



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 7 OF 2018**

**JACKSON ZAKAYO LIYAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal case No.784 of 2016 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi-Senior Resident Magistrate)*

**JUDGMENT**

1. **Jackson Zakayo Liyai**, the appellant herein, was convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.
2. The particulars were that on the 23<sup>rd</sup> December 2015 at Busia Township Location, within Busia County, jointly with others before court while armed with a metal bar robbed Augustine Barasa of his motor cycle registration number KMDT 507G, Kshs. 3000/= and one mobile phone all valued at Kshs. 93,000/= and at the time of such robbery wounded the said Augustine Barasa.
3. The appellant was convicted and was sentenced to serve fifteen years' imprisonment. He now appeals against both conviction and sentence.
4. He raised the following grounds of appeal:
  - a) The learned trial magistrate erred in law and in fact by convicting him on fatally defective charge.
  - b) The learned trial magistrate erred in law and in fact by admitting fake exhibits.
  - c) The learned trial magistrate erred in law and in fact by relying on improper identification.
  - d) The learned trial magistrate erred in law and in fact by relying on contradictory evidence.
  - e) The learned trial magistrate erred in law and in fact by relying on hearsay and circumstantial evidence.
5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that the evidence connected the appellant to the offence and that the sentence imposed was illegal.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. There are two main issues for my consideration as follows:
  - a) Whether the learned trial magistrate had sufficient evidence at her disposal to convict the appellant; and
  - b) Whether the sentence meted out was illegal.
8. Other than the two main issues that I have framed hereinabove, the appellant raised other issues which I will first address. One of the grounds of appeal was that the charge was defective. I have noted that the particulars of the offence state that the appellant **"jointly with others before court"**. This is erroneous for it clear at the time of the trial, he was alone. The charges against the other accused persons were

withdrawn and he was left alone. The particulars ought to have been amended to reflect the change effected by the withdrawal of the case against the other accused persons. However, the appellant was not in any way prejudiced by the failure to amend the particulars.

9. Though the appellant claimed that the agreement that was produced was fake, there was sufficient evidence that linked him not only to the sale agreement but also to the stolen motor cycle KMDT 507G. This was the evidence of Francis Kagendo (PW1). The transaction between the two was on 23<sup>rd</sup> December 2015. Before the two entered into an agreement, they communicated severally by phone on the same day. The first communication was at 6 a.m.

10. Augustine Barasa (PW4) testified that on 23<sup>rd</sup> December 2015 he was robbed of his motor cycle KMDT 507G but did not identify his assailant. He was hit with an iron bar and lost consciousness.

11. Sergeant Wesley Emongor (PW9) investigated this case. After the arrest of the appellant, he found him with a phone number 0716 103 746. This phone number corresponded with the number in the data he had obtained from Safaricom. The data that was obtained was in respect of the telephone number 0706 584 484 of Francis Muiruri (PW1). He established that the appellant called Francis at 6.32 a.m., 7.25 a.m. and at 8.45 a.m. on 23<sup>rd</sup> December 2015.

12. The learned trial magistrate invoked the doctrine of recent possession to find that the appellant must have been the robber. The Court of Appeal in the case of **Christopher Rabut Opaka vs. Republic Kisumu Criminal Appeal No. 82 of 2004 (unreported)** while addressing the doctrine of recent possession cited the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 82 of 2004** which laid the principles of the doctrine as follows:

**... It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses.**

In the instant case, the appellant was found with the motor cycle robbed of the complainant a few hours from the time of the robbery. The burden was on him to show how he came into his possession. In **Malinga v R [1989] KLR 225 Bosire, J** (as he then was) expressed himself thus at page 227:

**By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of the fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.**

In spite of the damning evidence against him, the appellant tendered evidence that amounted to denial of the possession of the motor cycle in issue. He therefore did not discharge his burden.

13. There was no contradictory evidence on record and neither did the court rely on hearsay evidence.

14. The offence of robbery with violence is established when the prosecution proves beyond any reasonable doubts any of the following ingredients:

- a) If the offender is armed with any dangerous or offensive weapon or instrument, or
- b) If he is in company with one or more other person or persons, or
- c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

This was stated by the Court of Appeal in the case of **Johana Ndungu vs. Republic [1996] eKLR**. In the instant case there was ample evidence that the complainant in the robbery case was attacked with an iron bar before he was robbed. He arrived at the hospital while still unconscious.

15. When a magistrate finds an accused guilty of the offence of robbery contrary to section 296 (2) of the Penal Code he/she has an obligation to pass the prescribed sentence. The Court of Appeal in the case of **Johana Ndungu vs. Republic** (supra) stated:

**If proved facts show that robbery under section 296(2) has been committed then the trial magistrate is obliged to convict the accused under this section and impose the sentence of death. Use of terms such as the one used in this case by the magistrate is not going to change facts so as to justify a conviction under section 296(1) when the proved facts show that the charge under section 296(2) has been proved. The same message also goes to the judges of the 1st appellate court who, because their**

**judgments are binding authorities for the sub-ordinate courts to follow, have a duty to give correct guidance in strict accordance to law.**

The sentence of fifteen years imposed herein was therefore illegal. Unless or until parliament amends section 296 (2) to provide for an alternative sentence, courts are called upon to be faithful in interpretation of the same.

16. From the foregoing analysis of the evidence on record, I find that the conviction of the appellant was based on the evidence on record. The appeal against conviction is dismissed. Since the sentence imposed was an illegal one, I set aside the sentence of fifteen years imprisonment and substitute it with a sentence of death.

**DELIVERED and SIGNED at BUSIA this 13th day of June, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**