



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 36 OF 2016**

**ANDERSON SAFARI KAZUNGU ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(From the Original Conviction and Sentence in Criminal Case No. 25 of 2014 of the Chief Magistrate's Court at Malindi – Mbogo C.G., CM)***

**JUDGEMENT**

1. The Appellant, Anderson Safari Kazungu was on 18<sup>th</sup> December, 2015 convicted and sentenced to suffer death by the Chief Magistrate's Court at Malindi for the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.
2. The particulars of the offence disclosed that on 11<sup>th</sup> January, 2014 at Dida Village, Ganze District within Kilifi County the Appellant jointly with others not before court while armed with a dangerous weapon, namely a knife, stole a motorcycle make Bajaj Boxer registration number KMCX 444F valued at Kshs.85,000/= the property of Franklin Shida Kaingu and at the time of such robbery wounded one Alex Sifa Jumaa.
3. The prosecution's case was summarized by the evidence of PW1 Alex Sifa Jumaa. He told the court that he is a boda boda operator and on 11<sup>th</sup> January, 2014 at about 2.00 p.m. he was riding towards Lango Mbaya from Kiembeni when he was flagged down by two young men. The young men told him that they were from Dida and they wanted him to take them to their aunt's place. They seemed not to know the place they were going to and they rang somebody who offered to give them directions to the place. They agreed on a fee of Kshs.1,000/= and they commenced the journey.
4. As they approached Dida the two asked him to branch to the right. They rang the woman who was giving them directions and she told them to ride slowly as she was waiting for them at a corner. After he slowed down the young man sitting immediately behind him grabbed him by the neck wanting to strangle him. He let go of the motorcycle and they all fell down. The one who wanted to strangle him urged the other one to give him the knife so that they could deal with him quickly. A struggle ensued and in the process he was cut on the lower lip. He also sustained injuries on his elbows. He managed to free himself and screamed as he ran away. Nobody responded to his alarm. Down the road he met an old man who directed him to a barrier managed by forest rangers where he reported the incident. Prior to meeting the old man he had gone back to the scene and found the motorcycle missing. PW1 testified that he thereafter proceeded home from where he went and reported the incident at Lango Baya Police Post.

5. Later, he made a follow-up of the matter with PW5 Franklin Shida Kaingu the owner of the motorcycle registration number KMCX 444F. In the company of police officers and other boda boda riders they went to an area called Madunga where they met a young man who led them to an area called Nyamada where they found a woman called Kadzo Charo who was arrested by the police. She was taken to Lango Baya Police Post where upon interrogation she named the two men who had robbed him.

6. PW1 told the court that Kadzo Charo led them to a boma known as Kibambe in Kakuyuni area where they met the Appellant. He identified him as one of his attackers and the police arrested him. He was escorted to Malindi Police Station.

7. PW1 testified that he was treated and a P3 form filled for him.

8. PW4 Ibrahim Abdullahi produced a P3 form as an exhibit. He told the court that PW1 had a cut wound on the lower lip and tenderness below the umbilical area. He classified the degree of injury as harm.

9. PW2 Administration Police Corporal Shadrack Opondo told the court that on 11<sup>th</sup> January, 2014 at about 8.00 p.m. he received a report of the theft of motorcycle registration number KMCX 444F from PW1. He informed him that two passengers had robbed him of the motorbike at Dida area. On 12<sup>th</sup> January, 2014 at about 4.30 p.m. he received information from one Charles that two suspects had been seen on 10<sup>th</sup> January, 2014 at Kibara Diru Market in Madunga area. He went to the boma where the motorcycle was said to have been taken to and arrested a woman by the name Kadzo Wanje. On 13<sup>th</sup> January, 2014 the woman led him, together with other police officers, PW1, PW6 and members of the public to a boma where she pointed out the Appellant who started running away. He was however apprehended with the assistance of the members of the public. He was escorted to Malindi Police Station for further investigations.

10. PW4 Police Constable Vincent Ayumba told the court that he rearrested the Appellant from PW3 on 13<sup>th</sup> January, 2014 and had him charged after he was convinced that an offence had been committed.

11. PW5 Franklin Shida Kaingu produced as exhibits a purchase receipt and invoice for motorcycle registration number KMCX 444F. He told the court that he bought the motorcycle from Amstel Trading Company for Kshs.83,000/=.

12. PW6 Ngala Mundu Beja told the court that he is a boda boda rider. On 13<sup>th</sup> January, 2014 two young men alighted from a matatu and asked him to ferry them. He told them to pay Kshs. 500/= for the trip but they only had Kshs. 300/=. They then called a woman who was a resident of Lango Baya who promised to pay him once he arrived with the two men at her home. She gave him directions to her home where the two men alighted and she paid him his dues. The following day at about 2.00 p.m. police officers went to his place of work and asked him about the two men. He took the officers to the homestead where he had dropped them. The woman was arrested and she led them to the home of one Kibabe. When they arrived a young man escaped. The police arrested another one and the woman who led them to that homestead identified him as the person the police officers were looking for.

13. In his defence the Appellant denied committing the offence with which he is charged. He told the court that he was at home on the material day when the complainant in company of police officers and a woman went looking for his younger brother, Baya. They did not find him. The woman then pointed to him alleging that he had spent the night in her home and that she had given him Kshs.1,000/=. The woman was released and he was handcuffed. He was escorted to the Malindi Police Station where he was booked in as Baya. He told the police that he was Anderson but they nevertheless went ahead and charged him. The Appellant told the court that the woman who led the police to his home used to be the wife of his other brother called Charo.

14. This being a first appeal, my duty is to evaluate the evidence afresh and come to my own conclusion on the same. In doing so, I must remember that unlike the trial court I never had the benefit of hearing and seeing the witnesses testify.

15. A perusal of the Appellant's Petition of Appeal dated 5<sup>th</sup> August, 2016 shows that he alleges that his conviction was based on unsatisfactory evidence. He also raises the question of his identification as one of the people who robbed PW1 of the motorcycle.

16. In his written submissions, the Appellant faulted the trial court for convicting him based on the evidence of a single witness. It is his case that PW1 did not even properly describe his attackers yet that evidence was used to convict him. According to the Appellant, PW1 in his evidence-in-chief had clearly told the court that he did not know his attackers but on cross-examination he stated that he knew him as Anderson Safari Kazungu. It is his view that PW1 never knew him because if he knew him he ought to have given his name and particulars to PW2 at the time he reported the robbery to him. The Appellant urged this court to find that it was unsafe to convict him on the insufficient and contradictory evidence of a single witness.

17. The Appellant also took issue with the documentary evidence saying that a witness from the company that sold the motorcycle to PW5 ought to have been called to testify in order to establish the fact that PW5 had a motorcycle.

18. The Appellant also submitted that the prosecution failed to call one Charles who was a crucial witness as he is the one who told PW2 that the suspects had been seen on 10<sup>th</sup> January, 2014 at Kibara Diru Market.

19. The Appellant asserted that the members of the pubic who arrested him ought to have been called as witnesses as it was necessary for them to come and tell the court why he was arrested.

20. Finally, the Appellant contended that the case against him was not proved to the required standards. He submitted that PW1 told the court that a knife had been dropped at the scene of crime by his attackers but the said knife was not produced as an exhibit.

21. In opposition to the appeal the Respondent contended that the case against the Appellant had been proved to the required standards. It is the State's case that the ingredients of robbery had been proved as the evidence adduced demonstrated that the offenders were armed with a knife which is an offensive or dangerous weapon; the robbers were two; and the victim (PW1) was wounded at the time of the robbery.

22. It was also the Respondent's position that the incident took place during the day and the Appellant had clearly been identified as one of the robbers.

23. In my view, there is need to find out if the evidence adduced established that the offence of robbery with violence was committed and, if so, whether there was evidence linking the Appellant to the offence.

24. The testimony of PW1 is clear that he was attacked and injured by his passengers who were armed with a knife. The evidence of PW4 confirmed that PW1 was indeed injured.

25. PW1 told the court that he ran away after the attack and when he came back to the scene he found the motorcycle that he had left at the scene missing. He told the court that the motorcycle belonged to PW5. PW5 indeed confirmed that he gave the motorcycle in question to PW1. He also produced a purchase receipt showing that he bought the motorcycle for Kshs.83,000/=.

26. The summary of the evidence shows that during the theft of PW5's motorbike from PW1, the robbers were armed with a dangerous or offensive weapon being a knife; the robbers were two and they used violence on PW1 and injured him in the process. All the ingredients of robbery with violence were therefore proved.

27. The evidence of PW1 is corroborated by that of PW4 and PW5. PW2 also saw him with injuries. On the question of the existence of a motorcycle, the evidence of PW1 and PW5 established that PW1 had a motorcycle which he was using for transport business. The same had been given to him by PW5. PW5 produced a purchase receipt for the motorbike. The evidence that was placed on record was therefore

sufficient to establish the existence of a motorcycle. The evidence of the seller of the motorbike was therefore not necessary in this case. In fact, the Appellant never challenged the evidence supporting the fact that robbery had taken place. The trial court's finding that PW1 was robbed of a motorcycle belonging to PW5 cannot therefore be faulted.

28. The remaining question is whether the evidence adduced sufficiently linked the Appellant to the crime. The only person who saw the robbers is PW1. On the evidence of identification the trial court held that: -

**“... The sole witness to the robbery happens to be the complainant. The complainant told the court that he was hired by the accused and another to take them to Dida. This was during daytime. He had time to observe his pillions as they discussed over the fare they were to pay him. In my view the complainant and the two robbers spent a reasonably sufficient amount of time together. I have warned myself about the dangers of relying on the evidence of a single witness but the evidence on record serves one to conclude that it was the accused jointly with another not before court who committed the offence. I am alive to the provisions of Section 143 of the Evidence Act that no particular number of witnesses shall, in the absence of any provisions of the law to the contrary be required for the proof of any fact. I do not believe PW6 when he says that the wrong person was arrested on the 10<sup>th</sup> January 2014 for there is nothing that could have prevented the complainant who was also present from alerting the arresting officers. I wish to state that I found the prosecution witnesses apart from PW6 honest and credible as opposed to the accused who in my view is a liar. In the circumstances, I reject the defence case and I proceed to convict the accused as he has been charged.”**

29. I find that the trial court correctly appreciated the guiding principles in dealing with the evidence of a single witness. The only question is whether the evidence in respect to the identification of the Appellant as one of the two robbers was sufficient to the extent that it could be used to send him to the gallows.

30. I will proceed to review the evidence on identification. PW1's evidence is that he was meeting the two young men for the first time on that day. The trial court was indeed correct that the robbers spent sufficient time with PW1 to enable him identify them if he were to meet with them later.

31. Fast-forward to the scene of arrest. The evidence on record is that Kadzo Charo is the one who led the police, PW1, PW5, PW6 and members of the public to the boma from where the Appellant was arrested. One Charles who gave information to PW2 that the suspects had been seen on 10<sup>th</sup> January, 2014 at a certain market was not called as a witness. That person is said to have led PW2 and his team to the house of Kadzo Charo. Unfortunately Kadzo Charo passed away before testifying. It is not clear why Kadzo Charo was arrested in the first place. The link between Kadzo Charo and the robbery was not established.

32. Now to the point of arrest. PW1, PW2 and PW5 all stated that when they arrived at the home of the Appellant he started running away but they managed to arrest him. PW6, however, testified that the person who ran away was not arrested. It is noted that PW5 and PW6 testified in the absence of the Appellant who had been declared unruly and ejected from the court. The evidence of PW5 and PW6 was not therefore tested by way of cross-examination. The trial court found that PW6 was a liar. The basis for this finding is not contained in the judgment. As he was not cross-examined, it cannot be said that cross-examination exposed him as a liar. The prosecutor did not apply to the court to have this witness declared hostile meaning that the contents of his statement to the police is what he restated in court. There are no notes in the court record on PW6's demeanour so that one can say that the statement that PW6 was a liar was based on the court's observations as he testified. In short, there is nothing on record to support the finding that PW6 was a dishonest person. Taking his evidence on its face value, it is clear that it contradicted that of the other prosecution witnesses. The contradictions in the evidence of the prosecution witnesses ought to have been reconciled in favour of the Appellant.

33. The trial court also rejected the defence of the Appellant. In my view, a proper consideration of his

defence would have led to a different conclusion. It was the Appellant's evidence that the person the police were looking for was his younger brother, Baya. He told the court that he was indeed booked at the police station as Baya forcing him to produce his identity card but the police still brought him to court. That the defence of the Appellant had an element of truth is supported by the manner in which he cross-examined PW1. He asked PW1 whether he knew him and PW1 answered that he knew him as Anderson Safari Kazungu. PW1 denied that he gave the name Baya to the police. Asked whether he visited the Appellant in prison he at first denied doing so before admitting visiting him in prison. He however denied telling the Appellant that he had discovered that his brother Baya is the one who robbed him. There was a thread of consistency in the defence case which was constructed by way of cross-examination and the Appellant's testimony in court. Coupled with the manner of the Appellant's arrest, I find that the prosecution's evidence linking the Appellant to the robbery was shaky and the Appellant ought to have been given the benefit of doubt.

34. In summary, I find that the Appellant has put forward strong arguments as to why his appeal should succeed. I allow his appeal. His conviction is quashed and the sentence set aside. He is set at liberty unless otherwise lawfully held.

**Dated, signed and delivered at Malindi this 18<sup>th</sup> day of July, 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**