



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA**

CRIMINAL APPEAL NO. 169 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

VINCENT GRANNY LUWUCHO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. B. Koech, dated 14th September 2017 at the Chief Magistrates Court at Kwale in Criminal Case No. 618 of 2015)

JUDGMENT

1. The appellant, **VINCENT GRANNY LUWOCHO** together with two other accused, **JAMES GATHUTHIRI NDERITU** (“Nderitu”) and **JOHNSON MUKUNYA NDIANGUI** (“Ndiangui”), were charged with the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 27th May 2015 at Kaya Forest Galu, Kinondo or Kinondo Location of Kwale County within Coast region, jointly with others not before the court while armed with rungun robbed **MARTIN THOITHI MURIITHI** of motor vehicle registration number KBL 285 N make Nissan Wingroad valued at Kshs. 500,000/-, mobile phone make TECHNO M7 valued at Kshs. 13,000/-, TECHNO T340 valued at Kshs. 1,500, cash amounting to Kshs. 5,000/- and other personal belongings all valued at Kshs. 519,500/- and immediately before or immediately after the time of such robbery killed the said **MARTIN THOITHI MURIITHI** (“the deceased”).
2. The appellant was convicted on the principal count of robbery with violence and sentenced to death while his co-accused were acquitted thus precipitating the appeal. The appellant filed written submissions in which he contended that he was not contesting the conviction but was contesting the death penalty imposed on him. He was of the view that he ought to have been convicted of the lesser offence of handling stolen goods contrary to **section 322(1)** of the *Penal Code* and sentenced accordingly.
3. The respondent supported the conviction and sentence on the ground that the prosecution had proved all the elements of the offence of robbery with violence and that the trial court properly applied the doctrine of recent possession upon which the appellant was convicted.
4. In order to determine whether the conviction was warranted, this court being the first appellate court had the duty to re-evaluate the evidence adduced so as to reach its own independent conclusion as to whether or not to uphold the appellant’s conviction bearing in mind that it neither heard nor saw the witnesses testify (see *Njoroge v Republic [1987] KLR 19*).
5. As I have pointed out, the case against the appellant was based on circumstantial evidence. Henry Katema Machira (PW 1), Samuel Konge Waweru (PW 2) and Kasoa Mwanza (PW 5) testified that they knew the deceased as the owner of a taxi registration number KBL 285N. They also recalled that he went missing at the end of May, 2015. The deceased’s son, John Waweru Thoithi (PW 3) told the court that he last communicated with his father on 26th May 2015 and when he was informed by his uncle that his father had disappeared, he tried to call him without success. He travelled to Ukunda and reported the disappearance of the deceased on 1st June 2015.
6. PW 4 testified that on 11th June 2015, he was called by officers from Diani Police Station and informed that a body had been found in a forest at Kinondo. He proceeded there and identified the body as that of the deceased. In addition, he was able to identify the shirt, trouser and safari boots as those belonging to his father. He also attended the post mortem where he identified the deceased’s body. He later identified the motor vehicle KBL 285N as that belonging to his father.
7. In the meantime, one Paul Maina Gitonga (PW 4) testified that on 18th June 2015, he was invited by his friend, JGN, to drive him to Nyeri Provincial General Hospital from Baricho in motor vehicle KBL 285N which he told him had been given to him by friends. He drove Nderitu to Nyeri and after conducting the day’s business they returned to Baricho. On the way, Nderitu was arrested by police officer on suspicion that he they had stolen the motor vehicle. PW 4 recalled that he was arrested and later released. He told the court that he only knew

Nderitu, who was his friend.

8. Corporal Charles Wachira (PW 6), a police officer, testified that he is the one who arrested Nderitu and Ndiangui after the appellant recorded a statement stating that he took the deceased's vehicle to Nyeri to go and sell it. Upon arrest Nderitu told the police that he was given the vehicle by the appellant. Nderitu informed him that the appellant was introduced to him by Ndiangui. After their arrest he handed them over to the Investigating Officer, Corporal Antony Mwanzi (PW 9). He told the court that he was informed by PW 9, that a body had been found in the forest at Kaya Kinondo. He proceeded there and observed the body of a male person which had been extensively eaten by animals. At the scene was Corporal Emmanuel Kondo (PW 8), a Scene of Crime Officer, who took photographs of the deceased's body and surrounding area. The body was taken to Msambweni Hospital Mortuary where the post mortem was done by Dr Allan Magoha (PW 7) on 12th June 2015. Despite the evidence of decomposition of the body, he observed that there was evidence of cervical spine fracture and a skull fracture which he opined were caused by blunt weapons.

9. PW 9 commenced investigation after it was reported that the deceased had disappeared on 27th May 2015. He received information from an informant that the appellant, who was a matatu driver in Diani, had disappeared on 27th May 2015 and resurfaced on 7th June 2015. He arrested the appellant who stated that he was away in Kilifi as his wife had given birth. The appellant later directed them to Kaya Kinondo forest where the deceased's body was found. The appellant told them that on 27th May 2015, he met one Sammy and DD at the forest throwing some luggage into the forest. He was given motor vehicle KBL 285N to take to Nairobi and they proceeded to Nyeri where they met Ndiangui who took them to Nderitu. After taking statements, PW 9 charged the appellant and his co-accused with the offence of robbery with violence.

10. In his unsworn statement, the appellant recalled that on 28th May 2015, he was approached by one of the conductors at Diani and informed that there was some work to take a vehicle to Nairobi. He was later given motor vehicle registration number KBL 285N to take to Nairobi by one DD and Kamau. When he arrived at Nairobi, he was requested to drive the motor vehicle to Nyeri but he refused. He then returned to Mombasa where he was arrested and charged.

11. In his sworn testimony, Nderitu told the court that on 29th May 2015, he was approached by his cousin also known as DD, that there was a motor vehicle being offered for sale. On 30th May 2015, he met the appellant and another cousin who had the deceased's vehicle. On 1st June 2015, the appellant told him that he wanted to sell the motor vehicle so that he could purchase another car. They agreed on terms and Nderitu requested for the documents, the appellant told him he had left them in Mombasa and that he could remain with the vehicle for two weeks to do a road test while he went to get the documents. As he was using the vehicle, Nderitu recalled that the appellant told him he was bereaved and in due course he was arrested for having a vehicle that was stolen. In his sworn defence, Ndiangui testified that he heard that Nderitu was arrested on 18th June 2015 and when he went to visit him, he was arrested and subsequently charged. He denied that he was involved in committing the offence.

12. Following his disappearance which was confirmed by PW 1, PW 2, PW 3 and PW 5, the deceased body was found at Kaya Kinondo forest. I have no doubt that a robbery took place in which the deceased was viciously assaulted and died as a result and his motor vehicle stolen. The facts fall within the definition of the offence of robbery with violence under **section 296(2) of the Penal Code**. The offence is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see **Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, Oluoch v Republic [1985] KLR 549** and **Ganzi & 2 Others v Republic [2005] 1 KLR 52**).

13. What is in issue is whether the appellant was implicated in the death of the deceased. The prosecution case was firmly founded on the doctrine of recent possession of the deceased's motor vehicle. The Court in **Malingi v Republic [1989] KLR 225**, had this to say about the doctrine of recent possession:

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 has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their 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 the 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 items. The doctrine being a rebuttable presumption of facts 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 or was a guilty receiver.

14. There is no doubt that motor vehicle KBL 285N belonged to the deceased and was initially recovered from Nderitu. When required to explain his possession of the apparently stolen vehicle, he pointed to the appellant as the person who had offered it to him for sale. After the appellant was arrested, he admitted that he had the motor vehicle and proceeded to take PW 6 and PW 9 to where the deceased's body was found. The appellant also admitted in his defence that he was given the deceased's vehicle to drive to Nairobi. The evidence of the appellant and Nderitu implicating each other is accomplice evidence which, as a rule of practice is required to be corroborated (**Kinyua v Republic [2002] 1 KLR 256**).

15. In this case though, the appellant approached Nderitu to purchase the deceased's motor vehicle on 29th May 2015 which is about the time the deceased is said to have disappeared, his explanation that he was asked to drive the vehicle to Nairobi, though innocent at first glance, rings hollow and was undermined by the testimony of PW 6 and PW 9 when he took them to where they found the deceased's body. This evidence leads to irresistible evidence that he, in the company of others was involved in the robbery of the deceased. He could not have taken PW 6 and PW 9 to where the deceased's body was found unless he was aware of or was involved in the robbery. His conviction was well founded and is affirmed. Since he is connected to the body of the deceased, he could not be convicted for the offence of simply handling stolen property as urged in his submissions.

16. As regards the sentence, in light of the Supreme Court decision in **Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15**

OF 2015 [2017]eKLR declaring the mandatory death sentence unconstitutional, I quash the sentence of death imposed on the appellant. I now invite him to make his mitigation before imposing the final sentence.

DATED AND DELIVERED AT MOMBASA this 4th day of September 2018.

D. S. MAJANJA

JUDGE

Ms Ogega: The appellant should be treated as a first offender but the offence is serious as someone was killed. I urge a severe and deterrent sentence.

D. S. MAJANJA

JUDGE

Appellant: I pray for leniency. In my submissions I had requested for 7 years.

D. S. MAJANJA

JUDGE

RULING ON SENTENCE

Considering that the appellant was a first offender, the offence was serious enough to warrant a custodial sentence as the robbery resulted in the death of person. I have considered the sentences set in similar cases by Court of Appeal for example in ***Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR*** where the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. Likewise, in ***Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018] eKLR***, the Court sentenced the appellants to 20 years' imprisonment where the robbery was aggravated by the use of a firearm. I therefore sentence the appellant, **VINCENT GRANNY LUWOCHO** to **twenty (20) years** imprisonment. Right of appeal explained.

DATED AND DELIVERED AT MOMBASA this 4th day of September 2018.

D. S. MAJANJA

JUDGE

Appellant in person.

Ms Ogega, Prosecution Counsel, instructed by the Officer of the Director of Public Prosecution for the State