



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 127 OF 2017

COSMAS KYALO MUSEMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Kwale

CM CR. Case No.968 of 2014 (Hon. Mulekyo CM)

delivered on 22/5/2017)

J U D G M E N T

1. **Cosmus Kyalo Musembi (“the Appellant”)** was charged with the offence of robbery with violence contrary to **section 296 of the Penal Code**. It was alleged that on 15/8/2014 at 4.40 pm at Magoni Village in Kwale County within Coast Region, jointly with another not before court, while armed with a dangerous weapon namely a knife, the appellant robbed David Muindi Maweu Motorcycle reg. number KMDG 781A (“The subject motorcycle”) make Boxer red in color valued at Kshs.106,500/= and immediately before or immediately after the time of the said robbery he injured the said David Muindi Maweu.

2. The appellant denied the charge but after trial, he was found guilty of the offence and was convicted and sentenced to suffer death. He has now appealed to this court against the conviction and sentence.

3. This being a first appellate court, the court is enjoined to re-appraise the evidence afresh and come to its own independent findings and conclusions. In so doing, the court must remember that it did not have the advantage of seeing the witnesses. (**See Okeno v. Republic [1972] EA**).

4. The prosecution case was that, on the material day at about 6pm, the complainant (**PW2**) was riding motorcycle reg. no. KMDG 781 A when he met the appellant who requested him to take him to Mivumoni. The appellant paid him Kshs.300/- and **PW2** took him to Mivumoni. On the way back, the appellant asked him to stop and he alighted. Suddenly, the appellant stabbed him on the left side of the abdomen. He lost consciousness and later found himself at Jocham Hospital, Mombasa.

5. He was admitted in hospital for one and a half weeks. On being discharged, he went to Msambweni Police Station where he was issued with a P3 form. He had known the appellant since childhood. In cross-examination, he admitted that he did not give a description of the appellant but had stated that he knew his attacker.

6 **PW1 Gideon Mutheka Makelu** recalled how on the 16th August, 2014, he heard that **PW2** had been robbed of his motorcycle. He joined others in looking for the motorcycle. The search took them to **PW3 Dudu Juma Dudu** who had been spotted with the subject motorcycle. **PW3** directed them to a particular witch doctor in Tanzania. On their way back, they met with the appellant who had been arrested by members of the public.

7. **PW3** recalled how on the 15th August, 2014 the appellant came to his home at about 7pm with a motorcycle. The appellant asked him to refer him to a witchdoctor which he did. They both travelled to Tanzania where the appellant met the witch-doctor. When they returned, the appellant left the motorcycle with him and requested him to take it for welding. He had it repaired and returned it to the appellant. Later on, people came asking for the appellant and **PW3** took them to Tanzania where they found he had been arrested.

8. **PW4 Justus Muthoka Kimau**, the chairman of Community Policing, Kasemene sub-location, recalled how he was notified of the theft on 16th August, 2014. He accompanied other people to the home of **PW3** who had been spotted with the subject motorcycle. **PW3** informed them that the appellant may have crossed over to Tanzania to see a witchdoctor. **PW4** called a Mr. Nyamawi, the security chairman in Maili Nane Tanzania and informed him of the incident. He gave the names of the appellant and the particulars of the motorcycle. Thereafter, he

together with others, went to Tanzania and found that the said Nyamawi had arrested the appellant and they recovered the motorcycle.

9. **PW5 Naomi Musyoka** testified that she was the owner of the subject motorcycle.

10. The case was investigated by **PC John Mbinda (PW6)** who told the court that a report was made by members of public that **PW2** had been robbed of the subject motorcycle by one Cosmas Kyalo. That when **PW2** came to the station on 13th October, 2014 and made his statement, he mentioned the appellant as the assailant. In cross-examination, he admitted that the initial report did not indicate that it was the appellant who had attacked the complainant. That the Complainant did not give him the full details of the attacker.

11. **PW7 CPL. Emmanuel Kondo** developed the photographs for the subject motorcycle which he produced. **PW8 Samuel Githui Kimani**, a clinical officer at Msambweni District Hospital examined the complainant on 13th October, 2014. The complainant told him that he had been stabbed in the abdomen by a person not known to him.

12. In his defence, the appellant told the court that he was a cattle trader. That on 17th August, 2014 at 6 am, he went to Tanzania to collect some cattle he had bought. He was arrested at Mbanga area in Tanzania for not having proper documentation. At Maili Nane, he met a group of people some who came from Lung Lunga. There was a motorcycle which was loaded into the vehicle he was in. On 21st August, 2014, he and some other person were brought to Kenya. The other person was released on 23rd August, 2014 and he was charged with the offence he was facing.

13. The appellant raised eight grounds of appeal which can be collapsed to only three; ***that the trial court erred in failing to consider that the complainant did not give adequate description of the suspect to the police; that there was no evidence that had been adduced to connect the appellant with the offence and; that the appellant's defence was not considered.***

14. Both the appellant and the state filed their respective submissions which this court has considered.

15. On the first ground, the complaint was that there was no identification parade that was held to identify the appellant. The state submitted that since the complainant knew the appellant, there was no need for an identification parade.

16. I agree with the state that where the victim knows and recognizes his assailant in circumstances that are clear, there would arise no need for an identification parade. However, in the present case, the complaint is that the complainant did not accuse the appellant as the assailant in the original report.

17. The record shows that after the complainant was stabbed in the abdomen, he fell unconscious. His evidence was that there were no people around when the incident occurred. He regained his consciousness at Jocham Hospital. It is not clear who found him at the scene and took him to hospital. It was not shown that before he lost consciousness, the complainant spoke to anyone or told anyone that it was the appellant who had assaulted him.

18. **PW1** testified that he learnt from one **Francis Muthui** that the complainant had been attacked and robbed of his motorcycle the previous day. The said **Francis Muthui** was never called to testify. It is not clear from the record, who first mentioned the appellant as the one who attacked the complainant.

19. As late as 13th October, 2014, two months after the incident, the complainant did not know who had attacked him. He told the Clinical Officer who examined him and filled the PS form that he had been attacked by an unknown person. Further, when he made his statement to the police on 13th October, 2014, he did not give the name of the attacker. He admitted this fact in cross-examination. Although he stated in the statement that he knew who his attacker was, he never revealed his name. Yet on the same day, he told **PW8**, the clinical officer, that he had been attacked by an unknown person.

20. **PW6** who investigated the case did not disclose who gave the name of the appellant. He stated that it was members of the public who came to rescue the complainant from the scene who had named the accused. None of those members of the public was called to testify. To my mind, there was doubt as to who the attacker was as the identification by the complainant was but in the dock.

21. In *Tekelav v Republic* [1952] EACA the Court of Appeal for Easter Africa held: -

“Evidence of first report by; the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safe guard later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there been no time for consultation with others ...”

22. In the present case, before testifying in court, the complainant had not mentioned to anyone that the appellant was his attacker. He never named him in his statement. He even told the officer who examined him in October, 2014, two months after the incident, that he had been attacked by an unknown person.

23. As regards the arrest of the appellant, he was arrested in Tanzania allegedly by the Tanzanian Police officers as a result of a report made there by members of the public. This court notes that **PW4** had testified that he had called a Mr. Nyamawi in Tanzania and reported the incident to him. He stated that it was the said Nyamawi who arrested the appellant and handed him over to the Tanzanian Police.

24. To the foregoing allegations, the appellant stated that he had been arrested in Tanzania for failure to have proper documentation. That on the way, he met some people some of whom he recognized to be coming from Lunga Lunga Kenya. That the subject motorcycle was the

loaded into the vehicle he was in.

25. It is not clear the circumstances under which the appellant was arrested in Tanzania. The reason he gave was that he did not have proper documentation. The prosecution did not dispute and or rebut that fact. If the appellant was officially arrested as a result of a report made to the Tanzanian authorities, it would be expected that when the appellant was being handed over to the Kenyan authorities, there should have been some official communication or evidence. That was not produced.

26. The trial court does not seem to have considered the defence of the appellant. The court trivialized the same by stating that it did not displace the strong evidence of the prosecution.

27. To my mind, the defence casted doubt on the case by the prosecution. It was not clear how and for what reason the appellant was arrested in Tanzania. To my mind, that doubt should have been resolved in favour of the appellant. The prosecution case cannot be said to have been proved to the required standard.

28. In the premises, I am satisfied that the appeal has merit and the same is hereby allowed. The appellant is to be set forth at liberty unless otherwise lawfully held.

DATED and DELIVERED at Mombasa this 6th day of September, 2019.

A. MABEYA

JUDGE