IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 5 OF 2018

BETWEEN

WILSON NJOROGE KANGATUA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kajiado (Nyakundi, J.) dated 14th October, 2016 in **H.C. CR.A. No. 2 of 2015)**

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JUDGMENT OF THE COURT

The appellant, **Wilson Njoroge Kangatua**, and the deceased (**James Kinyanjui Murange**) were cousins who resided in the same house in Kitengela in the then Kajiado District, the deceased having invited the appellant to stay with him. The deceased worked at a petrol station in that town and he owned a motor vehicle and two motor cycles which were used as taxis and they were driven by people he employed in that regard. According to the evidence led by the prosecution the appellant with others conspired to steal the motor vehicle and one of the motor cycles and this is why they killed the deceased on 16th June, 2010.

The appellant with another (who was acquitted at the trial) were arraigned before the Magistrate's Court at Kajiado and charged on Count 1 with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** particulars being that on 16th day of June, 2010 at Kitengela township with others not before court while armed with dangerous weapons namely a pistol they robbed the deceased of a motor vehicle registration number **KAN 542G** valued at **Kshs.300,000** and immediately after such robbery they killed the deceased.

On the second count the appellant with the other were charged with the offence of stealing a motor cycle particulars being that between 17th and 19th June 2010 at Kitengela township jointly with others not before court they stole motor bike registration number **KMCB 385H** make **Boxer** valued at **Kshs.80,000** the property of the deceased.

The appellant was convicted after a trial and was sentenced to death on the first count and to 5 years imprisonment on the second count, it being ordered that the sentence of 5 years imprisonment be suspended in view of the sentence in count 1. The appellant appealed against those findings at the High Court of Kenya at Kajiado. In a judgment delivered by **Nyakundi, J**., on 14th October 2016 the appeal was found to have no merit and dismissed.

This is a second appeal and our mandate is set out in **Section 361** of the **Criminal Procedure Code**, a mandate that has been the subject of this Court's pronouncements in various cases that have come before us. It was stated in the case of **M'Riungu vs Republic [1983] KLR 455** of that mandate as follows:

> ***" ...where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."***

We shall therefore in keeping with that mandate review the record to establish whether the two courts below carried out their mandates as required in law. The prosecution case was through the evidence of nine prosecution witnesses. **David Murunyo Kamau (PW1 – Kamau)** was a motorbike rider previously employed as such by the deceased. He was with the deceased in the morning of 16th June, 2010 when the deceased informed him that he (the deceased) was to travel to Thika that day and return to Kitengela in the evening. He called the deceased that night at about 11.30 p.m. when the deceased told him that he was on his way to Thika travelling in his motor vehicle **KAN 541G**. When

he called the deceased again at around midnight there was no answer as the call was diverted to voice mail. The next day he received a text message (SMS) from the deceased's mobile telephone to the effect that he should escort the appellant to one Mkono to collect a motorbike belonging to the deceased which the deceased had allegedly sold to the appellant. Further, that the deceased had been arrested for possession of a narcotic (bhang). The full text of the message was still on his phone line **No. 0725 982 976** as received from the deceased line **No. 0724 546 715** during the hearing before the trial magistrate and was read out to the Magistrate.

It was Kamau's further testimony that from 17th June, 2010 he mounted a search for the deceased in vain.

On 19th June, 2010 the appellant in company of another visited Kamau and enquired about the message Kamau had received on his phone. This visit resulted in Kamau escorting the appellant with the other person to the person called Mkono who, upon reading the SMS, released the deceased's motor bike to the appellant.

Harris Morianga (PW6 – Morianga), a farmer in Isinya, on 20th June, 2010, accompanied by his friend **Josephat Supeyo (PW7 – Supeyo)** went to Kitengela where they met the appellant who sold them a motorbike at Kshs.58,000. This is the same motorbike that the appellant had collected from Mkono and it belonged to the deceased. The appellant handed to Morianga the motorbike, its log book, a copy of the deceased's national identification card, a PIN certificate and the deceased's photograph. On 9th July, 2010 Morianga was summoned by CID, Kajiado, where he was told that the motorbike he had bought was a stolen one, its owner having been killed.

Morianga's version of events was confirmed by his friend Supeyo who added that upon asking the appellant to draw a sale agreement the appellant responded that there was no need for one as the original owner of the motorbike (the deceased) was in Kitengela and would facilitate transfer if that need arose.

Meanwhile Kamau had reported the deceased's disappearance to police. The body of the deceased had been found on 17th June, 2010 at a road side in Thika but the motor vehicle he had been driving was never found. The body was lying at Thika mortuary and it was not until 30th June, 2010 that Kamau and others identified the body as that of the deceased.

It was Kamau's further evidence that the appellant left Kitengela after selling the motorbike and was later arrested in Thika. Further:

> ***"I got the message on 17/6/10 at 1.45 p.m. He was allegedly found by the police on 17/6/10 at 8.00 a.m. The message was after he had been killed….."***

Norman Macharia Ngure (PW2-Macharia) was the owner of motor vehicle KAN 542G which the deceased was driving on the day he disappeared. He visited the deceased's house where he found the appellant who informed him that the deceased had been arrested in Thika for possession of bhang. He participated in the search for the deceased and later found his body at Thika mortuary. Meanwhile the appellant had left Kitengela for an unknown place and was later arrested in Thika.

Peter Kinyanjui (PW3 – Kinyanjui) was uncle to the deceased. On 19th June, 2010 he received a text message from the deceased's phone to the effect that the deceased was dead. He didn't know who was sending the message. He later identified the deceased's body at Thika mortuary.

P.C. David Cheruiyot (PW4) of **Kiruara Police Station** on 17th June, 2010 accompanied the **Officer Commanding Station** of that station after receiving a report that a body of a man had been found by a road side. Upon observing the scene he was of the opinion that the deceased had been killed elsewhere and the body dumped there as there was no sign of struggle. Photographs of the scene were taken and the body was taken to the mortuary. There was bleeding from the nose, mouth and eyes.

Cpl Eric Mugendi (PW5) of **Thika CID Scene of Crime** visited the scene and took photographs which he later processed, printed and produced in court as part of the prosecution evidence.

Cpl Onesmus Kyalo Kimeu (PW8) of **CID Kajiado** received a report of a missing person on 19th June, 2010. He investigated the case and confirmed factual events are related by prosecution witnesses. He produced various documents as exhibits in the case including a post-mortem report which he produced with no objection by counsel for the appellant. This post-mortem report which was signed by the Medical Officer, Thika Level 5 Hospital, stated that the cause of death of the deceased was severe head injury with fracture skull and subdural hematoma secondary to assault.

The last prosecution witness was **Superintendent Alavega Odengo (PW9 wrongly shown as PW8)** who took a confession statement from the appellant which he produced in court but as correctly conceded by the State Counsel at the hearing of this appeal, the High Court (on 1st appeal) misdirected itself in considering that confession statement as it was not taken in accordance with the law.

That was the case for the prosecution and the trial court, on consideration, found that there was a prima facie case which the appellant should answer. In a sworn statement the appellant stated that he was a green grocer in Huruma, Nairobi. Of the charges facing him he recalled that on 1st July, 2010 he was in Thika doing boda boda business when he relocated to Kitengela and continued with that business. In Kitengela he said:

> ***"… I was living with one young man called James Kinyanjui Murage who was doing a taxi business in Kitengela.***
>
> ***He had two motor bikes which he had hired out …."***

In further testimony he stated that on 10th June, 2010 the deceased offered him one of the motorbikes for sale and he (the appellant) offered

to buy it and paid a deposit. On 16th June, 2010 the deceased informed him that he was to take a customer to Thika and when he called the deceased later that night his phone was off. The next day he went to the man called Mkono and collected the deceased's motorbike from Mkono and, some days later, Moriango and Supeyo offered to buy the motorbike which he sold to them. He was arrested in Thika, transferred to Kitengela, released, and later, while at the office of the DCIO, Kajiado, on an unstated mission, he was arrested, tortured and forced to sign documents contents of which he did not know. He denied the two charges.

The trial magistrate found as a fact that the appellant and the deceased resided in the same house in Kitengela and that the two were together on the mission to Thika on 16th June, 2010. The trial magistrate disbelieved the appellant's testimony that the deceased had sold the motorbike to him as there was no evidence to back that allegation. The magistrate also found that the appellant used the deceased's phone to send a message to Kamau when the deceased was already dead; that he obtained the deceased's motorbike which he quickly sold and relocated from Kitengela to Thika; although the deceased was his cousin he was not bothered by the disappearance of the deceased. The High Court, on first appeal, re-evaluated the evidence and agreed with the findings by the trial magistrate.

There are five grounds of appeal taken by the appellant in Supplementary Memorandum of Appeal drawn for the appellant by his counsel, **K.A. Nyachoti** & **Company Advocates.** These grounds which were argued together at the hearing before us may be summarized thus: that the High Court erred in upholding the conviction of the appellant which was based on circumstantial evidence; that the High Court erred in finding that the appellant was at the murder scene when there was no evidence to that effect; that essential witnesses were not called; that the High Court did not re-evaluate the evidence, and, finally, that the High Court erred by relying on an SMS message purportedly sent from the mobile number **"… of the accused …."** and failed to re-evaluate the evidence to reach its own conclusion.

In submissions before us on 18th May, 2020 when we heard the appeal through a virtual Go-to-Meeting hearing due to the prevailing COVID-19 world pandemic, learned counsel for the appellant **Mr. Nyachoti** who had filed a list of authorities submitted that the High Court advanced theories that were not supported by the evidence. According to counsel the appellant was convicted on circumstantial evidence which was unreliable. Further, that the High Court erred by not holding that essential witnesses were not called. According to counsel the appellant received the SMS message but there was no evidence that it was the appellant who sent it. Further, that the appellant had bought the motorbike from the deceased and he had property in it and had a right to sell it.

In opposing the appeal learned **State Counsel Mr. Omirera** submitted that the appellant had special knowledge on robbery of the motor vehicle. Counsel wondered why the appellant, a relative of the deceased who resided with him did not join others in looking for the deceased after he had disappeared. Counsel further submitted that the appellant did not produce any agreement to show that he had purchased the motorbike; the appellant had an opportunity to call Mkono as his witness, and, on motive, the appellant wanted to steal the motor vehicle and the motorbike.

We have already indicated State Counsel's concession that the confession statement was wrongly considered.

Mr. Nyachoti in a rejoinder, submitted that there was doubt whether it was a case of robbery with violence or the offence of murder.

We have considered the whole record, the submissions made by both sides and the law and having done so these are our findings regarding this appeal.

There are concurrent findings of fact by the trial court and the High Court that the appellant and the deceased were cousins who resided in the same house in Kitengela, the deceased having been invited there by the appellant. It was also found as a fact that on the fateful day of 16th June, 2010 the deceased and the appellant left Kitengela for Thika in a car either owned by Macharia (PW2) or a man called Mugo. The deceased's body was found by the road side the following day and, according to post mortem report, the deceased had been hit on the head fracturing the skull.

Morianga testified that he was offered a motorbike by the appellant which he bought and the appellant handed to him a log book and other documents all belonging to the deceased. This was on 20th June, 2010, four days after the deceased left Kitengela for Thika and three days after the deceased's body was recovered in the early morning of 17th June, 2010 at a road side in Thika and then disappeared.

There was evidence that the appellant left Kitengela immediately after disposing of the deceased's motorbike and was later arrested in Thika.

All these circumstances pointed at no person other than the appellant who planned the killing of the deceased for the sole purpose of stealing the motor vehicle (this was not recovered) and the motorbike (which he sold to Morianga). He devised a scheme where, after killing the deceased and stealing the motor vehicle he used the deceased's mobile phone to send to his (appellant's) phone a message to the effect that he was authorized by the deceased to collect the deceased's motorbike then held by one Mkono. The SMS message was sent when the deceased was already dead and the body had been collected at a road side and taken to the mortuary. The appellant sold that motorbike four days after the deceased left Kitengela for Thika.

It has been held through a long line of judicial pronouncements by this Court and the predecessor to this Court that circumstantial evidence will sometimes be the best evidence – See the case of **Joan Chebichii Sawe v Republic [2003] eKLR** where it was held:

> ***"As we have already pointed out, the evidence in this case was entirely circumstantial. 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."***

Upon our own analysis both courts below reached the correct and concurrent conclusion that the circumstances established to the required

standard that the appellant robbed the deceased of the motor vehicle and in the process viciously attacked his own cousin inflicting fatal injuries on him. He dumped the body at a road side.

On the complaint that the High Court advanced its own theories we can see no merit in that ground of appeal. The judge carefully re-evaluated the evidence and reached correct conclusions thereon.

On alleged failure to call some witnesses it was held in the case of **Bukenya & Others v Uganda** (**1972**) **EA 549** that:

> ***"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

On the whole the witnesses called by the prosecution established the appellant's guilt to the required standards and the appeal on conviction is dismissed.

We note that the appellant prays in Supplementary Memorandum of Appeal that we set aside the conviction and quash the sentence. Counsel for the appellant did not address the issue of sentence in submissions before us but in view of the modern jurisprudence in Kenya after the holding by the Supreme Court in the case of **Francis Karioko Muruatetu & Others v Republic [2017] eKLR** where it was held that the mandatory nature of death sentence was unconstitutional, we should address the issue of sentence.

The appellant was sentenced to death and this was confirmed in the first appeal.

As we have shown the appellant and the deceased were cousins, the deceased being the younger of the two. It is the appellant who invited the deceased to stay with him in Kitengela. The deceased owned two motorbikes and either alone or with Mugo owned the motor vehicle stolen with violence. The appellant lured the deceased to accompany him to Thika where, whether alone or with others, he viciously attacked the deceased, killing him and dumping his body by the road side. He stole the motor vehicle and, a few days later, sold the deceased's motorbike after which he disappeared. We find the attack on the deceased to have been unprovoked.

The circumstances like here where the elder of two cousins attacks the younger with the sole purpose of robbery and in the process inflicts fatal injuries called for the sentence of death awarded to the appellant.

The appeal has no merit and we dismiss it accordingly.

Dated and delivered at Nairobi this 25th Day of September, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR