the said home. He was living there as a son to PW-3, who is a daughter of *Mr. and Mrs. James Misoi*. At about 7.00 p.m he went to the toilet outside the house. On his way back, the appellant held him and attacked him on the head with a panga. He ran and told his mother (PW-3) about it. The mother was in the kitchen and she left. She bumped into the appellant. The appellant had a panga and hit her twice on the head. She fell unconscious. PW-6 (*Emily Chepkebon*) had taken food to the accused. On not finding him she went and kept it in the main house. On her way out she was hit on the head and passed out. When she gained consciousness briefly she heard her husband had been killed. She fell again unconscious.

PW -7 *Christine Chepkemboi*, was employed as a house help in the said home. At the time she was cooking. She heard commotion outside and went to check what it was about. She saw the appellant hitting someone on the head. She asked him what he was doing and the appellant attacked her with a

jembe on the head. She fell down unconscious.

PW-2, PW-3 and PW-7 saw and recognized the appellant on the material night using electric light which were in the main house, along the corridor and at the house under construction.

PW-4 who is a neighbour was told of the incident. He tried to call the deceased but there was no response. He went to the scene. He found PW-2 and PW-3 bleeding on the head. He organized for their treatment. He called the tractor driver (PW-5), who said he was at Naiberi. He was told the tractor was missing and should get to the scene. He got to the main road and met PW-4. PW-4 and others present said the tractor was seen leaving. They pursued it. They got information that it was driven towards Matunda. They pursued it there. They saw it being driven. The driver jumped out of it and escaped. PW-5 jumped into the driver's seat and controlled it to a stop. PW-4 did not pursue the tractor to Matunda but got back to the scene. In the main house he saw PW-7 who had an injury on the head. PW-6 was also there on the ground, with a head injury. She said her husband had been killed. PW-4 saw the body on the ground. More neighbours were called at the scene and the police. PW-9 was a scene of Crime officer. He went to the scene and photographed the deceased's body and the recovered tractor. A jembe and a piece of wood were also recovered. They were suspected to have been used as weapons in the incident.

The suspect was traced by his father in Uganda. The father arrested him and took him to Chepkoilel AP's camp. He was picked from there and taken to Eldoret police station.

Those injured were issued with P-3 forms of which were filled at Moi Teaching and Referral Hospital by PW-1. He assessed the degree of injury to each one of them as grievous harm. He thus filled the P-3 forms.

The deceased's body was taken to Moi Teaching and Referral Hospital mortuary. The post mortem was conducted on 23 February, 2016. The pathologist who conducted it was of the opinion that he died out of head injury due to blunt trauma.

The appellant herein was then charged with the offences.

In his sworn defence, the appellant stated that he was employed by the deceased as a cow herder. On 13th February 2016 the deceased called him in the house to discuss about work. He went and while there the door was knocked at. The deceased asked who it was. The door was forced open. A person entered and hit the deceased on the head. The deceased held him as he called for help. Other people appeared and he ran outside as people screamed. He went to the main road and was chased after. He escaped to Kitale and then Kapkoi where he went home. The following day he went to Uganda where the father works. He told the father about the incident and father said he'll take him to report to the police. They went to Chepkoilel to report and the police at Ziwa were alerted. He was then detained. The next day he was taken to Eldoret police station and charged.

The trial court evaluated the evidence and found the appellant guilty of all the four counts. On the first count he was sentenced to death and on each of the others to 10 years imprisonment. Save for the death sentence, the rest were held in abeyance.

The appellant dissatisfied with the said conviction and sentences appealed to this court on the grounds that:-

1. The first report did not disclose him as a suspect.
2. He was not properly recognized as the intensity of the claimed available light, its position and that of the appellant were not stated by the witnesses.
3. The death sentence is unconstitutional.

4. It was wrong to find him guilty on the ground that he had escaped to Uganda and never reported the incident, while it is clear he was confused and frightened at the time.

I have considered the charges preferred against the appellant, evidence adduced on the prosecution side, the defence by the appellant, judgment of the lower court, mitigation, sentences passed, grounds of appeal and submissions by both sides.

As was submitted by the state prosecutor, there is no dispute that the appellant was at the scene on the material night. PW-2, PW-3, PW-6 and PW-7 who are all victims to the said offence knew the appellant before then as they had lived with him for a period of 9 days. Save for PW-6 the rest saw the appellant and recognized him as he attacked PW-2 and 3 with a panga and PW-7 with a jembe. PW-7 even spoke to him. They used electric lights which were in the main house, along the corridor and in the house under construction. Though the witnesses as claimed by the appellant did not clearly state in their evidence the position of the said light points in relation to where the attacks happened, and the distances, this evidence of recognition needs to be weighed together with the rest of available evidence.

The appellant was at the scene during the attack. He is the only one in the house who was not attacked. Neighbours who went to assist did not get him at the scene or in areas nearby. He was later traced in Uganda by his father who arrested him and handed him to the police. His defence that the deceased was attacked in the house by a stranger while he was deliberating about work with him is not convincing. The evidence lacks details on how it is only the deceased who was attacked, and how he emerged to escape without an injury. It is not convincing on why he escaped after calling for help, and why those who went to help chased after him. Also the reason as to why he left his home country Kenya, for Uganda, knowing very well serious offences had been committed at his work place. All these circumstances considered together leave no doubt that he was involved in the commission of the crimes and made an escape to Uganda to avoid arrest. However, his own father being a just person, arrested him and handed him to the police in Kenya. The direct and circumstantial evidence available, points irresistibly to his guilt. The trial court therefore was right in finding him guilty on all the counts.

On the death sentence as submitted by the state prosecutor, it is not per se unconstitutional. It is a mandatory death sentence which is unconstitutional and not the death sentence. In commission of the offence the appellant took advantage of his relationship with the victims as he was their employee and was living with them. He abused the trust bestowed upon him by the employer when he turned against the entire family for personal illegal gain. In the offence a life was lost while four other family members were seriously wounded. The death sentence passed by the lower court in count 1 was deserved given the circumstances. There is no cause to interfere with it. I therefore find the appeal unmerited and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 16th Day of May, 2019

In the presence of:-

The appellant

Ms Mokuu for state

Ms Sarah - Court Assistant