



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRA NO.128 & 131 OF 2011

(Appeal from the sentence and conviction by Hon. D. Nyambu in Malindi CM Cr. No.1768 of 2009)

MWALIMU WASI KALUME 1ST APPELLANT

AMINI SAIDI KIBAO 2ND APPELLANT

VRS

REPUBLIC..... RESPONDENT

JUDGMENT

The two appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that the appellants on the 9th December, 2009 at Timboni Village, in Malindi District within Coast Province while armed with offensive weapons namely iron bar, jointly robbed Alex Katana Jackson of a motor cycle Bajaj registration number KMCF 158A valued at ksh.80,000/- and immediately after the time of such robbery killed the said Alex Katana Jackson.

The two appellants were convicted of the charge and sentenced to suffer death. The grounds of appeal for the 1st appellant Mwalimu Wasi Kalume are:

- a) That the charge sheet was defective
- b) The conviction was based on circumstantial evidence.
- c) None of the witnesses saw him committing the crime.
- d) The sentence is harsh
- e) The conviction was also based on the evidence of his co-accused which is not admissible in law.
- f) The case was not proved beyond reasonable doubt.
- g) That nothing was recovered from him.
- h) That his defence was not considered.

The appellant filed written submissions in support of his appeal and relied on those submissions. The appellant contended that he was arrested three months after the incident. The circumstantial evidence did not point to his guilt. The lady (PW3) who allegedly saw him with the motor bike did not indicate the registration number and colour of the motor bike. She also testified that she could not identify the person who ran away. PW7 who claimed to have seen the appellant with the deceased was not present when the appellant was arrested. His names were not given to the police after the victim had disappeared. The trial court relied on the evidence of his co-accused which was not admissible in law. There was no evidence of identification and only PW7 purported to have identified him. The trial magistrate ought to have warned herself on the dangers of relying on a single identifying witness. The evidence was not up to the required standard.

The grounds of appeal for the 2nd appellant Amani Saidi Kibao are:-

- a) That the sentence is harsh yet the charge was defective.
- b) The witnesses were not straight forward and they disowned their own statements.
- c) The conviction is unsafe as the evidence was contradictory and the investigations were shoddy.
- d) The trial court disregarded his sworn defence.
- e) The conviction was based on the allegations of recent possession yet the evidence was insufficient.
- f) The burden of proof was shifted.

The 2nd appellant filed written submissions and entirely relied on them. He contends that his arresting officer did not testify. It is submitted that the trial court found that the appellant was not seen robbing or killing the deceased by any of the witnesses. The evidence was purely circumstantial and reliance was made on the doctrine of recent possession. The appellant maintains that if he was arrested with the motor cycle why was he released by the police yet the motorcycle was suspected to have been stolen. The arresting officer testified that he did not arrest him with anything. The circumstances of the case did not point to the appellant's guilt.

Mr. Nyongesa, state counsel, opposed the appeal. Counsel submitted that the evidence was consistent and the charge was proved. The doctrine of recent possession applied. The deceased was robbed of his motor cycle and the two appellants were seen being carried by the deceased who was a motor cycle operator. The stolen motor cycle was found in possession of the 1st appellant, Mwalimu Wasi Kalume. The 2nd appellant gave his name as that of the deceased when he was arrested.

Being the 1st court to deal with the appeal, it is our duty to evaluate the evidence before the trial court and make our own decision taking into account the fact that we did not see the witnesses who testified. **Alfred Kalume** was PW1. On 10/12/2009, he was informed by Zawadi Mkungu that the deceased had not been seen from the previous day when he was seen with the two appellants. Zawadi is a brother to the deceased. PW1 reported the matter at the Watamu Police Station. The same day at about 2.00 p.m, PW1 got information that the 2nd appellant had been seen at Timboni Area. The 2nd appellant was taken to Watamu Police Station and PW1 saw him being interrogated by the police. The appellant told the police that he had alighted at Gede and the deceased went with the 1st appellant. On 11/12/2009, bodaboda operators informed the police that the motor cycle had been seen at Ganze. They went with the police and the 2nd appellant. They found the motor cycle. The 2nd appellant alleged that the motor cycle was his and he was released to go and get the log book. On 15/12/2009, they were still looking for the deceased and they went to Ganze with the 2nd appellant in the company of the police. The 2nd appellant took them to a bush and the area chief managed to assist in the recovery of the deceased's body that was rotting. PW1, managed to identify the deceased by his trouser. PW1 knew both appellants who are his neighbours. The 1st appellant was later arrested at Mtwapwa.

PW2, Edward Kalama Gona, informed the court that on the 15/12/2009, he got information that the body of a deceased person had been seen by a man who was grazing his cattle. He is the assistant chief of Mwafula sub-location. He was taken to the area and found the deceased's body in a cave. The body was naked and there was a pair of trouser. The body had started decomposing. He informed the police from Watamu who went to collect the body. **PW3, Fatuma Ndere**, testified that on the 9/12/2009 at about 4.00 p.m she was walking along the road when she saw two people pushing a motor cycle. One of them ran away. She followed the one who remained with the motor cycle and on the way they met Kahindi (PW8). Kahindi escorted the man who had the motor cycle to the village elder and then to the District Officer. The man who had the motor cycle was the 2nd appellant who was wearing a black t-shirt. The witness was recalled and she reiterated that evidence.

PW4, APC Kennedy Isanda Chweya, was based at the Kikambala District Officer's (D.O) Office. On the 25/3/2010 at about 7.30 a.m. he saw a group of about 20 people who were making noise and intending to lynch someone. He went there and rescued the man who was the 1st appellant. The crowd told him that the 1st appellant was a suspect of murder and robbery of a motor cycle. One Peter Kazungu, a relative of the deceased, was with the crowd. **PW5 APC Hussein** was based at the Ganze District Headquarters. On the 9/12/2009, he was called by the chief of Kauma Location and informed that they had arrested the suspect who was accused of having robbed a motor cycle. They went there and arrested the suspect. They took the motor cycle registration number KMCF 158A, a blue Bajaj Boxer. The person they arrested was the 2nd appellant. He informed them that the motor cycle belonged to his uncle who was at Watamu. The 2nd appellant was released on the following day so that he could go and collect the documents and take his uncle to the police station. At about 2.00 p.m the 2nd appellant was taken to Ganze under the escort of police officers from Watamu Police Station. PW5 did not talk to him. At that time, the Ganze police did not know that someone had been robbed and killed and that is why the 2nd appellant was released.

PW6, PC Charles Ruto was based at the Watamu Police Station. He investigated the case. He testified that a report was made at the station on the 10/12/2009 at about 10.30 a.m that the deceased had disappeared. The 2nd appellant was taken to the station as a suspect. The 1st appellant informed him that he was on the motor cycle but had alighted at Gede. The following day PW6 received a report that a motor cycle had been detained at Ganze and it was the same motor cycle that was being used by the deceased. He went to Ganze and went to the D.O's office. He was informed by the D.O that the 2nd appellant had identified himself to them as Alex, the deceased. They had gone with the 2nd appellant to Ganze. They took the motorcycle and returned to Watamu Police Station with the 2nd appellant. The deceased's body was recovered on the 15/12/2009. It is the evidence of PW6 that it is the 2nd appellant who took them to Ganze to a bushy area where the body was eventually found. The body was found about 300 metres from where the 2nd appellant had told them to stop. The body had started decomposing and the relatives identified it by his trouser. He charged the 2nd appellant with the offence of robbery with violence. The 1st appellant was arrested at Kikambala on 25/3/2010 and was charged with the offence of robbery with violence. The cases were consolidated.

PW7, Juma Mzungu, informed the court that, he was a milk vendor at Timboni. On 9/12/2009 at about 10.00 a.m he was at Timboni selling his milk when he saw the deceased and the two appellants on a motorcycle. The deceased was riding the motorcycle and proceeded towards Gede. He knew the three of them. The 1st appellant is his uncle's son while the 2nd appellant is his neighbour. The deceased was his nephew. The following day he was informed by one Shaban that the deceased had not been seen. They reported the matter at the police station. They went to the house of the 2nd appellant who informed them that he had been dropped at Gede and the deceased left with the 1st appellant. They went with the 2nd appellant to the police station where he was locked in. They got information that the motorcycle had been seized at Ganze. They went to Ganze with the police and other motorcycle riders together with the 2nd appellant. They learnt that the 2nd appellant had slept at Ganze. He recognised the motorcycle as the one that used to be operated by the deceased. It is his further evidence that when he saw the three people riding on the motorcycle, the 1st appellant waved at him.

PW8, Kahindi Kalume testified that on the 9/12/2009 while on his way home, he met two ladies. They informed him that they had seen a man pushing a motorcycle. He followed the man whom he identified as the 2nd appellant. He also identified the blue motorcycle. The 2nd appellant informed him that he was from Watamu and he had taken a passenger to Ganze. He took the 2nd appellant to the chief's office as he suspected him since there was a series of crime in the area. The Administration police officers at the chief's office attended to the 2nd appellant. **PW9, PC Peter Okal** was based at Watamu Police Station. A report was made at the station about a missing person on 10/12/2009. On the same day at about 3.30 p.m, the reportee returned at the station in the company of the 2nd appellant. He was told that the missing person was a motorcycle operator and the 2nd appellant was on board the motorcycle. The 2nd appellant informed him that he had alighted at Gede while the rider and the other person left. He booked the 2nd appellant in the cells. On 11/12/2009, they got information that the motor cycle the missing person was riding had been seen at Ganze. They left for Ganze with the 2nd appellant and went to the Ganze AP Camp. At the camp, they were informed that the 2nd appellant was seen pushing the motorcycle and had been taken to the chief's camp where he introduced himself as Alex Katana, the deceased. He had claimed that the motor cycle belonged to his father and he was released to go and collect the documents for the motorcycle. On 15/12/2009, the 2nd appellant took them to Ganze up to the area where the deceased had been killed. They combed the area and could smell a rotten body but could not see the body. His colleague Chief Inspector Rotich called the area chief who assisted in recovering the body. The appellants were later charged with the offence.

PW10, Cpl Robinson Maina, was based at the Malindi scene of crime office. On the 7/6/2010 he took photographs of the stolen motorcycle registration no.KMCF 158 A, blue Bajaj. **PW11, Dr. Faraj Tahia**, was based at the Kilifi District Hospital. He produced a post mortem report conducted by his colleague Dr. Ojwang who had left the hospital. The report was that of Alex Jackson Katana and was conducted on 17/12/2009. According to the report, there was fracture of the deceased's neck. The cause of death was fracture of the neck.

The appellants' were put on their respective defences. In his sworn testimony, the 1st appellant Mwalimu Wasi Kalume stated that on the 25/3/2010, he went to his place of work at a construction site. One person asked him whether he was aware that he had been implicated in the death of the deceased. He informed him that he was not aware and that he had seen the deceased about one year before. The person asked him to accompany him to Watamu Police Station but he resisted. The person screamed thief! thief! and people charged at him. They assaulted him and he was rescued by AP officers from Kanamai AP Camp. He was taken to the camp and was later charged with the offence. He does not know the 2nd appellant.

In his sworn defence, the 2nd appellant Amani Saidi Kibao stated that on the 10/12/2009 at about 3.00 p.m, **Juma Mzungu (PW7)** went to his home with another person alleging that they had seen him with Alex who had not returned home. He told them that he had alighted at Gede and went to a bar. They asked him to go and book a report at the Watamu Police Station. At the station, PW7 and his colleagues talked to the police separately and he was booked in the cells. He stayed there for 3 days and was later charged with the offence which he knows nothing about. He was a passenger on the motorcycle on 9/12/2009 and he was alone. He knows nothing about the 1st appellant.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The prosecution evidence does prove that the deceased was robbed of motor cycle registration number KMCF 158 A and subsequently killed. On 9/12/2009, the deceased was seen by PW7 Juma Mzungu riding the motor cycle while carrying the two appellants. It was about 10.00 a.m. the evidence against the 1st appellant is provided by PW7. He saw the appellant being carried by the deceased on a motor bike. PW7 was at Timboni and the three passed him while heading towards Gede area. It was his evidence that the 1st appellant even waved at him. There is the evidence of **PW3, Fatuma Ndere** who testified that she saw two people pushing a motor cycle. It was about 4.00 p.m. She was walking along the road in Ganze. One of the two men ran away. The one who remained informed her that the one who had ran away was afraid. It is her evidence that she asked the one who remained many questions but he did not answer. She did not identify the the one who ran away.

It is true that there is no witness who saw the 1st appellant kill the deceased. In his defence, the appellant explained how he was arrested. The prosecution evidence does confirm that the appellant was seen riding on a motor cycle with the deceased at about 10.00 a.m. the evidence further establishes that the 2nd appellant was seen pushing the same motor cycle at about 4.00 p.m in Ganze. This is a difference of about six (6) hours. PW3 saw a second person who ran away. Given the evidence on record, we do find that it was the 1st appellant who ran away when he saw PW3. The defence evidence does not prove that the 1st appellant was not with the deceased. The appellant was with the deceased. The victim's body was recovered in Ganze area. PW2, the area chief confirmed that the body was recovered in Ganze. According to PW2, the body was recovered near Njora River. According to PW6, they were taken to a bushy area by the 2nd appellant.

From the evidence on record, it is our finding that the 1st appellant robbed the deceased of his motor cycle. He was seen on the morning of 9/12/2012 with the deceased. The deceased must have been killed before 4.00 p.m when PW3 saw the 2nd appellant pushing the deceased's motor cycle. The fact that the appellant was arrested after three months does not disprove the evidence that he was one of those people who killed the deceased. The 2nd appellant was interrogated and informed PW1, PW7 and the police that he purportedly alighted at Gede. Although that evidence is of no value and cannot be the basis of the conviction, the prosecution evidence in totality points at the accused's guilt. We do find that the appeal by the 1st appellant lacks merit and is disallowed.

With regard to the 2nd appellant, the prosecution evidence is that he was also seen by PW7 riding on the deceased's motor cycle. There is the evidence of PW3 who saw the 2nd appellant pushing the deceased's motor cycle. PW5, APC Hussein arrested the 2nd appellant after he had been taken to the D.O's office with the motor bike. The appellant was released by the police as by that time there was no information about the robbery. The appellant's contention that if he was a robber why was he then released by the police cannot stand. He was released so that he could obtain the ownership documents for the motor cycle.

The prosecution evidence is consistent. The incident occurred on 9/12/2012. It was reported to the Watamu Police Station on 10/12/2012. The 2nd appellant was arrested at Ganze and put in the cells. He was released the following day 10/12/2012. He went back home that day and PW7 found him in his house. They went with him to the Watamu Police Station where the appellant was put in the cells. On the 3rd day, 11/12/2012, the police in Watamu got information about the recovery of the motor cycle. They went to Ganze with the 2nd appellant. There is the evidence that the 2nd appellant used the name of the deceased "**Alex**" when he was arrested in Ganze.

There is the evidence of PW6 that the 2nd appellant took them to a bushy area in Ganze. He stopped them at about 300 metres from where the body was recovered. PW2 had been informed about the deceased's body and led the police to the exact place where the body was. According to **PW8, Kahindi Kalume**, he saw the appellant pushing the motor cycle which turned out to be the one operated by the deceased. That evidence is in line with that of **PW5, APC Hussein** who arrested the appellant when he was taken at their office. It is the evidence of **PW9, P. C Peter Okal** that it is the appellant who took them to Ganze up to the area where the deceased's body was recovered.

The appellant's evidence is that he had alighted at Gede. That cannot be true as he was seen by PW3, PW5 and PW8 in Ganze with the deceased's motor cycle. This was at around 4.00 p.m. The evidence on record, although circumstantial, does point to the appellant's guilt. The appellant did participate in the robbery of the deceased. He was found pushing the deceased's motor cycle.

The charge sheet was not defective. The sentence is lawful. We do find that the two appeals lack merit and the same are disallowed.

Dated, delivered and signed at Malindi this 5th day of November, 2015.

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SAID J. CHITEMBWE

JUDGE

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M. MUYA

JUDGE