



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEALS NOS. 63 & 64 OF 2013 (CONSOLIDATED)

KASSIM OLOO JUMA.....1ST APPELLANT

DOMNIC OMONDI OBARA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 1605 of 2010 of the Chief Magistrate's Court at Siaya – R.B. Ngetich- Ag. CM)

J U D G M E N T

1). The appellants were among five accused who were charged before the acting chief magistrate at Siaya with robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were that on 9-11-2010 at Pal Pal village along Ndere - Ambira road in Siaya District within Siaya County, while armed with firearms they jointly robbed Joel Lochukut Akwe (the deceased) of Kshs. 270,000/= and at or immediately before or immediately after the time of such robbery killed the deceased. They were convicted and each sentenced to death. They were the 5th and 2nd accused, respectively. The other accused were acquitted of the charge. This appeal resulted from the appellants' dissatisfaction with the conviction and sentence. They prosecuted this appeal in person. The state was represented by Mr. Mongare who supported the conviction and sentence.

2). The undisputed prosecution evidence was that on 9-11-2010 at about 7 p.m the deceased was driving motor vehicle registration number KBM 422H canter between Ndere and Ugunja. He had a turnboy by name Charles Kiplangat Koech (PW7). They had sold agrovet drugs worth Kshs. 270,000/= and had kept the money in the dashboard. They were employees of Dr. Stanley Kiptoo Tarus (PW5), a veterinary doctor in Kitale where he operated an agrovet shop. Suddenly, a gunshot rung and the window glasses fell. PW7 saw two motor bikes in front of the vehicle. Each bike had two people. One of the people had a jacket and cap covering the head. He produced a gun. PW7 asked the deceased to stop. The deceased, however, said he was going to run over these attackers. PW7 ran out of the vehicle and went to hide in the bush. While there he heard over twenty gunshots. He used his cell phone to contact the OCS Ugunja police station and to report the attack. After about 40 minutes the OCS came with police officers. PW7 came out of his hiding. He found the deceased's body in a pool of blood outside the vehicle. The body was removed to Siaya District Hospital.

3). The post mortem conducted on the body of the deceased on 10-11-2010 found that he had been shot in the head. The occipital bone and cervical vertebrae were fractured. There was massive blood loss. Death had resulted from the injuries. Exhibit 1 refers.

4). PW7 did not identify the attackers, and the appellants were not found with anything to connect them with the attack. They were, however, convicted on the basis of a confession made to Supt. Kariuki Ngugi (PW2) (who was the DCIO at Siaya CID office) by Morris Odhiambo Muhasa who was the 4th accused in the trial. In the confession, the 4th accused stated that he was a boda boda rider who on this day was hired by the 2nd appellant to take him to Ndere. They reached the market where waited for about 1^{1/2} hours for the appellant's friend. A motor cycle came with a passenger. The appellant told the accused that the passenger was the friend he was expecting. He asked that they follow the motor bike. They followed it upto Pal Pal. A lorry had passed them but was driving behind the other motor bike. Suddenly there were gunshots. The 2nd appellant asked the accused to stop. He went towards the lorry as gunshots rung from the direction. After a while the other motor bike came back and passed going in the direction of Ndere. The 2nd appellant came and asked the accused to turn and follow the motor bike. The accused asked what was happening but got no answer. They reached a petrol station next to Mwisho Mwisho. The appellant asked the accused if he had sufficient fuel. He did not have. The appellant gave him fuel and he refueled. They went towards town. The appellant booked him in a hotel and bought him supper. He gave him Kshs. 4000/= for having ridden him. He (the appellant) asked him not to report the shooting to police. The accused recalled that the man who had shot was the 1st appellant. He had a jacket and a cap which were covering his face. He heard the appellant exclaim "what has Kassim done?" in reference to him. He (the appellant) did not know that someone had been killed. The Kassim he was referring to was the 1st appellant.

5). The trial court conducted a trial-within-a trial before it admitted the confession. The 4th accused denied making the statement or signing it. He repealed this in a sworn defence.

6). The appellants made sworn statement each to deny any participation in the commission of the offence.

7). On basis of the confession, the trial court found the 4th accused guilty of being an accessory after the fact of robbery with violence under sections 396 (1) and 397 of the Penal Code and sentenced him to three years in jail.

8). We wish to reiterate that, other than the confession by the 4th accused, there was no other evidence linking the appellants to the violent robbery. The confession was repudiated by the accused. The confession was therefore evidence of the weakest kind. Without corroboration it ought not to have been relied on (**Kinyua & Another -VS- Republic [1980] KLR 141**). In any case, the accused was not a person of any integrity, if the confession was to be believed. He saw an offence being committed. A gun was used. He was paid to keep quiet, when he had a civic responsibility to report the crime. Can he be the basis for the conviction of the appellants? He was at best an accomplice, and for that reason his evidence required corroboration (**Okumu -VS- Republic [1985] KLR 803**).

9). We appreciate that in an appropriate case, where there is other evidence connecting the accused with the offence charged, a confession of a co-accused can provide corroboration if it is sufficient to justify the maker's conviction. It may be taken into account against the maker's co-accused even if it is retracted and repudiated (**Anyuma S/O Omolo & Another -VS- Republic [1953] 20 EACA 218**). We have found that the repudiated confession was the only evidence available.

10). In conclusion, we find that the appellants were convicted on insufficient evidence. We order the conviction quashed and the sentence set aside. The appellants shall be set at liberty forthwith unless they are otherwise lawfully held.

Dated and signed and delivered at Kisumu this 14th day of July, 2014.

A. O. MUCHELULE

H.K. CHEMITEI

JUDGE

JUDGE