



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 35 OF 2017**

**PHILIP NJOGA ISOE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against the conviction and sentence by Hon. M. Cheronoh (SRM) in Kapsabet Principal Magistrates' Court Criminal Case No. 2045 of 2016 on 7<sup>th</sup> March, 2017)**

**JUDGEMENT**

1. The appellant was convicted of robbery with violence and sentenced to life imprisonment. He lodged this appeal on grounds that the prosecution case was contradictory, that he was not properly identified and that the evidence of possession was not proved to the required standard.

2. This is a first appeal and this court has warned itself of its duties to reconsider and re-evaluate the evidence afresh and to arrive at its own independent conclusion bearing in mind that it did not have the benefit of seeing the witnesses' demeanor.

3. Brief facts are that on 9<sup>th</sup> June, 2016 Daniel Langat (PW1) who was a *bodaboda* rider was instructed by the appellant to ferry him to Dr. Cleophas. On arrival at the gate, the appellant told him that he had passed the gate. He shortly thereafter jumped and alighted. He removed the helmet and appeared to be searching for something from his pocket. As he approached he was hit and lost consciousness. He saw a motorbike and informed the rider that he had been hit and robbed of his motorbike. PW1 stated that he had the previous day ferried the appellant to Wanja's place and he asked for a helmet claiming that he had an allergy. That there were security lights with which he identified the appellant but that the point where he alighted was dark. He after the incident went to Kapsabet County Referral Hospital where an x-ray was done and he was found to have sustained a fracture near his right eye. He was stitched and after two days he was taken to Medihealth Hospital Eldoret for CT-Scan. He later reported to the police and recorded a statement. His fellow riders asked for his motor cycle registration number which he gave them thus KMDU 768C make TVS and informed them of the person who took it. That he was informed by the fellow *bodaboda* riders that they had arrested someone. He went to the police where he identified the appellant. Simon Kipketes (PW2) who is the chairperson of *bodaboda* group Nandi Hills stated that he and other *bodaboda* riders left Nandi Hills at 11.00 am for Kisii looking for PW1's motor cycle. By 5.00 pm they were in Kisii. On their way back, one of the motor cycles ran out of fuel and had to stop to wait. As they waited, someone informed them that there was someone taking tea and had a folded motor bike. The person said his name is Philip and he was headed to Nairobi from Kapsabet. In the process he saw a crowd gather. He called CID Nandi Hills and he was escorted to Kimwah. The motor cycle KMDU 768C was taken and proceeded and when they reached Chebarus Primary the appellant fell on the tarmac and injured himself. The appellant was arrested together with the motor cycle. He stated that the motor cycle recovered was not the one they were looking for. Police Constable Samuel Maka (PW3) who was the investigating officer in the matter stated that he visited PW1 in hospital and noted that he had sustained an injury on the right side of his head. He issued him with a P3 form and escorted him to Kapsabet District Hospital where he was examined and P3 form filled. On 12<sup>th</sup> June, 2016 he and PC Omondi went to Nandi Hills Police Station and met the arresting officer PC Mutindwa who assisted him in tracing the chairman of the motor cycle association Nandi Hills (PW2) whose statement he recorded. He visited the scene and later collected the motor cycle which he took to Kapsabet. He stated that PW1's statement was that on 9<sup>th</sup> June, 2016 the appellant approached him and asked him to take him to show ground. While on the way, the appellant borrowed a helmet from him which he gave. That immediately the appellant told him that he had reached his destination, he alighted and told PW1 that he wanted to turn so as to be paid. That the appellant then stabbed PW1 with an unknown object and he fell. That before he became unconscious he saw the appellant ride off the motor cycle. That the appellant was arrested by motor cycle riders from where they had gone to look for their stolen motor cycle. That they had gone to Kisii and on their way back an informer told them of the appellant who had the motor cycle whose registration number plate was folded. That the appellant was being escorted to Nandi Hills Police Station when he jumped out of the motor cycle and injured himself at Chebarus area. He was re-arrested and taken to police and charged. PW3 produced exhibits in that regard; helmet (P. Exhibit 3, 2 teeth (P. Exhibit4), Motor cycle registration number KMDU 768C (P. Exhibit 5), Registration book (P. Exhibit 6), Official receipt (P. Exhibit 7), Change of ownership/transfer form (P. Exhibit 8), Change of ownership (P. Exhibit 9), income tax form (P. Exhibit 10) and photos (P. Exhibit 11 a, b, c and d). Danson Githenji (PW4) a clinical officer at Kapsabet County Referral Hospital confirmed that PW1 was admitted at the facility with a history of head trauma and had blood stained clothes. He stated that PW1 had cracked lower incisor teeth and a skull CT-Scan revealed that he had a minimally depressed fracture of the right temporal bone with underlying bleeding under the skull that was clotted. That there was a right fracture zygomatic part but not displaced and the approximate age was 2 days. He stated that the probable weapon was sharp. That the wound which was 5 cm long was stitched. Police Constable Mutinda (PW5)

who was the arresting officer stated that he was on mobile patrol when he was called by the OCS Chief Inspector John Kiarie who alerted him that there was a suspect who had a motor cycle that was suspected to have been stolen and was being assaulted by members of the public. He and his colleague Sila went to Chebarus area and found that *bodaboda* operators has already arrested the appellant. That the appellant had been arrested and had jumped off the motor cycle and got injured. That the appellant lost his teeth and was bleeding.

4. The appellant was put on his defence wherein he stated that he did not understand what the charges meant. That he was in Nairobi. That he was called by his father who informed him that his brother was in hospital and had been operated on. He alighted to get direction when he was subjected to mob justice. He was laid on the tarmac and surrendered when he was overwhelmed.

5. I have given due consideration to the evidence and the submissions tendered in this case. The issues for determination are:

**a) Whether or not the essentials of robbery with violence were proved.**

**b) Whether or not the Appellant was found in possession of the motor cycle that had been stolen from the complainant in a robbery with violence incident.**

**c) Whether or not the evidence was contradictory.**

6. PW1's evidence was that the appellant had on the previous day and the material day instructed him to take him to Wanja's place and Dr. Cleophas place respectively. He stated that he identified the appellant using street lights from where he had boarded. While making his report, the complainant was clear on the fact that it was the appellant whom he had ferried was the one who robbed him. He at the point of making his report to the police gave the description about the Appellant. An inference is therefore made that he positively identified the appellant through recognition. On this point I reiterate the holding in Maitanyi v. Republic [1986] KLR 198 thus:

***“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his assailants, to those who came to the complainant's aid or to the police...”***

PW1 stated that he was hit and he lost consciousness. That evidence was corroborated by PW4 who confirmed that PW1 had cracked lower incisor teeth and a skull CT-Scan revealed that he had a minimally depressed fracture of the right temporal bone with underlying bleeding under the skull that was clotted. That there was a right fracture zygomatic part but not displaced and the approximate age was 2 days. When PW2 in company of other riders mounted a search, they found the appellant in possession of the subject motor cycle. PW3 produced a logbook and transfer of ownership to prove that the motor cycle was PW1's. In the end, I find that the essentials of robbery with violence were proved beyond reasonable doubt. That the appellant used actual violence on PW1 and robbed him of the motor cycle and that he was found in possession of the motor cycle but failed to explain how he found himself in possession of it. It is worth noting that the defence tendered by the appellant did not weaken the prosecution case. It is also noted that the Appellant on being apprehended attempted to escape by jumping off from a motor cycle but was quickly subdued.

7. On the issue of contradiction, the same were so minor that they did not affect the material facts of the prosecution case. in this regard I am fortified by the holding in Philip Nzaka Watu v. Republic [2016] eKLR where the Court of Appeal stated:

***“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.”***

8. The respondent argued that the trial court erred by sentencing the appellant to life imprisonment in place of death sentence prescribed for the offence of robbery with violence. I am minded of the fact that the offence of robbery with violence attracts a mandatory death sentence. The Supreme Court while discussing section 204 of the Penal Code which prescribed death sentence for the offence of murder in the case of Francis Karioko Muruatetu & Another v. Republic., Petition No. 15 of 2015 consolidated with Petition No. 16 of 2015 had this to say:

***“48. Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a sentence the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right...”***

***52. We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only death sentence shall be imposed.”***  
[Emphasis mine]

Applying the test, my point of departure from the trial court's finding is her holding that the sentence of death was unconstitutional. As a matter of fact the Supreme Court was of the view that the provision deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. However, bearing the above holding and having in mind the circumstances of this case I find that the sentence imposed by the trial court was within the law. The conviction and sentence is hereby upheld. The appeal is therefore devoid of merit and is dismissed.

Orders accordingly.

**D. K. KEMEI**

**JUDGE**

**Delivered at Eldoret this 22<sup>nd</sup> day of November, 2018.**

**HELLEN OMONDI**

**JUDGE**