



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CRIMINAL APPEAL NO. 16 OF 2018**

**BORU HALKANO DIDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in criminal*

*case No.414 of 2018 of the Principal Magistrate's Court at Marsabit Hon B.M. Ombewa)*

**JUDGMENT**

The appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(1) of the Penal Code. The particulars of the offence are that the appellant together with his co-accused, on the 5<sup>th</sup> day of July, 2018 at Manyatta Chorora in Marsabit town within Marsabit County jointly with others not before court while armed with panga's robbed Bonaya Luchia Guyo of a motor cycle registration No. KMEL 106U make Boxer red in colour valued at Kshs.112,000/= and immediately after the time of such robbery used violence on the said Bonaya Luchia Guyo while using a panga thereby occasioning him actual bodily harm.

The trial Court acquitted the appellant's co-accused. The appellant was unlucky. He was convicted and sentenced to suffer death. The ground's of appeal are THAT:-

- 1. The appellant pleaded not guilty.***
- 2. That the sentence meted by the honourable court was excessive and inhuman.***
- 3. That the learned magistrate erred in matters of law when he failed to take into account that there was no identification pared which was conducted to that effect. Your hounour even the trial court avers this in his judgement that no pared was conducted.***
- 4. That the learned trial magistrate erred in law and facts when he failed to note that investigation officers never conducted the investigation to the required standard in law.***
- 5. That despite being first offender before any court and lay man the trial magistrate did not consider the appellant mitigation and also reject the his defense without giving enough reasons.***
- 6. The lower court exercises its judicial power by overlooking the facts in issue and passing judgement on other facts.***
- 7. The learned trial magistrate doctored the appellant's defence when he recorded that the appellant agreed the defence of 1<sup>st</sup> accused.***
- 8. That the learned trial magistrate erred in both law and facts when he acquitted the 1<sup>st</sup> accused who was found being in possession of the said motorbike alleged to have been robbed.***
- 9. That the complainant was attacked in darkness at around 7.30pm after they met with the assailant, this obviously could not make the victim to identify the assailant very well, so that the voice could be the first and final approval if it was the accused who robbed the complainant or not.***
- 10. That the recent decision made by the Supreme Court vide petition No.15 of 2017 that the sentence to be served as death has***

*been declared unconstitutional.*

The appellant relied on his grounds of appeal. He further submitted that he denied committing the offence in his defence. He can't understand why his co-accused was acquitted. He was arrested in town. He is an orphan.

Mr. Ochieng, learned prosecution Counsel, opposed the appeal, Counsel submit that the prosecution proved its case beyond reasonable doubt. All ingredients of robbery with violence were proved. The appellant was properly identified. The victim carried the appellant on a motor bike for more than 20 minutes and it was not dark. Ownership documents of the motor cycle were produced. The stolen motor cycle was traced in Ethiopia. The victim was injured in the process of the robbery. The weapon used to injure the complainant was recovered and produced in court. The appellant's co-accused had bought the stolen motor cycle from the appellant. The appellant's defence is a sham. The trial court took into account the fact that the no identification parade was conducted. The sentence passed by the trial Court is lawful.

This is a first appeal. This court has to re-evaluate the evidence afresh and arrive at its own conclusion. Before the trial Court five witnesses testified for the prosecution. **PW1 BONAYA LUCHIA GUYO** was the complainant. He operates boda boda business using his motor cycle registration number KMEL 106U. On 5.7.2018 he was at stage 44 at about 7.30pm waiting for customers. The appellant asked to be taken to Manyatta Chorora. On their way the appellant stopped him asking to check on a friend. They resumed their journey as the appellant told him that his friend had already left. When they reached the destination, the appellant pretended that he was removing some money only to produce a panga and cut him on the left ear. PW1 became unconscious.

It is PW1's evidence that upon regaining consciousness he found that his motor cycle was missing. He called his father who took him to hospital. He was able to clearly see the appellant as it was not very dark at the time they left for manyatta Chorora. The motor cycle was later recovered. He had not known the appellant before the incident.

**PW2 FATUMA DABASO** resides at Harobata within manyatta Chorora. On 5.7.2018 at about 10.00pm she was with her husband heading home on a motor cycle. They found a panga on their way and picked it. The following day she went to a gate and found many people including PW1's father (PW3). She was told PW1 had been robbed of his motor cycle the previous night. She told them that they had picked a panga on the road the previous night. The panga was taken by PW1's father (PW3).

**PW3 HIRBO DAIKO HIRBO** is PW1's father. On 5.7.2018 at about 7.45pm was at home when he received a call from PW1 informing him that he had been robbed of his motor cycle. PW3 went to the scene and took PW1 to the Police station. He then took PW1 to Marsabit general hospital where he was admitted. The following day he went to the scene to make inquiries. He met PW2 who told him that she had picked a panga on the road the previous night. The appellant's co-accused was arrested in Ethiopia with the motor cycle. The co-accused told them that he had bought he motor cycle from the appellant.

**PW4 PC GUYO GALGALO** was attached to the Marsabit Police station. He investigated the case. On 5.7.2018 PW1 was taken to the station having been injure. PW1 was rushed to hospital where he was arrested for two days. PW1 narrated what had happened to him. PW4 sent a signal to the Police along the border to detain motor cycle number KMEL 106u, RED Boxer should it be spotted. He later got information that the motor cycle had been seen in Ethiopia. On 27.7.2018 he wrote a letter to chief Dokale Chicho of Ethiopia. The chief then handed over the appellant's co-accused to PW1's family to negotiate. The co-accused was escorted to the Police station. The chief from Ethiopia also handed over the motor cycle to the chief in Sololo and it was brought to Marsabit Police Station.

It is PW4's evidence that upon interrogating the appellant's co-accused, he told him that two young men had sold the motor cycle to him. He was given their names as well as their description. He managed to arrest the appellant in Marsabit town. PW1 gave him the ownership documents for the motor cycle. It is PW4's further evidence that when the co-accused saw the appellant, he started crying saying the appellant had destroyed his life.

**PW5 DIBA DIKA GALO** is a clinical officer at Marsabit County referral hospital. On 26.7.2018 he examined PW1 and filled his P3 form. PW1 had a history of assault. His clothes were soaked in blood. PW1 had blurred vision on the left eye. PW1 also had a cut on the face. PW5 classified the injury as harm.

The appellant gave unsworn evidence. He come from Uran. He is a boda boda operator. He was arrested at his place of work. He was framed. He met the investigation officer three days before he was arrested who told him that someone had claimed that he had sold a motor cycle to him. He denied stealing the motor cycle. He blamed his co-accused for framing him. He had his own motor cycle. He did not know his co-accused. There was no written agreement showing that he had sold the motor cycle.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt against the appellant. The evidence of pW1 does prove that he was the owner of motor cycle registration number KMEL 106U. Bajaja red boxer. A log book was produced and the motor cycle was registered on 4<sup>th</sup> May, 2018. The registered owner is Auto Industries Limited, Nairobi PW1 produced a receipt dated 8.6.2018 to prove that he bought the motor cycle. The prosecution evidence does prove that the motor cycle was being operated by PW1 on boda boda business in Marsabit town. According to PW1, the motor cycle was forcefully taken away from him on 5<sup>th</sup> July, 2018. The prosecution's case is that it is the appellant who robbed the complainant of his motor cycle.

On his part the appellant maintains that he was not found in possession of the motor cycle. He was arrested at his place of work. He was told by the investigation officer that someone had mentioned his name and three days later he was arrested.

The evidence of PW2 and PW3 corroborates that of pW1 to the effect that pW1 was robbed of his motor cycle. PW2 recovered a panga from the scene. Its PW1's evidence that the robber produced a panga instead of money and PW1 was hit on the ear. PW3 is pW1's father. PW1 called him on phone and immediately PW3 went to the scene.

The most crucial issue is:

(i) Whether the complainant positively identified the appellant

(ii) Whether the evidence of the appellant's co-accused is sufficient enough to sustain the conviction.

During cross examination by the appellant, PW1 testified this he identified the appellant. It is pW1's evidence that it is the appellant who hired him at about 7.30pm. The trial Court in its judgement held as follows:-

***The complainant also testified that it was the 2<sup>nd</sup> accused person who attacked him. The 2<sup>nd</sup> accused denied committing the offence. He testified that the 1<sup>st</sup> accused is framing him up. I reject that evidence. I do not believe that both the complainant and 1<sup>st</sup> accused are framing up the 2<sup>nd</sup> accused. There is no evidence to suggest that they had grudge that would have caused them to fame up the 2<sup>nd</sup> accused.***

***Although no identification parade was conducted, I am satisfied that it was the 2<sup>nd</sup> accused who committed the offence of robbery with violence against the complainant. The evidence of the complainant and 1<sup>st</sup> accused is sufficient to warrant his conviction. The 2<sup>nd</sup> accused chose not to cross examine the 1<sup>st</sup> accused when he gave incriminating evidence against him.***

The trial Court observed that no identification parade was conducted. However, the court was convinced that it is the appellant who robbed the complainant of his motor cycle. It is clear to me that the complainant only identified the appellant at the dock. No identification parade was conducted for both PW1 as well as the appellant's co-accused. In the case of **Kiarie V Republic [1984] KLR, 739**, the Court of Appeal held inter alia:-

**“The identification of an accused person in Court by a complainant is almost worthless without an earlier identification”.**

It is true that PW1 carried the passenger who ultimately robbed him. It is equally true that the passenger stopped him on the way and went to look for someone and then continued with their journey. The incident occurred past 7.30pm. The appellant was arrested and taken to the Police station. What was so urgent such that the police could not have conducted an identification parade for PW1 to enable him identify the appellant PW1's insistence in court that it is the appellant who robbed him cannot amount to identification. PW1 did not know the appellant before. Pw1 did not give the description of his robber, to the police. It is both normal and usual for a complainant who is testifying to point at the person on the dock as the one who committed the offence. At that time it is normally the accused seated alone in the dock. The complainant simply presume that the police must have done a good job and arrested the correct perpetrator of the offence.

It is incumbent upon the prosecution to lay a basis on identification evidence. The identifying witness must tell the court how he identified the accused. What was the source of light that enabled him to identify the accused if the identification was at night? Did he give some form of description of the appearance or physical characteristics of the suspect to the Police or to those he came into contact soon after the crime was committed. Did the witness help in the arrest of the accused since the witness identified the suspect at the scene. Did the witness know the suspect before the date of the offence? All those issues among others are to be taken into account before a conclusion is made that the witness conclusively identified the suspect.

Given the fact that PW1 did not give some form of description of those who robbed him to the Police and in view of the fact that the complainant was only called to testify after the suspect had been arrested. I do find that the dock identification of the appellant by PW1 is inconsequential. The offence occurred on 5<sup>th</sup> July, 2018. The appellant was arrested over two weeks later on 24.7.2018. The police had all the time to conduct an identification parade so as to enable PW1 identify the appellant.

The next issue relates to the evidence of the appellant's co-accused. The trial court acquitted the co-accused and held that it was convinced that it is the appellant who sold the stolen motor cycle to the co-accused. The sequence of events show that the motor cycle was stolen on 5<sup>th</sup> July 2018. The appellant was arrested on 29.7.2018. The appellant's co-accused was arrested on 24<sup>th</sup> July 2018 and was charged in court in criminal case number 414 of 2018. The appellant was arrested on 29.7.2018 and charged separately in criminal case number 428 of 2018. The two cases were consolidated on 3.8.2018.

The appellant's co-accused was arrested at Magadho area in Ethiopia while in possession of the stolen motor cycle. According to the investigation officer the motor cycle was found in Ethiopia being operated without a number plate by the co-accused. PW4 interviewed the co-accused who gave good description of two young men who took the motor cycle to him. PW4 further testified as follows:-

***“I managed to arrest accused 2 (appellant) whom accused 1 identified as the one of the 02 young men who took the motor cycle to him ...” I arrested accused 2 in Marsabit town he is an Ethiopian citizen”***

It is clear from the evidence of the investigation officer that no identification parade was done. How did the co-accused identify the appellant. The record of criminal case file number 414 of 2018 indicate that the co-accused was arraigned in court on 26.7.2018. This was before the appellant had been arrested on 29.7.2019. The co-accused was granted a security bond of Kenya shillings one million and one surety of similar amount. The record of 26.7.2018 as has the following order.

#### **Order**

***“The accused to be escorted to Marsabit County referral hospital for age assessment since he claims to be seventeen years. On inquiry, meanwhile, he shall be remanded at Marsabit Police station.”***

There is no evidence that the co-accused was present when the appellant was arrested. How did PW4 fit the description given to him by the

co-accused to be that of the appellant. What guided PW4 to arrest the appellant. Did the co-accused give the appellant's name. Even PW4 thought that the appellant was an Ethiopian. The co-accused did not produce any sale agreement. He testified that he bought the motor cycle from the appellant for Ksh.90,000. No date is given when he bought the motor cycle. No name of a witness is given by the co-accused.

The appellant's co-accused further testified as follows:-

*.....we came to Marsabit with the 02 people where I was locked up. I requested for time to call 2<sup>nd</sup> accused but I was not given time. The second day, 2<sup>nd</sup> accused came to the cell. I identified him and he was arrested. While in the cell, 2<sup>nd</sup> accused told me he would finish the matter..” The area chief and people from my area are aware that I bought the motor cycle from 2<sup>nd</sup> accused.”*

During cross examination the co-accused testified that there was no written agreement when he bought the motor cycle. The record shows that the appellant was arrested after the co-accused had taken plea on 26/07/2018. The appellant was arrested on 29.7.2018 and charged in court on 30.7.2018. It is clear to me that after being taken to the cells after having been taken to hospital for age assessment, that is when the co-accused identified the appellant. The alleged identification must have been on 29.7.2019. The co-accused alleged that he was seventeen years. The age assessment done on 30.7.2019 indicate that he was above 18 years. His evidence is that his employee was using the motor cycle before he was arrested. It is clear to me that the co-accused is not a honest person and was out to exonerate himself. If he asked the Police to give him time to call the appellant, he could have even produced the appellant's mobile phone number to prove that he had been in touch with him. PW4 did not testify that he got the appellant's phone number from the co-accused. According to PW4, when the co-accused saw the appellant he started crying saying he had destroyed his life. Why didn't PW4 organize an identification parade for the appellant to enable the co-accused identify the appellant? How did PW4 simply conclude that the co-accused indeed knew the appellant. The co-accused did not testify as to how long he had known the appellant.

In the case of **CHOGE V REPUBLIC 1985[KLR] I**, the Court of Appeal held as follows on the confession of a co-accused:-

*A confession by one accused person which involves the guilt of another accused person is of itself, if unsupported by other testimony, evidence of the weakest possible kind against that other accused person. It is accomplice evidence which needs independent corroboration and this need is the greater when its maker has sought to retract it. An extra judicial confession by one accused person cannot be corroborated by a similar confession of that person's co-accused.*

In the case of **Waringa –V- Republic [1984] KLR, 617**, the Court of Appeal dealt with the evidence of an accomplice. In that case the appellant claimed that the person he was alleged to have sold the stolen property to must have been treated as an accomplice and not a witness. The court held inter:

- 1. When considering the evidence of an accomplice, the first duty of the court is to decide whether the accomplice is a credible witness.*
- 2. The corroboration which should be looked for when considering the evidence of an accomplice in some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.*
- 3. The corroboration must be independent evidence which affects the accused by connecting him or tending to connect him with the crime.*

It is important that the evidence of the co-accused or accomplice be corroborated by the other independent witness. There is the evidence of the complainant. PW1's evidence confirms that he was indeed robbed of his motor cycle. I have already found that lack of an identification parade renders the identification of the appellant by PW1 to be nothing but dock identification. Other than confirming that the motor cycle that was robbed from PW1 was found with the co-accused, the prosecution evidence is doubtful as to whether it is the appellant who robbed the complainant violently and later sold the motor cycle to the co-accused. The evidence of the co-accused is not credible. The alledged crying of the co-accused in the cells when he saw the appellant cannot be held as truthful evidence. The police failed to conduct identification parade to enable both PW1 and the co-accused identify the appellant. Was the motor cycle sold to the co-accused with a number plate. The co-accused had no Kenyan number plates on the motor cycle. The number plates were found later. How could the co-accused buy a motor cycle without the log book. Was he a credible witness. He was not 17 years old as he alleged. He had no phone contacts of the appellant.

The prosecution is supposed to prove its case beyond reasonable doubt. I do find that the identification of the appellant by the co-accused is very unreliable as it is dock identification. The co-accused did not lead to the arrest of the appellant. In the absence of other credible evidence, I am not satisfied that the co-accused gave an exact and accurate description of the appellant to PW4 which description enabled PW4 to arrest the appellant. Its not known for how long the co-accused had known the appellant.

I do find that the appeal is merited and is hereby allowed. The prosecution did not prove its case beyond reasonable doubt. The appellant shall be set at liberty unless otherwise lawfully held.

**Dated, Signed and Delivered this 17<sup>th</sup> day of July 2019**

**S. CHITEMBWE**

**JUDGE**