



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 30 OF 2016

ISAAC AGWATA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case No. 1470 of 2015 of the Chief Magistrate's Court at Busia by Hon. H.N Ndung'u – Chief Magistrate.)

JUDGMENT

ISAAC AGWATA, the appellant herein, was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the offence were that on diverse dates between the 8th and 13th July 2015 at **KAJORO** village, **NAMBALE** sub-location, within **BUSIA** County, jointly with others not before court, robbed **SAMMY OMEKE (deceased)** of a motor cycle registration number KMDE 728 G D valued at Kshs. 95,000/= and during the time of the said robbery, killed the said **SAMMY OMEKE**.

The appellant was sentenced to suffer death. He now appeals against both conviction and sentence.

The appellant was in person. He raised five grounds of appeal that I have summarized as follows:

1. That the learned trial magistrate erred in law and in fact by failing to note the breach of his constitutional rights.
2. That the learned trial magistrate erred in law and in fact by convicting the appellant on the basis of hearsay and contradictory evidence.
3. That the learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.
4. That the learned trial magistrate erred in law and in fact by ignoring his defence.

The state opposed the appeal through Mr. Gacharia, the learned counsel.

The facts of the prosecution case were briefly as follows:

The deceased was a motor cycle (boda boda) rider. When he went missing, a search was mounted. The motor cycle was recovered in the home of one Panyako who was killed by a mob before he could be handed to the police. Before his death, he implicated on Isack. The body of **SAMMY OMEKE** was

recovered in a shallow grave in the home of the said Panyako. Another witness came forward and contended that he had witnessed the appellant and Panyako dismantling the motor cycle that had been robbed of from the deceased, **SAMMY OMEKE**.

The appellant denied the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

The issue of legal representation has been addressed severally by the superior court. In the case of **DAVID MACHARIA NJOROGE vs. REPUBLIC [2011] eKLR** it was held:

State funded legal representation is a right in certain instances Article 50 (1) provides that an accused shall have an advocate assigned to him by the State, at the States expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal and is mandatory. We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result,’ persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a retrial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly, every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.

I agree with the superior court. I also wish to observe that if the state is to shoulder the burden of the legal representation of all accused persons facing capital offences, we shall witness miscarriage of justice by delays occasioned by lack of funding. My proposal for compliance with article 50 of the Constitution would be as follows:

- (1) A court before which an accused person is taken for plea on a capital offence or for an offence with a mandatory life sentence to inquire whether such an accused person is in a position to engage his/her advocate. The response to be recorded.
- (2) Where the accused indicates that He/she is not in a position to hire the services of an advocate, an enquiry should be made to verify the truth of the same in the same manner courts verify if one qualifies to be treated as a pauper.
- (3) If it is established that the accused cannot be able to cater for the services of a counsel, then the state will have an obligation to hire a counsel for such an accused person.

This should not be viewed as contradicting the Constitution, but would be a gradual short term measure towards the ultimate compliance with Article 50 of the constitution.

In the instant case, the appellant did not suffer any prejudice for failure by the state to provide him with a counsel.

The appellant was linked to the offence by the purported implication by Panyako from whose home the motor cycle was recovered and the body of **SAMMY OMEKE**, the victim of the robbery was exhumed. Since Panyako did not live to testify, what was attributed to him has no probative value unless it is corroborated by some other material evidence. It ranks closely to that of an accomplice. Panyako's allegations were not tested for veracity. The trial court was therefore left with the evidence of Stephen Shikuku (PW 3).

This witness testified that on 13th July 2015 while taking a customer to Tanga Corner, he spotted the appellant and another. These two were removing a dark green cover and a customer seat. He said the number plate of the motor cycle KMDE 728 G was intact. He described the people he saw as one tall and heavily built and the other as brown and short with a scar on his cheek. He said he was about 8 meters from them. He testified that he informed the boda boda chairman about it. The evidence by this witness has some loose ends.

(1) During cross examination, he said he could not be able to establish 200 meters and yet in examination in chief he had estimated that the people he had seen dismantling the motor cycle were about 8 meters. Is this an issue of giving evidence selectively?

(2) The chairman whom he purportedly reported to, about the dismantling of the motor cycle was not called to testify. Am making this observation because by this time the rider of the motor cycle he alleged to have seen being dismantled had been reported missing. By 9th July 2015 he was aware that the rider and the motor cycle were missing. This was therefore a matter that required urgency.

(3) When the appellant was arrested he ought to have been called to an identification parade after the basics of such a parade were met. This is because the defence evidence contended that the appellant was elsewhere and was only arrested on the strength of what Panyako said. He was arrested from his home.

It is trite law that a fact can be proved by the evidence of a single witness as was observed in the case of **ABDULLAH BIN WENDO vs. REX 20 EACA 166**, The Court of Appeal held as follows:

Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.

In the instant case I find that it was unsafe to base a conviction on the evidence of Stephen Shikuku (PW3). Without his evidence the prosecution case had no base to stand on. I therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 18th day of July, 2017

KIARIE WAWERU KIARIE

JUDGE