



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.146 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. T.L. TANCHU – SRM delivered on 28th August 2013 in Limuru SPM. CR. Case No.901 of 2011)

DANIEL KAGO KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Daniel Kago Kariuki was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 27th and 28th October 2011 at unknown time at Tigonu Location in Kiambu County, the Appellant, jointly with others not before court robbed Samuel Kimani Kigweru of motor cycle registration KMCS 416B make Lifan valued at Kshs.75,000/- and at or immediately before or immediately after the time of such robbery, murdered the said Samuel Kimani Kigweru (the deceased). The Appellant was alternatively charged with **handling stolen property** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on 2nd November 2011 at Mushomoroni Estate in Mombasa County, otherwise than in the course of stealing, dishonestly retained motor cycle registration KMCS 416B make Lifan valued at Kshs.75,000/- knowing or having reason to believe the same to be stolen. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of the main count of robbery. He was sentenced to death. He was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. In an amended petition filed on 12th November 2015, the Appellant raised several grounds of appeal in support of his appeal. He stated that the charge sheet upon which he was convicted was defective. He was of the view that the ingredients establishing the charge of robbery with violence had not been established. He took issue with the manner in which the trial court had improperly applied the doctrine of recent possession. In particular, he stated that the motor vehicle was not recovered in his possession, neither was an inventory taken during the recovery of the motor cycle. The Appellant faulted the trial magistrate for failing to note that the evidence adduced in court was at variance with the charges preferred against the Appellant. The Appellant was of the view that there were gaps, inconsistencies and material contradictions in the prosecution's case. He stated that **Section 200** of the **Criminal Procedure Code** was not complied with when the convicting magistrate took over from the magistrate who initially

heard the case. In particular, the Appellant faulted the trial magistrate for not recalling PW2 who was a critical witness in the case. He was finally aggrieved that the totality of his defence, particularly his alibi defence was not considered before the trial magistrate convicted him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard rival submission made by Mr. Amutala for the Appellant and by Ms. Kule for the State. Whereas Mr. Amutala made submission urging the court to allow the appeal in light of the many irregularities that he had highlighted, Ms. Kule submitted that the prosecution had adduced sufficient culpatory evidence to secure the conviction of the Appellant on the charge that he was convicted. This court shall revert to the arguments made after briefly setting out the facts of the case.

The deceased in this case was employed by PW2 Stephen Kiragu Mbuthia. He testified that he was the owner motor cycle registration No. KMCS 416B make Lifan. He produced receipts and the logbook of the motor cycle which established his ownership of the same. He testified that he employed the deceased to operate the said motor cycle as a taxi. On 27th October 2011, as was the usual case, the deceased took possession of the motor cycle. PW3 George Maina Ng'ang'a, testified that on the evening of the 27th October 2011, he was relaxing at Tigoni Trading Centre. He was taking beer at a bar called Migingo. He was with the deceased. The deceased requested him to take a customer to Kamandura. He took the customer to Kamandura and returned to the same bar. He met with the deceased and they went to a nearby bar called Rainbow. They met with the Appellant. The Appellant was known to them prior to that date because he had previously repaired the television and radio of the deceased. PW3 saw the Appellant having a discussion with the deceased. The deceased gave the Appellant the motor cycle which he rode to the Vision bar before returning to where they were. The Appellant handed the keys to the deceased. At about 9.30 p.m., it started to rain. PW3 left the Appellant with the deceased.

On the following morning (28th October 2011), PW3 found people standing in groups at the shopping centre. He was informed by a boda boda rider that the deceased had been killed and his body found dumped at Tigoni River. The motor cycle was missing. PW3 was shocked by the turn of events. He went back to the bar where they were with the deceased the previous night and met with PW4 Anne Wanjiku Wairimu. He informed her what had transpired. PW4 testified that on the night of 27th October 2011 at about 10.00 p.m., he saw the deceased carry the Appellant in the motor cycle. She recalled that the deceased gave the Appellant his jacket at the time he rode off on the motor cycle. PW3 reiterated that he was a good friend of the deceased before the incident. When he learnt that the deceased was dead, he tried to call the Appellant but could not reach him. He recorded a statement with the police. He informed the police that the last person seen with the deceased was the Appellant. The police commenced the search of the Appellant.

PW1 Catherine Wangari Kiarie, the deceased's wife testified that on the night of 27th October 2011 at about 10.00 p.m., the deceased went home and requested to be given his black jacket. He was riding the motor cycle. She was informed on the morning of 28th October 2011 that her husband had been killed. PW7 PC Patrick Onyango was at the material time based at Tigoni Police Station. He was the investigating officer in the case. He recalled that on 28th October 2011 at about 8.00 a.m., he received a report a man had been killed and his body thrown in a dam. He accompanied Inspector Ndiema to the scene. He saw the body of the deceased. The deceased was wearing a black jacket and a red cap. His body was retrieved and a phone with a remote control recovered. Through the memory card in the phone, PW6 learnt that the deceased was a boda boda rider of the suit motor cycle. The motor cycle was missing. He commenced investigations after taking the body of the deceased to the mortuary. He learnt that the Appellant was the last person seen with the deceased the previous night. He received information on 1st November 2011 that the motor cycle that the deceased was riding was seen at Mushomoroni area in Mombasa. He wrote a letter to the OCS Nyali Police Station to assist him in the recovery of the motor cycle and the arrest of the Appellant. On 2nd November 2011, PW5 PC James Githua attached to Nyali Police Station was assigned to trace the motor cycle. He was accompanied by two men from Tigoni Police Station. He testified that when he went to Mushomoroni area, he found the Appellant operating

the motor cycle as a taxi within the area. He was seated on the motor cycle at Mushomoroni stage. He arrested the Appellant and took him to Nyali Police Station. He also detained the motor cycle. PW7 travelled to Mombasa where he collected the Appellant together with the motor cycle.

Post mortem was conducted on the body of the deceased by PW6 Dr. Peter Ndegwa, a Pathologist based at the City Mortuary. He noted that the deceased had sustained multiple stab wounds on the face and head. He had sustained a depressed skull fracture which caused intracranial hemorrhage. He formed the opinion the cause of death of the deceased was head injury due to sharp force trauma.

When the Appellant was put on his defence, he denied that he was arrested while in possession of the motor cycle. In particular, he testified that he was called at about midnight by PW2 and a request made if he could meet with him. This was on the night of 1st November 2011. He acceded to the request and directed PW2 to his house in Mombasa. He was surprised when PW2 went to his house with four police officers who arrested him. While acknowledging that he had previously worked in Tigoni area, Limuru, he denied that he was at Limuru on the material night that the deceased was killed. He denied being in possession of the motor cycle. He told the court that he had relocated to Mombasa and was in Mombasa at the time it is alleged the deceased was killed. He testified that the motor cycle was planted on him. He was not aware of how the motor cycle was recovered in Mombasa. His evidence regarding his stay in Mombasa was corroborated by DW2 James Karanja Gichini. The Appellant testified that PW4 lied in court when he testified that he was with deceased on the material night that the deceased was killed.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)” .

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

There are several issues that the Appellant raised on this appeal. This court will address each issue. The first issue is whether the Appellant’s right to fair trial was breached when he was not allowed to recall PW2 during trial before the first magistrate who heard the case and later when the convicting magistrate took over the proceedings. **Section 200(3)** of the **Criminal Procedure Code** grants an accused person the right to recall any witness where another magistrate takes over the proceedings from the one who previously heard the case. In the present appeal, the Appellant had on two previous occasions during the hearing before the first magistrate requested the trial court to have PW2 recalled for the purpose of being further cross-examined. The trial magistrate did not specifically reject the Appellant’s application. However, by the time the prosecution closed its case, PW2 had not been recalled to be further cross-examined. The Appellant had the opportunity to have this witness recalled when the convicting magistrate took over the proceedings. On 10th April 2013, he was asked by the convicting magistrate whether he wished to take advantage of **Section 200** of the **Criminal Procedure Code** to have any witness recalled. The Appellant told the court that he wished to have the case proceed from where the proceedings had reached. This court therefore holds that the Appellant is dishonest when he raises the issue of the recall of PW2 to be further cross-examined on the appeal when he passed the opportunity to do so when the convicting magistrate took over the proceedings. That ground of appeal lacks merit and is hereby dismissed.

The Appellant argued that the prosecution had not established its case on the charge of robbery with

violence contrary to **Section 296(2)** of the **Penal Code**. He submitted that he had been convicted on the basis of a defective charge. In particular, the Appellant argued that the prosecution had not adduced any evidence to connect him with the crime. On re-evaluation of the evidence adduced by the prosecution witnesses, it was clear to this court that no witness testified that he saw the Appellant rob the motor cycle from the deceased. There was no direct evidence. The prosecution relied on circumstantial evidence and the application of the doctrine of recent possession. Regarding circumstantial evidence, the Court of Appeal in **Sawe –Vs- Republic [2003] KLR 364** at page 372:

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

In the present appeal, the prosecution was required to adduce evidence that points to the Appellant as the only person who could have robbed the deceased of the motor cycle, and no one else. PW3 and PW4 testified that the Appellant was with the deceased on the night of 27th October 2011. PW4 was the last person to see the deceased with the Appellant. She testified that she saw the Appellant and the deceased ride off on the motor cycle. PW3 and PW4 knew the Appellant prior to the material day. The Appellant was not a stranger to them. The body of the deceased was recovered the following day dumped near Tigoni River. He had injuries consistent with being stabbed with a sharp object. The Appellant was nowhere to be seen. He could not be traced by his phone. The motor cycle which the deceased was riding on the material night was missing. PW7 received information that the motor cycle had been seen in Mushomoroni area in Mombasa. He sought the assistance of the OCS Nyali Police Station. PW5 testified that he arrested the Appellant with the motor cycle at Mushomoroni Bus Stage.

The issue for determination by this court is whether this evidence sufficiently connects the Appellant to the death of the deceased and the robbery of the motor cycle from him. In the present appeal, it was clear that the inculpatory evidence connects the Appellant to the robbery of the motor cycle from the deceased. He was the last person seen with the deceased on the material night. He was nowhere to be seen on the following day when the body of the deceased was recovered. The motor cycle that was robbed from the deceased was recovered from him. Although the Appellant denied that he was found in possession of the motor cycle, this court upon re-evaluation of the evidence adduced by the prosecution witnesses particularly PW5, is convinced that the said witness had no reason to adduce false evidence against the Appellant. He had no grudge against the Appellant. He was telling the truth. On the other hand, the Appellant’s testimony in his defence was tinged with self-interest. He was obviously adducing evidence in a bid to exonerate himself from the crime.

Further, if it is found that circumstantial evidence was not sufficient to connect the Appellant with the crime, the doctrine of recent possession finds him guilty. He was found in possession of the motor cycle so soon after the same had been robbed from the deceased. Taking into consideration the distance that the motor cycle was taken from Limuru to Mombasa (more than 500 kilometres), this court is of the considered view that the recovery of the said motor cycle five days after the robbery and the killing of the deceased is proximate and sufficiently recent to connect the Appellant to the crime (See **Malingi –vs- Republic [1989] KLR 225**). The Appellant did not give an explanation which could exonerate him from the presumption that he was the robber when he was found in possession of the suit motor cycle.

As regard to whether the prosecution established the elements of the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, this court holds that the prosecution was required to establish that the Appellant robbed the deceased and in the course of the robbery either wounded, beat, struck or used any personal violence to any person. In the present appeal, the prosecution established that the Appellant robbed the deceased of the motor cycle and in the course of the robbery fatally injured him.

The Appellant’s appeal lacks merit. His defence was justifiably dismissed by the trial court as self-

serving. It is hereby dismissed. The conviction and sentence of the Appellant is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF APRIL 2016

L. KIMARU

JUDGE