



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 110 OF 2015

MORGAN YAWA KABUNGU.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal arising from conviction and sentence is Mariakani Senior Principal Magistrate's Court criminal case no 552 of 2013 delivered by Hon. N.S. Lutta on 16th June 2015)

JUDGMENT

1. MORGAN YAWA KABUNGU, the Appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that;

“On the 6th day of December, 2013 at Mwanzau village in Rabai sub county, the appellant jointly with others not before court, while armed with dangerous weapons namely knives, robbed ISHAEL FUNDU KESI, of his motor cycle registration number KMDD 013A make HOAJIN valued at Kshs84,000/= and immediately before such robbery caused actual violence to the said ISMAEL FUNDU KESI.”

2. The appellant was also charged with a alternative charge of handling good contrary to section 322(1)(2) of the Penal Code. The particulars of the offence are that;

“On the 7th day of December, 2013 at 10:00 hours at Bombululu in Kisauni sub county within Mombasa country, otherwise then in the course of stealing dishonestly retained a motor cycle registration No KMDD 013A make HOAJIN valued at Kshs84,000/= knowing or having reason to believe it to be stolen property.”

3. The appellant pleaded NOT GUILTY to the charges and the trial commenced on 10.12.2013. He was convicted and sentenced after a full trial on 16th June 2015. Aggrieved with the judgement, the appellant filed an appeal in which he raised five (5) grounds of appeal (amended and verbatim) namely;

a. The learned trial magistrate erred in law by failing to comply with the mandatory provisions of section 200(3) of the CPC when he took over the matter from his predecessor contrary to what the law provides.

b. The learned trial magistrate erred in law by failing to hold the evidence of identification or recognition was unsafe to rely on as the same was not free from the possibility of an error when given that;

“The witness who claimed to have recognized the appellant had seen me and recorded their statement a day after I had been arrested.”

c. That learned trial magistrate erred in law and fact in connecting arrest with the matter in question without proper seeing the same had no connection when given that;

i. I was arrested with nothing in criminative to link me with this matter.

ii. My arresters were unreasonably left out of the prosecute case.

iii. They failed to exactly specify from where the appellant was arrested and the alleged motor cycle was recovered, was it the same place?

iv. The court failed in the rule of law by admitting that the blood stained clothes were taken from my mother inside my house yet my mother was never called in court to prove the same by evidence.

d. THAT the learned trial magistrate erred in law and fact by failing to consider the uncorroborated testimony of the complainant.

e. THAT the learned trial magistrate erred in law and fact by inadequately rejecting my defence without giving cogent reasons as to why it was inadmissible yet it was not impaired in any way by shoddy fabricated prosecution case.

4. The appellant filed written submissions which, on the day of hearing, informed court that he would rely on. In the said submissions, the appellant fused and argued the grounds as one. He attacked the trial in regard to the procedure which is required to be followed when another court takes order a partly heard case; the evidence of identification alleging that the conditions described were unfavourable to rely on in a case of recognition; the evidence of the investigating officer where he claimed that he failed to call witnesses who had crucial evidence and those who arrested him and concluded that the presumption here, be that their evidence would damage the prosecution's case. It also faulted the complainant with regard to the hospitals he was treated.

5. M/S Ochola, learned counsel for the state in her oral submissions, opposed the appeal and supported the judgment by the trial magistrate. She asserted that section 200 of the Criminal Procedure Code had been complied with on 27th May 2014 by Hon N.S. Lutta who also delivered the judgment, except for using initials at other times and other times his full name.

6. She also supported the evidence of PW1 with regard to recognizing the appellant as his friend and well known to him as they used to work together as boda boda operators, which evidence she said was corroborated by PW4 another boda boda operator.

7. On the issue of failing to call crucial witnesses, M/s Ocholla submitted that there was no need to call the arresting officer and the people who arrested the appellant to testify as the evidence that was availed the by prosecution was sufficient.

8. She also submitted that the evidence of PW1 was corroborated by that of PW4 and PW7 and stated that the doctor who testified as PW8 was able to corroborate PW1's testimony that he had been stabbed all over the body.

9. The duty of the first appellant court is to re-evaluate and analyze the evidence that was adduced before the trial court afresh so as to arrive at its own conclusion, while taking into account that it did not have the advantage of observing the demeanour of the witnesses and hearing of them as the trial court did and therefore warn itself of this. This principle, which was held in the case of **OKENO VRS REPUBLIC (1972) E.A 32**, has been restated now and again on many occasions including in the case of **HENRY MUKURA VRS CHORES GICHINA MWANGI (2013) eKLR**.

10. I will proceed to give a brief summary of the prosecution's case, which is that PW2, **JOYCOB WAMBUA NZOLA**, took a loan from Equity Bank and bought a motor cycle make HAOJIN registration number KMDD 013 at kshs84,000/=. He identified a retail order no 089479 dated 27.7.2013, a delivery note serial number 39565 dated 19.8.2013 and a receipt dated 27.7.2013 for Kshs84,000/= to court. PW2 said he handed over the motor cycle to ISMAEL FUNDO (PW1) on 5.12.2013 so he could work with it and take him Kshs400/= per day. He also identified the insurance policy number 073/003077/13/12/200 for the motor cycle.

11. PW1, ISMAEL FUNDO confirmed that he had been given the motor cycle and had agreed to take back Kshs400/= per day. He operated within Shanzu area. He then said that on 6.12.2013, he was at the Shanzu stage when a friend by the name Morgan Nyawa requested that he takes him somewhere. They agreed on a fare of Kshs350/= and the friend rode the motor cycle to his home, where they left after about one hour. They fuelled the motor cycle and after riding for some distance, the friend asked him to take over as he was tired.

12. And as PW1 was riding, this person, who he later identified as the appellant, and the friend who he used to work with and had hired the motorcycle, held him by the neck and stabbed him on the head till he fell down. He started to roll but the appellant followed and they struggled until the knife cut him on the left hand, PW1 said that he was stabbed all over the back and stomach that he had to pretend to be dead and so the appellant left him.

13. PW1 went on to state that he struggled to the road where he stopped some boda boda operators who assisted and took him to Makadara (coast) hospital and later taken to Mariakani hospital where he was admitted for 4 months.

14. He later learnt that the appellant had been arrested and was in custody. He went to Mariakani police station where he was issued with a P3 form. He identified the motor cycle in court from its number plate and the sticker on the back. He also identified the clothes that the appellant is alleged to have been wearing on that day.

15. PW3, KAHINDI MWARINGA KENGA, also a boda boda operator at Serena area in Shanzu is the one who was called and asked if he knew FUNDO, PW1 and he confirmed knowing him. He said that he was informed that Fundo had been attacked by one Morgan, who he also confirmed was known to him.

16. He said that they went to the appellant's home and even though they did not find him, his mother told them that he had returned his clothes and left. They took the clothes (exhibit p4 (a) and (b)) that were blood stained and went to Bamburi police station where they found the appellant had been arrested. That they also visited PW1 and confirmed he had multiple stab wounds on his body. He also identified the motor cycle exhibit which PW1 had been riding to court.

17. PW4, BENSON NZAI, also a boda boda operator, confirmed knowing both PW1 and the appellant as fellow boda boda operators. He said that the appellant had his brother's motor cycle and had no lights and so he asked PW1 if he could take him to chonyi since his motor cycle could not go on a journey. They agreed at a fare of Kshs300/= and they left with the appellant riding motor cycle while carrying PW1. He described that the appellant was wearing a black jacket and a green T- shirt (Exhibit p1 (a) and (b)). He also told court that he is the one who led people to the appellant's house since he knew it and confirmed that his mother told them that the appellant had left home in a hurry after returning his clothes, which they took. He confirmed that they found the appellant arrested and at Bamburi Police station where they handed over clothes from the appellant's home. He identified the motor cycle (Exhibit P2) to court. He also confirmed the PW1 had been seriously injured.

18. PW5, OMAR ABDALLA ZAHARANI, another boda boda operator at Mtwapa, told court that on 6.12.2013, at about 9:30pm, he was travelling with a customer to Chonyi when at a place called Visangaliwani, he saw someone lying on the side of the road while lifting his hand. He went to the person and found he had multiple stab wounds and was bleeding all over. That the man told him that he had been stabbed by a friend called Morgan who had stolen his motor cycle. He rushed him to Mwanzai hospital where he left him after calling his friend at Shanzu to inform him that PW1 was injured.

19. PW6, ALLAN MASHA MWASHA, a boda boda operator, is the person who was riding on a motor cycle with PW5 when they found PW1 lying on the side of the road at Visangaliwani, injured with multiple stab wounds. He confirmed that PW1 introduced himself as FUNDO and said that he had been stabbed by one Morgan who had stolen his motor cycle. They took him to Mwanzai Dispensary for treatment and called some people from Shanzu and asked them to inform PW1's relatives about the incident.

20. PW7, GRAHAM RUNA KALAMA a boda boda operator confirmed knowing Ismael Fundo Kesi, PW1 as they worked together as boda boda operators. He said that on 6.12.2013, he had been at Shanzu with other operators where he left PW1 with the appellant and motor cycle make Haojin KMDD 013A and went home. He said that he was later called at about 10:00am and informed that PW1 had been stabbed by the appellant. That the following day he went to the appellant's home where he found his mother and she told him that the appellant had come home shortly but left. He was given the clothes that the appellant had been wearing on the previous day. He identified the clothes (exhibit p 4(c) and (b)).

21. PW8, BARRINGTON EDWARD CHARO, a clinical officer at Mariakani Sub-District Hospital testified that on 13.1.2014 he examined one KESI FUNDO and filled a P3 form for him when he went to him with allegations that he had been assaulted by someone known to him. According to PW8, the said FUNDO had a deep cut wound on the scalp front of the neck, chest and on the back and the left hand's thumb. He said that PW1 was treated and sutured. He classified the degree of injury the said Fondo had sustained as grievous harm. He concluded that the possible weapon likely to have been used to inflict the injuries was a sharp object and produced the P3 form Exhibit p1.

22. PW9, NO. 72823 PC. LAZARUS MUTUA testified that he assisted in the investigations of the matter after receiving information on 7.12.2013 that the complainant (PW1) had been attacked by a person who had used his motor cycle. He established that the appellant was that said passenger on PW1's motor cycle make Hoajin registration No. 013A red in colour. He also established that the appellant and PW1 had agreed on a fare of Kshs300/= since they were both boda boda operators based at Shanzu. He further established that when PW1 and appellant reached a place called Mwazai, the appellant requested that he relieves himself but PW1 insisted that they stop at a safe place. This is when he stabbed PW1 severally and he went away with the motor cycle after PW1 fell down. That the complainant was assisted by good Samaritans and taken to hospital after he had struggled to reach the road.

23. PW9 stated that he recorded witnesses statements as the other boda boda operators went out in search of the suspect who was known to them. He received the clothes the operators found at the appellant's home, which were alleged to have been what he wore on the day he was last seen leaving the stage with PW1.

24. PW9 identified the motor cycle, the receipts for the purchase and documents of ownership of the motor cycle, the number plate for the motor cycle, a jumper and green t-shirt as exhibits P1-P8.

25. After the close of the prosecution case, the appellant was found to have a case to answer and placed on defence. He opted to give an unsworn statement in defence and called no witness. According to the appellant MORGAN YAWA, the charges against him were not true. He said that on 7.12.2013 he was on his way from Mombasa town to Shanzu. He said that in looking for a vehicle to take him home, he went to Bombolulu to get another vehicle. That some county guards entered the vehicle and asked him to follow them. He was taken to Bamburi police station where he found some of the prosecution's witnesses who he also knew. He was then taken to Mariakani police station where he was interrogated and taken to court over charges he did not know.

26. In his judgment the trial magistrate, while "minded that in criminal case the duty is always upon the prosecution to prove its case against the accused person beyond any reasonable doubt," proceeded to find that;

"The evidence by the prosecution witness is consistent and corroborated. The accused person was well known to the complainant. They were friends and had worked together as boda boda operators. On the fateful day the accused was armed with dangerous weapon namely a knife and he attacked and robbed him of the motor cycle registration no. KMDD 013A. The accused used violence on the complainant.

DETERMINATION

27. In determining this appeal, I have analyzed the proceedings of the trial court in line with the grounds of appeal, read through and considered submissions by both appellant and state counsel together with the cited authorities and the law.

28. The first issue that the appellant has raised in support of his appeal is that the law with regard to a magistrate taking over a partly heard case from another magistrate was not complied with in this case as is required under Section 200(3) of the Criminal Procedure Code.

29. That trial of this case commenced on 27.5.2014 before the Shanzu SPM, when he heard the evidence of two witness. The matter then came up for hearing on several occasions but was adjourned for one reason or another. Hon N. Shiundu last handled the matter on 7.7.2014. On 21.7.2014, Hon Gatheru, who was in charge mentioned the matter and adjourned it because Hon N. Shiundu was away on official duties. The matter was placed before Hon. S. Lutta, Senior Principal Magistrate on 4.8.2014 but it is not until 27.11.2014 that the matter resumed hearing and was concluded on 16th June, 2015 when he rendered his judgement.

30. I have carefully perused the record and find no record to confirm the Hon Shiundu (SPM) had been transferred and the matter was being taken over by Hon N. S. Lutta (SPM). There is even no record to show that there was effort by the trial magistrate to inform the appellant that he was taking over the trial from his predecessor and explain to him his right as provided for under section 200(3) of the Criminal Procedure Code.

31. Section 200(3) of the Criminal Procedure Code provides that:

“Where a succeeding magistrate commences as the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused of that right.”

In the case of **SIMON NGARE KAYAA –VS- REPUBLIC (2014) eKLR** (being *Criminal Case No. 5 of 2011*), the Court of Appeal ruling in Malindi held that non-compliance with the provisions of Section 200(3) of the Criminal procedure Code, which are mandatory provisions of the law is fatal, and therefore renders subsequent proceedings a nullity.

32. Our court system is that of reliance on precedence and stare decisis based on hierarchy so that a lower court is bound by the decisions of a superior court. Any attempt to run away from this arrangement renders a decision “per incium”. In observance of this, I rely and apply the decisions of the court of appeal sitting in Malindi in the above cited case, and proceed to declare the proceedings of the court from 27.10.2014, a nullity. The appellant has therefore succeeded on this ground.

33. Having found so, it is my considered opinion that it will be an academic exercise to proceed and consider the other grounds of appeal which were cited by the appellant because they arise from the nullified proceedings.

34. The next issue for this court to consider is what happens to the victim of robbery with violence, SAMWEL FUNDO KESI, whose evidence reveals that he survived several stab wounds and was hospitalized for four (4) months? It is worth noting that his evidence and that of PW2 remain intact. This victim, (PW1) deserves justice so that he can find meaning in the maxim. “Justice must not only be done but must be seen to have been done.” The court of appeal in the same cited case considered the old case of MWIRURI –VS- REPUBLIC (2000) KLR 552 where the court ordered a retrial and stated that;

1. Generally, whether a retrial should be conducted or not depends on the circumstances of the case.

2. It will only be made where the interest of justice require it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment (in court) of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecutions making or not”.

35. The mistake in the instant case would be blamed on the court in whose knowledge the fact of the predecessor having proceeded on transfer was with the succeeding trial magistrate, but failed to inform the appellant of the same and explain to him his right, especially since he was unrepresented. The appellant was sentenced to death and has been in custody since 2013. However, I find he is not about to complete his sentence for him to be prejudiced.

In the circumstances, and in the interest of justice, the appeal is hereby allowed, the conviction quashed and sentence of death imposed upon the appellant set aside.

However, I proceed to order for a retrial before another magistrate seized with competent jurisdiction at Mombasa. The appellant to remain in custody for 14 days from the date hereof, so that the fresh trial is set in motion.

The hearing should be expedited in view of the period the appellant has been in custody.

Judgement DELIVERED, SIGNED and DATED this 12th day of November, 2018.

D. CHEPKWONY

JUDGE.

In the presence of;

M/S Ocholla counsel for the state.

Appellant in person: Present

