



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: MAJANJA J.

CRIMINAL APPEAL NO. 34 OF 2018

JOHNSTONE OYIENDE ALIAS SONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. M.M Nafula – SRM

dated 7th June 2018 at the Principal Magistrate’s Court

at Ogembo in Criminal Case No. 1940 of 2016)

JUDGMENT

1. The appellant, JOHNSTONE OYIENDE alias SONGO was tried and convicted of the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code (chapter 63 of the Laws of Kenya). The particulars of the charge were as follows:

On the night of 18th and 19th September 2016, at unknown time at Bosoti Location in Kenyenyia Sub-County within Kisii County, jointly with another not before court, while armed with dangerous weapon namely a string, robbed FRED OTENYO OMOGO of a motorcycle Reg No. KMDX 354T, make Bajaj valued at Kshs. 100,000/= and a mobile phone make Tecno T431, valued at Kshs. 1799/=, the property of FRED OTENYO OMOGO and immediately before the time of the said robbery used personal violence to FRED OTENYO OMOGO by strangling him, thereby killing him.

2. The appellant was convicted and sentenced to thirty (30) years imprisonment. He now appeals against the conviction and sentence. Counsel for the appellant stated that there was no evidence connecting the appellant to the incident of robbery alleged. The State concedes this appeal on the basis of lack of evidence.

3. In as much as the State has conceded the appeal, I am required to analyse the evidence afresh and reach an independent decision as to whether to uphold the conviction or allow the appeal as conceded by the State.

4. The testimony of Leakey Ogugu Nyabuto (PW 1), a boda boda rider was that on 18th September 2016 at about 6.45 pm, he was at Kenyenyia Stage with other riders including the deceased who had a motorcycle registration number KMDX 354T. He saw him talking to a person who appeared to be a customer but who he did not know. In cross examination he stated that “*The customer he set off with is not in court*”. On the next day, he was among the people who found the deceased body near the river Nyangweta.

5. Shem Ondiki Ogoti (PW 2) testified that on the night of 18th September 2016, he was on his motorcycle when he saw the deceased with two people. One of them was the appellant. He did not recognize the other person. He greeted the deceased but the deceased did not respond. He proceeded on his way. It is on the next morning, in response to screams, that he went to view the deceased body. He testified that from the scene where the body lay there were motorcycle tyre prints that led to the appellant’s home.

6. Kennedy Nyakwamba (PW 3) testified that he owned motorcycle registration KMDX 354T which he bought and gave to the appellant to ride and pay him Ksh. 400/= per day. Prior to 18th September 2016, the deceased had not paid him any money and on the 18th September 2016, he was not answering the calls. It is on the next day that he was informed that the deceased had died and when he went to the scene, he found the tyre tracks to the accused’s home.

7. Samuel Omogo Obwoga (PW 4), the father of deceased was informed on the morning of 19th September 2016 that the deceased's body had been found. He later identified the deceased body at the post mortem. Likewise Victor Osoro Mwendu (PW 5), the deceased cousin was informed of the deceased's death.

8. The chairman of the Boda Boda Sacco Jared Ogaro Orenge (PW 6) testified that he was informed of the deceased's death on the morning of 19th September 2016. When he visited the scene, he saw the deceased body and near the were some tyre tracks that led to the appellant's home.

9. DR. Benjamin Ndihiile (PW 7) is the doctor who carried out the post mortem and confirmed that the deceased had a fracture of the neck.

10. The investigating officer, DCIO Tobias Akumu, investigated the matter. He visited the scene and found the deceased body and organized for it to be taken to the mortuary. He took statements from the witnesses and was informed that the appellant was in Mombasa from where he was arrested.

11. The appellant denied the charge against him. He told the court that he had gone to Mombasa to look for a job. He only learnt that the deceased passed away but he did not know him.

12. The prosecution case was based on circumstantial evidence as no one saw the appellant rob and kill the deceased. The prosecution relied on two pieces of circumstantial evidence; that the appellant was seen with the deceased by PW 1 and PW 2 and the other witnesses saw tyre tracks leading to the appellant's home. In order to prove this case, the test of circumstantial evidence must be applied. In ***Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)***, the Court of Appeal enunciated the test as follows:

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

13. Whereas the appellant was seen with the deceased, the deceased was a known boda boda rider who carried people. The fact of tyre tracks leading to his home was either inculpatory or exculpatory. It is possible that the deceased was killed after leaving the accused's home. Further it was not shown that the tyre tracks belonged to the motor cycle that the deceased rode that night.

14. The totality of the evidence is that even though there is grave suspicion against the appellant, the evidence before the court leaves open the fact that any other person would have robbed and killed the deceased on that night.

15. The trial magistrate failed to analyse the evidence and consider this possibility and as such the conviction is unsafe. I allow the appeal and quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

Dated and delivered at Kisii this 11th day of October, 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Mr. Ochwangi, Advocate, for the appellant.