REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 98 OF 2013

NICHOLAS KARANI KOMBO……..…….APPELLANT

-VERSUS-

REPUBLIC…….…….....……....…….....RESPONDENT

(An appeal from the conviction and sentence of the Senior Resident Magistrate's Court (B. M. Ochoi) at Wanguru, Criminal Case No. 22 of 2012 delivered on 8th August, 2016)

JUDGMENT

1. The appellant **Nicholas Karani Kombo** was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** before the Senior Resident Magistrate's Court at Wang'uru in Criminal Case No. 22 of 2012.

2. Appellant pleaded not guilty. He was tried and convicted and sentenced to suffer death as provided under the law. The Appellant was dissatisfied with both he conviction and sentence and filed this appeal which raises the following amended grounds filed in Court on 15th May, 2017.

(i) The trial magistrate erred in law and facts by not considering that the case was not proved beyond reasonable doubt is required in criminal proceedings.

(ii) The trial magistrate erred in law and facts by not considering that there existed a grade between 1, P.W.2 and P.W.3 and the whole case was to settle scores.

(iii) The trial magistrate erred in law and facts by not according me a fair hearing that I am a mbeere and the language used is English/Kiswahili; English/Kikuyu. The language used was not consistent and the court did not facilitate to help get the defense witnesses and did not accord me time to prepare for my defence.

(iv) The trial magistrate erred in law and facts by not considering there was contradictions and inconsistencies in the whole case.

(v) The trial magistrate erred in law and facts by not considering no evidence was produced to collaborate the evidence of P.W. 2 that the ignition key to the lost motorcycle was recovered from me (no witness was produced to back his claim)

(vi) The trial magistrate erred in law and facts by failing to note that there were two bodies that existed during the trial, one that was recovered from the river and one allegedly exhumed.

(vii) The trial magistrate erred in law and facts by not considering that the motorcycle reported to have gotten lost with the deceased indicated was not the one recovered and produced in Court.

(viii) The trial magistrate erred in law and facts by not considering that the evidence that I was present when the body was being exhumed was contradicting and was not backed with any documentary evidence i.e. temporary removal from Ciakago Police Station since I was in custody.

(ix) The trial magistrate erred in law and facts by not considering my defence.

The Appellant prays that the appeal be allowed.

3. The State opposed the appeal and filed written submissions. Their prayer is that the appeal be dismissed.

4. This is a first appeal and this Court has a duty to analyse the evidence, reconsider, evaluate it and make its own independent finding in deciding whether the decision of the lower court should be upheld. **Okeno -V- R (1972) E.A 32** refers. The Court of Appeal has reiterated this in the case of **David Njuguna Wairimu -V- R (2010) eKLR** where it was stated:

"The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the Court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

5. I embark on this duty of analyzing the evidence. The prosecution case is that on 20th November, 2011 at Kamunyange Village in Embu County the Appellant jointly with others not before Court robbed one Antony Waweru of his motor bike registration number KMCQ 313Y make Shivery valued at Ksh.78,000/= and immediately after the said robbery killed the said Anthony Waweru. In support of the charge the prosecution called eight witnesses. The Appellant was found guilty, convicted and sentenced to death. His co-accused was acquitted.

6. The evidence adduced by **Daniel Njagi Munene** (P.W.1) is that on 20th November, 2012 he was with Anthony Waweru Gatua, the deceased in his barber shop when he was called by a broker to go for charcoal. The deceased used to operate a barber shop but used to sell charcoal to supplement his income. The person who called him also told him to buy some items for him like cooking oil and vegetable. The deceased left Kimbimbi. He did not return and could not be reached on phone. On 22nd November, 2011 the matter was reported to the Police. The Appellant was the Charcoal broker who had called the deceased. Later on 2nd January, 2012 the appellant was found with the key of the motor bike which belonged to the deceased. The Appellant had on the same day been training to ride a motor bike make Shivery and he had burnt some clothes within his compound. P.W. 1 identified a piece of the Jacket which deceased was wearing on the date he went missing. It had been burnt. The motor cycle was eventually recovered. The Appellant was arrested and he revealed where the body of deceased was. The body was exhumed from where it was buried.

7. The evidence by P.W. 1 shows that the deceased had the motor bike before he went missing. He also identified the motor bike in Court.

8. P.W. 2 **Joseph Nthiga Munyi**, assistant chief Karira sub location testified that the report of a missing person was made to him on 23rd November, 2011. On 8th December, 2011 he arrested the Appellant for another offence. The Appellant removed a key for a Shivery motor bike which P.W. 2 recovered. Later the key was identified as the one for the motor bike of the deceased. The key was identified by P.W. 1 as

that of the deceased's motor bike. Later P.W. 2 recovered the motor bike where it was hidden in a shamba of one Peter Ndie, who alleged he was keeping it for the Appellant. Some plastic mudguards were recovered buried the shamba while the Appellant showed P.W. 2 where the number plates were hidden in a miraa plantation. The appellant also led the Police to the place where he had buried the body. The body was exhumed. The body was buried with the clothes on but the coat was missing.

9. P.W. 2 has adduced evidence which shows that the Appellant had items which were stolen from the deceased, led Police to recover others and finally the appellant showed where he had buried the deceased.

10. P.W. 3 **Peter Ndie Muriuki** testified that on 20th November, 2011 the Appellant went to his home with a motor cycle which had a puncture on rear tyre. He said he could not use the motor bike. The appellant alleged that he had bought the motor bike at Matuu for Ksh. 20,000/=. Thereafter the appellant went for it and he (P.W. 3) asked him for cycling lesson. They realized it had defects. The P.W. 3 and appellant said he would look for a mechanic to repair the motor bike. The appellant removed the number plates and mudguards and metal bars. Later on 3rd January, 2012 Joshua Murimi a brother of appellant went for the motor bike alleging that the appellant had told him to go and hide as it was a stolen motor bike and the key had been recovered. P.W. 3 gave the motor bike to Murimi who went and hid it in the shamba. He also took the metal bars and plastic mudguards and hid them.

11. On 4th January, 2012 the sub chief the area chief went at 8.00 p.m. and told him (P.W. 3) that he had information he was keeping a stolen motor bike for the appellant. P.W. 3 led P.W. 2 where the motor bike was hidden. On 5th January, 2012 Police went with appellant and the number places were recovered from where he had hidden them. The appellant led Police to where he had buried the deceased and the body was exhumed.

12. The evidence by this witness which was not shaken shows that the appellant took the motor bike to him on the same day the deceased went missing and this leads to the reasonable conclusion that the appellant stole the motorcycle on the same date the deceased went missing. The doctrine of recent possession applies. The appellant claimed to have bought the motor cycle when he left it with the P.W. 3.

13. P.W. 4 **Benjamin Mureithi Njeri** confirmed that he had seen the deceased riding the motor bike in the month of November, 2011 before he went missing. Later between 20th and 30th November, 2011 he saw the appellant riding the same motor bike with other people and they looked like they were learning how to ride. P.W. 4 identified the motor bike, exhibit 6 when he gave evidence in Court.

14. P.W. 5 **Nancy Wanjiru Waweru** is the wife of deceased. She testified on how the deceased went missing after he received a call from Nicholas Karani the appellant to go for charcoal. The deceased went on his motor bike KMCQ 313Y green in colour make Shivery. He did not return and when she called him later that night his mobile phone was switched off. Later on 2nd January, 2012 the ignition key was recovered and subsequently the motor bike and body of deceased recovered as testified by other witnesses. She testified that the body of deceased had the same clothes he was wearing on the day he went missing and the body had an injury on the head.

15. P.W. 6 **Inspector Gilbert Fondo Biria** is the investigating officer. He gave evidence on how the motor cycle key was recovered from appellant and the motor bike and other parts were recovered. The appellant led him to recover the motor cycle number plates and the body of the deceased. The appellant was then charged.

16. P.W. 7 **Jackson Kiprop** is the scenes of crime officer from Embu. On 5th January, 2012 he took photographs. He took photographs of the scene where the body was buried in a shallow grave and of the body after it was exhumed.

17. P.W. 8 is **Doctor Geoffrey Njuki Njiru** who performed the post mortem on the body of the deceased. The body had fractures on the upper hand sternum and on 3 and 4 ribs. There was a depressive fracture of the skull bone. Cause of death was cardio pulmonary arrest which would have been caused by head injury

or pulmonary insufficiency due to fractures noted on the anterior aspect of the chest. The injuries were caused by a blunt object. He produced the postmortem form as exhibit 8.

18. I have considered this evidence which was tendered before the trial Court. The appellant was convicted based on the fact that there was evidence he had called the deceased on the day he disappeared to go and collect charcoal. The appellant took the motor cycle of the deceased to P.W. 3 who kept it for him the same day the deceased went missing. The ignition key of the motor bike was recovered from appellant. This shows that the appellant is the one who caused the disappearance of the deceased and stole his motor cycle. The appellant led the Police to recover the number plates of the motor cycle as well as the body of the deceased. There was overwhelming evidence which connected the appellant to the commission of the offence. The postmortem report showed that the deceased had injuries caused by a blunt object. It shows that force, that is, striking the deceased with a blunt object and causing his death, was used. The trial magistrate properly addressed his mind to the facts and the law in convicting the appellant.

19. Be thus as it may, the appellant faulted the Court for convicting him. The first issue raised is inconsistent and contradictory evidence. His allegation is that there were contradictions and inconsistencies in the whole case. First the appellant states that the motor cycle reported to have gotten lost with the deceased was the one recovered and produced in Court. This he says is the first report which indicated the motorcycle which was stolen was KMCQ 381Y but the deceased's wife P.W. 5 indicated the motor cycle was KMCQ 313y. I am of the view that there is no contradiction on the identity of the motor cycle. P.W. 1 and P.W. 5 gave the registration. It is the same motor cycle which was recovered and produced in Court as exhibit. The registration given in the first report may have been an error. It is noted that the appellant has not disputed that the motor cycle does not belong to the deceased nor does he claim ownership of the motor cycle which was recovered. The registration indicate on the first report is not a material contradiction. It is a contradiction which this Court will safely ignore as there is overwhelming and undisputed evidence that the motor cycle of deceased which was stolen was KMCQ 313 and is the one testified by witnesses and particulars given on the charge sheet. The Court of Appeal in a binding decision in the case of **Erick Odeng -V- R (2014) eKLR** when dealing with the issue of contradictions stated that, not every contradiction warrants rejection of evidence. This should be the case as the contradiction is not material. From the defence of the appellant, he was present when the report of disappearance of deceased was made at Kiritiri Police Station. This report had indicated that the deceased went missing on 18th November, 2011 and gave the motor cycle registration as KMCQ 381Y. My view that the appellant who it has been shown had robbed the deceased the motor cycle and killed him could have been responsible for giving this false date of disappearance and the wrong registration of the motor cycle. The Occurrence Book report was not produced in Court. The Occurrence Book report on the charge sheet is no. 38/5/12012. The appellant cannot benefit from the report when he was a party to the report and made it to try and cover up. In any case, an Occurrence Book report is made in the course of investigations. The investigations are completed then evidence is presented in Court. The evidence is most crucial in the case than a report because the evidence is given on oath and is tested in cross-examination. Such evidence which is interrogated on oath is best evidence which a Court will rely on other than a mere report. The evidence tendered is cogent on the date the deceased disappeared and the registration and make of the motorcycle. This ground is without merits. The Court of Appeal in **Daniel Mbugua -V- R (2014) eKLR** it was stated:

> ***"From the record we find that the evidence of P.W. 1 and 2 was consistent and corroborative. Any discrepancies or inconsistencies in the evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record."***

This is the case here, the date of disappearance and registration of motor bike is corroborative, consistent, credible and cogent by all the witnesses.

20. The appellant submits that he was not accorded a fair trial as provided under **Article 50 (c)** and **(m)** of the Constitution. The appellant claims that he is a mbeere and the language used was English/Kiswahili which was not consistent. The record shows that the appellant answered the charge when the language of the Court was English/Kikuyu. He did address the Court on several occasions and he gave a defence in

Kiswahili. In every sitting there was a Court interpreter. He was able to cross examine all the prosecution witnesses. This he could not do if he did not follow the language. He never complained that he could not follow the proceedings. This allegation is clearly an afterthought. The manner in which he was free to address the Court he could not have failed to bring it to the attention of the Court that he could not follow the language. His defence responded to the evidence by the prosecution witnesses. This shows that he followed the proceedings and his right to fair trial was not violated.

21. The second limb on this ground is that Court did not facilitate him or help him to get his witnesses and that the Court did not accord him time to prepare for his defence. He submits that he informed the Court that he wanted to call witnesses but he was unable to communicate with them because he was in custody. He submits that upon being ordered by the Court to notify the witnesses the prosecution did not file an affidavit to confirm that he informed the witnesses. From the record, it is the Appellant who informed the Court that the witness who he intended to call is no longer available and therefore he would proceed in his absence. This is captured on the proceedings of 27th March, 2013 at page 75 of the typed proceedings (page 76 of the record.) He stated: "I wish to inform Court that my witness who I intended to call is no longer available. I will therefore precede (sic) in his absence."

Article 50 (2) (c) and **(m)** of the Constitution provides:

> ***"Every accused person has the right:***
>
> ***(c) to have adequate time and faculties to prepare his defence.***
>
> ***(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."***

My view is that the Appellant was accorded these rights and the allegations that they were violated is a sham. This ground cannot hold.

22. The Appellant submits that there was lack of corroboration of the evidence of the witnesses. He submits that there was no corroboration to the evidence of P.W.2 that the ignition key to the motor bike was recovered from him. That Edward Mbogo ad the duty officer Kiritiri Police Station were not called to testify. The evidence of P.W.2 on how he recovered the key was cogent. It should be noted that when P.W. 2 recovered the key, the Appellant had been arrested for a totally different offence. The trial magistrate found P.W. 2 to be a credible witness. At page 9 of the judgment (page 91) of the record, this is what the trial magistrate had to say about P.W. 2 from line -5-:-

> ***"The accused in his defence confirmed that indeed he was arrested on the night of 1st January, 2002 and that on 2nd January 2012 the prosecution witness -2- and other people went to question him about the keys in the cells at Kiritiri Police Station. Though the 1st accused denied that he was found with ignition keys I believe the testimony of P.W. 2 who looked genuine in his evidence in chief and was consistent even on cross-examination, his evidence was believable and I find the ignition key was recovered from the 1st accused."***

What we have here is an observation of the demeanor of the witness – P.W. 2 which was done by the trial magistrate. The appeal Court cannot fault that observation on demeanor as the trial magistrate had the benefit to observe the demeanor unlike this Court. In my view after considering the evidence of P.W. 2 I have no reason to fault the observation by the trial magistrate. In the case of **Okeno -V- R supra** it was stated that the appeal Court has to leave room for the fact that the trial magistrate had an opportunity unlike the appeal Court, of seeing the witnesses when they testified and observe their demeanor. The fact that the trial magistrate found P.W. 2 to be credible, the fact of recovery of the key from the Appellant, was proved to the required standards even without corroboration. **Section 143 of the Evidence Act** provides:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary,***

be required to the proof of any fact."

There is evidence which is given by other witnesses which proves that it is P.W. 2 who recovered the ignition key of the motor bike. The failure to call the two witnesses named by the Appellant is not fatal. The evidence of P.W. 2 was intact even after cross-examination and adequately proved the fact of recovery of the ignition keys of the stolen motor cycle from the Appellant. In any case there is adequate evidence to connect the Appellant to the charge even in the absence of the evidence of the two he says were not called. It should also be noted that Edward Mbogo is a relative of the Appellant. All what the prosecution was required to do was to prove the fact of the recovery of keys from the Appellant, the number of witnesses proving that fact does not matter. One witness – P.W. 2 impressed the Court and proved the fact beyond any reasonable doubts. The ground must fail.

23. The Appellant submits that his defence was not considered. This is because he had claimed that there was a grudge between him and P.W. 2 and P.W. 3 and who wanted to take his father's land. No evidence was adduced by the Appellant to establish that a grudge existed between him and the two witnesses. The Appellant did not give particulars of his father's land. The trial magistrate found there was concrete evidence implicating the Appellant in the commission of the offence. P.W. 2 and 3 were the key witnesses. P.W. 3 was the Appellant's brother-in-law. What would a brother in-law have to do with Appellant's father's land. Similarly P.W. 2 was not Appellant's relative. The allegation is a mere afterthought and a sham. The chronology of the evidence leading to recovery of number plates of the motor cycle KMCQ 313y make Shivery, the exhumation of the body of the deceased through pointing of the spot by Appellant was proof that the Appellant committed the offence. The defence of the Appellant was considered by the trial magistrate at page 12 of the judgment at page 94 o the record. The magistrate found that the Appellant did not give the particulars of the properties and how the two witnesses would get those properties after the accused was charged. This defence was in my view a sham. P.W. 2 denied when he was cross-examined and stated he has no interests in his (Appellant) father's shamba. This allegation was not put to P.W. 3 when he testified. The ground is without merits.

24. The Appellant faults the evidence by the prosecution contending that he was not present when the body was exhumed. There is sufficient evidence to prove that it is the Appellant who led Police to where he had buried the body of the deceased. The evidence by P.W. 8 was conclusive that the body was exhumed. There is sufficient evidence to prove that the Appellant led Police to the spot where the body was exhumed leaving no shred of doubt. The body was exhumed and identified by witnesses. Apart from the body, the Appellant had showed the Police where he had buried the number plates of the motor cycle. Clothes of the deceased were burnt in his compound and a piece was recovered. All these is material evidence to prove that the Appellant was involved in the robbery. It is far fetched for Appellant to say there were two bodies. The evidence that a body was recovered in a river was hearsay which is inadmissible. The evidence was well corroborated and proves beyond any shred of doubt that the Appellant is the one who committed the offence.

25. The trial magistrate found that there was evidence to prove that the Appellant had the motor bike so soon after the deceased went missing from which he drew an inference that the appellant had the motor bike after robbing the deceased. This is the doctrine of recent possession. The Court of Appeal while dealing with the doctrine has laid down the facts which need to be proved. In the case of **Erick Otieno Arum -V- Republic (2006) EKLR C.A**. it was stated:

> ***"In our view 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 identified as 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.***

26. In this case the evidence of P.W. 3 proved that the Appellant had the motor bike of the deceased on the night of 20th and 21st November, 2011, the day the deceased went missing. This motor bike was positively identified by P.W. 1 and P.W. 5. The deceased had the motor bike on 20th November, 2011

before he went missing and later his body traced with help of Appellant. At the time the Appellant took the motor cycle to P.W. 3 he was in recent possession of it.

27. Recent possession is a basis for conviction. The Court of Appeal in the case of **David Mutune Nzongo -V- R (2014) eKLR** stated:

> ***"It is important to note that even though the High Court made a finding that the evidence on identification with regard to the Appellant and co-accused was not sufficient, the evidence of recent possession alone is sufficient for the conviction of the appellant. In the case of Douglas Sila Mutuku & 2 others -V- Republic (2014) eKLR the Court of Appeal held that:***
>
> ***"Although none of the witnesses identified the 3rd appellant, the fact that shortly after the robbery, he was found in possession of some of the items stole from the victims there is a rebuttable presumption of fact under Section 119 of the Evidence Act, that he was either the robber or a guilty receiver unless he offers a reasonable explanation as to his possession of those items."***

28. The Appellant was in recent possession of the stolen motor bike. There is evidence that he had called the deceased to go for the charcoal and after that the deceased could not be found. There is a strong presumption that the Appellant robbed the deceased and this presumption is corroborate by material evidence analysed above. **Section 119 of the Evidence Act** provides that:

> ***"The Court may presume the existence of any fact which it thinks likely to have happened regard being had to common course of natural events human conduct and public private business in their relation to the facts of a particular case."***

The prosecution discharged its burden of proof in this case. **Section 296 (2)** of the **Penal Code** states:

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

In the case of **Daniel Njoroge Mbugua V Republic [2014] eKLR** the Court of Appeal stated:

> ***"The ingredients of the offence of robbery with violence were further elaborated by the Court of Appeal in the case of Oluoch vs Republic (1985) KLR where it was held that robbery with violence is committed in any of the following circumstances:***
>
> ***(a) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***(b) The offender is in company with one or more person or persons; or***
>
> ***(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person……" emphasis supplied.***
>
> ***The use of the word "or" implies that if any of the three conditions is fulfilled then the offence would be said to have been committed."***

In this case there was no direct evidence linking the Appellant to the offence. However, there is strong circumstantial evidence which proves that the Appellant is the one who robbed the deceased of his motor cycle and killed him in the process then secretly buried him. Such evidence must only lead to one conclusion, that is, the guilt of the accused person. The Court of Appeal in the case of **Mwangi & Another -V- R (2014) 2 KLR 32** it was held:

> ***"In a case depending on circumstantial evidence, each link in the chain must be closely and***

separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."

The entire evidence adduced by the prosecution, from Appellant calling deceased to go for charcoal, to Appellant possessing the deceased motor bike the same night of robbery, to recovery of the key of the motor cycle, to arrest of Appellant, to recovery of parts of the motor cycle and the number plates and finally to the Appellant leading the Police to where he had buried the body of deceased, the body being exhumed and identified and that cause of death was a brutal attack with a blunt object, leads to only one reasonable hypothesis, which is that the accused is guilty of the charge. The prosecution discharged the burden of proof of the charge against the Appellant beyond any reasonable doubts. The appeal is without merits and so I dismiss it. I uphold the conviction and the sentence of the appellant.

Dated and delivered at Kerugoya this 8th day of February, 2018.

L. W. GITARI

JUDGE

Judgment read out in open Court, Mr. Sitati for the State, Appellant present, court assistant Naomi Murage this 8th day of February, 2018.

L. W. GITARI

JUDGE

8.02.2018