



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO. 130 OF 2013

TWALIB RAMADHAN.....1ST APPELLANT

ALFRED OTSIMI.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Appeal against conviction and judgment from the original Criminal Case No.2133 of 2012

at the Chief Magistrate's Court Kakamega [P.A. ACHIENG, Ag. SRM]

J U D G M E N T

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 17.10.2012 at Shirere sub-location, Bukhungu Location within Kakamega Central District in Western Province, jointly with others not before court, robbed EUGINE ADOLI of his motorcycle Registration number KMCW 783M make TVS Star Red in Colour valued at KShs.85,000/= and immediately before the time of such robbery used actual violence to the said EUGINE ADOLI.*

The appellants were convicted and sentenced to death. the grounds of appeal which are similar for both appellants are that they did not plead guilty to the charge, the charge was defective, that they forced to confess by the police, no exhibit was found with the 1st appellant, the sentence imposed is harsh, inhuman and unconstitutional, the evidence was not corroborated, no identification parade was conducted, no medical record was produced to show that the complainant was injured and their alibi defences were not considered.

During the hearing of the appeal both appellants filed written submissions which mainly expound on the above grounds. No identification parade was conducted. The complainant alleged he knew the 1st appellant but when he went there he said he did not know him, no physical features of the 1st appellant was given to the police. The Administration police officers from Shinyalu where the report was made were not called to testify. No log book or receipts for the stolen motorcycle were produced. The same submissions were made by the 2nd appellant. It is further contended that the incident occurred at midday and the first report was produced but did not have the appellant's names yet the complainant alleged to have known them. No other witness saw the incident happening.

Miss Omondi, State Counsel, opposed the appeal. Counsel submitted that the charge was proper. The

appellants stole the motorcycle after having been carried by the complainant. The motorcycle was recovered from the 2nd appellant. PW5 saw the 2nd appellant parking the motorcycle at a hostel.

The record of the trial court shows that ten witnesses testified for the prosecution. The prosecution case was that the two appellants hired the operator of the motorcycle during the day and were taken to Kakamega General Hospital. They later asked to be taken to National Housing area and on the way they snatched the keys and dumped the operator. Investigations were conducted and the motorcycle was recovered the following day. **PW1 EUGINE ADOLI** was the operator of the motorcycle registration number KMCW 783M. On the 17.10.2012 at about 12.30 p.m. the 1st appellant asked him to take him to Kakamega from Shinyalu. After a short distance the 2nd appellant joined him. They went up to Somken and the 1st appellant asked him if he could allow him to ride the motorcycle but he refused. They then asked to be taken to Provincial General Hospital which he did and they agreed on the fees. Thereafter they asked to be taken to National Housing and on the way the 1st appellant tried to come out of the motorcycle and they fell down. The 2nd appellant held on the ground the complainant while the 1st appellant started riding the motorcycle. The 2nd appellant ran and boarded it and they left.

The complainant called his friends and the matter was reported at the Shinyalu AP camp. They went to the 1st appellant's house and PW1 told the police he did not know him. They went again a second time and the complainant identified him. The police assaulted him and he said that the 2nd appellant was living at Shikhambi area. They took the 1st appellant to the police station. The following day the police took the motorcycle to the station in the company of the 2nd appellant.

PW2 ROBERT IKOCHELI OTWONGA was the owner of the motorcycle. He was informed about the theft of the motorcycle while he was in Nairobi. He came to Kakamega on 18.10.2012 and found that the motorcycle had been recovered. **PW3 EUTYCHUS CHITAYI AGWEYU** is also a motorcycle rider. He had given the motorcycle to PW1 to operate. PW1 informed him about the theft of the motorcycle and they found him on the road crying. He told them that the motorcycle had been snatched from him. They conducted investigations and the following day he found the motorcycle had been recovered and taken to Kakamega police station. **PW4 JAMES ASUNZA KHACHINA** testified that on the 18.10.2012 he had gone to Mama Grace's kiosk for breakfast. He saw police officers with the 2nd appellant. They arrested him together with Grace and himself and were taken to the police. He later learnt that the 2nd appellant had stolen the motorcycle.

PW5 BENSON OMINGO LUTOMIA was a student at Sigalagala Polytechnic. On the 17.10.2012 at about 12.30 p.m. the 2nd appellant called him and informed him that he had taken a customer at Kefinco estate but the motorcycle had ran out of fuel. He asked him if he could keep the motorcycle at the hostels. He went to the hostel at about 3.00 p.m. and found the motorcycle had been parked. On the 18.10.2012 in the morning he received a call from the police enquiring about the motorcycle. He went to the police station and then showed them the motorcycle. He also took the police to Shikhambi area where they found the 2nd appellant. **PW6 EDGAR WERE SHEM** is a student at MasindeMuliro University. He lives at Kefinco estate. The 2nd appellant is their caretaker at the residence and they call him "baba". He found the motorcycle and he was told that it was the 2nd appellant who had left it. The police went there looking for the motorcycle and the appellant. They went to Shikhambi area on 18.10.2012 and found the 2nd appellant who was arrested. **PW7 GRACE BOSIBORI MAISIBA** was preparing samosas at her kiosk when the police went there and she was arrested together with other people. She was taken to the police station but she was later discharged. **PW8 MONICA MUTHONI NDUNGU** is the Deputy Principal of Bukhaywa Secondary School. On the 17.10.2012 at about 10.00 p.m. she got a call from a teacher informing her that the police were looking for the 2nd appellant in connection with a stolen motorbike. She called the 2nd appellant and asked him about the motorbike. The 2nd appellant was later arrested and charged with the offence. She had employed the 2nd appellant for a period of two years.

PW9 PC SAMSON BOR was attached at the Kakamega police station. The report was made at the station and on 18.10.2012 they went to the 2nd appellant's place at Shikhambi where they arrested the 2nd

appellant. **PW10 PC MICHAEL KIPRONO ROTICH** is also based at the Kakamega police station. He investigated the matter and was informed that the appellants had snatched the motorbike from PW1. Investigations were done and the appellants were arrested and charged with the offence.

The appellants were put on their defence. The 1st appellant **TWALIB RAMADHAN** testified that he was a Form II student at Serenare High School. On the 17.10.2012 at about 2.30 p.m. he saw the motorcycle at their home with three people. He had not left home that day. The complainant went there and he did not identify him. He was told to accompany the APs to the camp which he did and on 18.10.2012 his finger prints were taken and later charged with the offence. The 2nd appellant **ALFRED OTSIMI** testified that he is a caretaker at the home of **GEORGE LUTOMIA**. On the 18.10.2012 he was preparing tea when a neighbor by the name Grace told them that the police were there. They were arrested and taken to the police station. Some people paid some money and were released while he was charged with the offence.

The main issue for determination is whether the appellant robbed the complainant of the motorcycle. According to the evidence on record it is clear that the manner in which the motorcycle was taken was not violent. According to the investigating officer as well as the complainant himself and PW3, the motorcycle was simply snatched from the complainant. We do find that the ingredients of robbery with violence were not satisfied. This was a simple robbery. The complainant was not threatened neither was he attacked. No medical evidence was produced. The evidence shows that the motorcycle was recovered with the 2nd appellant. It is also clear that it is the 1st appellant who mentioned the 2nd appellant. The evidence of confession by the appellants was irrelevant as it was not lawfully taken. Since the 1st appellant mentioned the 2nd appellant and the motorcycle was found with the 2nd appellant we do find that it is the two appellants who snatched the motorcycle from the complainant. The incident occurred on the 17.10.2012 and the recovery was made the following day. Several witnesses saw the 2nd appellant with the motorcycle.

Given the evidence on record I do find that the case of robbery with violence was not proved. However, the prosecution did prove that the appellants robbed the complainant of the motorcycle. We do find the appellants guilty of the offence of robbery contrary to section 296 of the Penal Code and they shall be convicted of the same. The 1st appellant alleged that he was a Form II student but the court did not interrogate that issue. The 2nd appellant did not indicate his age. The appellants were convicted on the 11.7.2013. They have been in custody for about one year. We do set aside the death sentence and replace it with a term of imprisonment of **three (3) years** from the date of conviction. Each of the appellants shall serve three years imprisonment from the date of conviction.

Delivered, dated and signed at Kakamega this 8th day of October 2014

SAID J. CHITEMBWE

GEORGE DULU

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