



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 65 OF 2013.

HILLARY ODARI ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from original conviction and sentence of G. Mmasi – Ag. SPM. in Criminal Case No. 275 of 2012 delivered on 5th April, 2013 at Vihiga.)

JUDGEMENT

Introduction.

1. The appellant HILLARY ODARI was charged together with two others with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that (1) HILLARY ODARI (2) NEWTONE NYALEIGU and (3) ALEX NAVULI ASILIGWA on the night of 10th/11th March, 2012 at Kigama sub location, Kivitu village of Vihiga District within Western Province, jointly with others not before court being armed with dangerous weapons namely jembe and pangas robbed WYCLIFFE KIPLIMO LELEI of his motor cycle registration No. KMCC 825 F make TVs Star red in colour valued at Ksh. 75,000/= and immediately before the time of such robbery killed the said WYCLIFFE KIPLIMO LELEI.

2. The trial court after hearing the case found the appellant guilty of the offence as charged, convicted and sentenced him to death. The other two accused persons were released for lack of independent evidence incriminating him.

The appeal.

3. Being aggrieved by the said judgment, the appellant filed this appeal on the following homemade grounds:-

- i. That the trial magistrate erred in both law and facts by convicting me without any direct circumstantial evidence;*
- ii. That the trial magistrate erred in both law and facts in arriving at a judgment relying on contradictory evidence;*
- iii. That the trial magistrate erred in both law and facts by failing to comply with section 169 (1) of the CPC and the manner in which she dismissed my defence was wanting;*

iv. That the trial magistrate erred in both law and when she failed to observe that the investigation done in the case was shoddy and lacked substance to sustain a conviction in a capital offence;

v. That the trial magistrate erred in both law and facts when she failed to observe that the prosecution was below the required standard in the absence of essential witnesses i.e. a Mr. Kennedy Alingo, the owner of the house where the motor bike was allegedly found;

vi. That the trial magistrate erred in both law and facts when she failed to put in mind the medical officer's report which indicated that the wound was from an animal bite and not from assault;

vii. That the trial magistrate erred in both law and facts when she failed to appreciate the submissions made by I, the appellant, the then accused after the prosecution had closed their case;

viii. That I wish to add more grounds on my petition if supplied with a certified copy of the trial proceedings and judgment.

He wants this appeal allowed, conviction quashed and sentence set aside.

Submissions.

4. The appellant filed written submissions in respect of his appeal. He submitted that the trial magistrate relied on mere allegations which were never proved and that he was not a tenant of the house where the deceased's motor cycle was recovered. He submits that the landlady of the said house confirmed that her tenant was one Kennedy who was not summoned to testify. He claims not to have been given time to prove that the trouser produced as evidence was his and that clothes do resemble.

5. Mr. Oroni from the office of the Director of Public Prosecution opposed the appeal. He relied on prosecution witnesses testimonies and stated that there was corroboration of the same. He further stated that conviction was proper and the defence did not shake the prosecution case.

6. This being a first appeal this courts duty is to look at the evidence on record afresh with a view of making its own decision in the matter as to whether the trial court's finding should be allowed to stand. In doing so this court will make allowance for the fact that it neither saw nor heard the witnesses who testified during the trial and therefore any issues touching on the demeanor of witness is best left to what the trial court observed. See the case of **PANDYA VS. REPUBLIC [1957] E.A. 336 at Pg. 337** where the duties of the 1st appellate court were well put. In determining this appeal, this court fully understands its duty.

7. This question as to the duty of the first appellate court, was answered in the cases See **Okeno vs. Republic 1972 E.A. 32 and Mwangi vs. Republic 2006 2KLR 28** where the court stated the duty of an appellate court on first appeal as follows:-

“An appellant on a first appeal is entitled to treat the evidence as a whole to be submitted to a fresh and exhaustive examination”.

The above position was enunciated in the case of Pandya vs. Republic where the court held that “an appellate court ought to treat the evidence as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expectaffirm a conviction on evidence that has been reviewed.”

8. In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is the function of a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

9. Thus this being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & another vs Republic**. The court citing **Okeno v. R** held:-

“An appellant on a first appeal is entitled to treat, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

The prosecution’s case.

10. The prosecution called a total of thirteen (13) witnesses to prove their case. The evidence was more circumstantial because none of them saw the accused directly committing the crime. Briefly from the evidence, the accused and his family was carried by the deceased from Koboyor to Shemakhokho area in Kakamega. The next day the deceased was nowhere to be traced. He (deceased) was later found murdered near a river. Investigations which were undertaken led to the motor cycle belonging to the deceased being recovered in a rental house which was occupied by the first accused. The 1st accused was also found wearing the deceased’s blue jeans trousers which was identified by the deceased’s brother and sister as the property of the deceased which he was wearing the day before his death. The deceased’s body was found near the river and it was naked.

11. PW1 who is the grandmother to the appellant testified that he saw the appellant with the deceased on 10th March, 2012 at about 6 p.m. and that the appellant went with him (deceased) to a funeral. Appellant went back to his grandmother’s house the next day in the morning but left telling the grandmother that he was seeing off his friend (deceased).

12. PW7 explained how she took lunch with her brother (the deceased) on the 10th March, 2012 at about 1.30 p.m. His brother told him that he was taking the accused and his wife to Kakamega. In the evening she called him but he was not picking up. She reported to the police at Kaboujoi that her brother was missing. She also called her uncle PW2 and the appellant’s mother PW5. She was later called only to be told that her brother had been murdered. She identified the clothing of the deceased and his motor cycle in court. Actually what links the accused to the death of the deceased was the fact that he was the last person seen with him, the motor cycle was recovered in a house where he slept in when visiting his grandmother not necessarily his house.

13. PW2, while doing his investigations managed to meet the accused in the presence of other people but the accused ran away. Although PW2 didn’t know the clothes the deceased wore on 10th March, 2012 he identified his (deceased’s) jeans trousers PMFI (2). Plaintiff exhibit 2. PW3 confirmed that the accused was wearing a T-shirt and jeans when he was arrested. He (PW3) saw the deceased and described his wounds and stated in his testimony that the body was without a trouser. PW4, the village elder informed the area chief of what he saw at the river i.e. the body of the deceased. A post mortem was conducted and the doctor produced the report as evidence (P. Exh. 3), the incident was investigated and evidence pointed to the accused.

Defence case.

14. The accused in his defence did not rebut any of the evidence by the prosecution. He claimed to have been arrested while on the road on a motor bike and he didn’t know why he was arrested. He didn’t call any witnesses in support of his claim.

15. The trial court in its judgment after considering the evidence concluded that the person who was ferried by the deceased was the 1st accused and he (accused) was found wearing the pair of blue jeans trousers which trouser the deceased was wearing the day he was murdered. The trial court also relied on the evidence by PW1 who saw the 1st accused with the deceased and later learnt that the deceased was found murdered the next day. The court relied also on the investigations that led to the recovery of the deceased's motor cycle. The court observed that the evidence against 1st accused was overwhelming and therefore found him guilty.

Determination.

16. After carefully reconsidering and evaluating the evidence afresh, I find that the prosecution case against the appellant was premised on circumstantial evidence. Before a court can rely on circumstantial evidence the principles stated in the court of Appeal in **ERICK ODHIAMBO OKUMU VS. REPUBLIC (2015) eKLR (Mombasa Criminal Appeal No. 84 of 2012** are proper to follow. It was held as follows:-

“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”

17. But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence.

18. In **Abanga alias Onyango vs. Republic Cr. App. No. 32 of 1990** the court tabulated the conditions as follows:-

“It is settle law that when a case rests entirely on circumstantial evidence, such evidence must satisfy the tests:

i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. those circumstances should be of a definite tendency unerringly pointing towards guilty of the accused;

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

See also **SAWE VS. REPUBLIC (2003) KLR 364** and **GMI VS. REPUBLIC CR. APP. NO. 308 OF 2011 NYERI**).

19. Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances which would weaken or destroy the inference of guilt see **TEPER VS. REPUBLIC [1952] ALL ER 480** and **MUSOKE VS. REPUBLIC [1958] E.A. 715**.

20. In **DHALAY SINGH VS. REPUBLIC CR. APP. NO. 10 OF 1997** this court reiterated this principle as follows:-

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt

and an accused is entitled to an acquittal.”

21. Applying these principles, this court notes that the deceased was with PW7 her sister on the 10th March, 2012 who he told that he had a customer who he was taking to Kakamega. PW1 the grandmother to the accused confirmed that the appellant ate supper in her home together with the deceased. They then left with the deceased. The appellant came back in the morning and left again claiming that he was seeing of the deceased. Her grandmother didn't know whether that morning the accused was in the company of the deceased or not. She (PW1) later learnt that the deceased died. PW2 saw the accused in the company of other people but the appellant ran away. From PW7's evidence the deceased's motor cycle was found in the house where the appellant used to sleep. None of the prosecution witness placed the appellant at the scene of the crime. No evidence was also brought of the appellant being armed with a dangerous or offensive weapon, or of using of violence or being in the company of other persons at the time of the alleged offence.

22. In as much as the above were not shown or proved what was proved was that the appellant was in the company of the deceased all along and that the deceased was found murdered by the river side. The deceased had no trousers on but the appellant was found wearing the deceased's pants. The deceased's motor cycle was also found in a house where appellant frequented. The appellant has not shown whether there were any other circumstances to prove otherwise. He didn't put a strong defence to sway the mind of the trial court.

23. The circumstances in this case were cogently established all pointing unerringly towards the guilt of the accused. The circumstances taken cumulatively form a chain so complete that even if one wants to think otherwise, it is actually very difficult. All evidence point to the appellant as having committed the crime and to no one else.

24. Having come to that conclusion, this court finds the appeal to have no merit. The same is dismissed.

SIGNED, DATED and DELIVERED at KAKAMEGA this 10TH day of NOVEMBER, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....**In person.....for the Appellant.**

.....**Ng'etichfor the Respondent.**

.....**Anunda Court Assistant.**