



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJA)

CRIMINAL APPEAL NO. 29 OF 2017

BETWEEN

JOSEPH MUKHWANA LINGODO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Conviction, Judgment and Order of the High Court of Kenya at Eldoret (*J.R. Karanja & G. K. Kimondo, JJ.*) dated 18th November, 2014

in

H.C. Cr. A. No. 84 OF 2016)

JUDGMENT OF THE COURT

[1] The appellant **Joseph Mukhwana Lingodo** and one **Yusuf Amani Owino** were convicted by the Principal Magistrate's Court at Kitale for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** and each sentenced to death. They appealed to the High Court against conviction and sentence. The appellant's appeal was dismissed in its entirety. However, the appeal of **Yusuf Amani Owino** was allowed, conviction quashed and sentence set aside. The appellant now appeals against the judgment of the High Court dismissing his appeal.

[2] The particulars of the charge were that on 11th November 2007 at Kitale Township, the appellant; Yusuf Amani Owino jointly with others not before the court while armed with dangerous weapons namely a pistol, knife and iron bars robbed **George Njoroge Ngugi** of Motor vehicle registration No. KAP 353E Toyota E91 valued at Shs. 360,000/- and an Equity ATM Card No. 62785100330119909 and at or immediately before or after the time of such robbery killed the said **George Njoroge Ngugi (deceased)**.

The prosecution called seven (7) witnesses namely; **Obadia Mburu Ngugi** (PW1) **Mary Wanjiru** (PW2), **George Maloba** (PW3) **Joseph Shikuku Wekesa** (PW4), **Corporal Frank Anunda** (PW5), **Dr. Edward Bilembwa** (PW6) and **Corporal David Makau** (PW7).

[3.1] The prosecution case was briefly as follows:

The deceased **George Njoroge Mburu**, his brother **Obadia Mburu Ngugi (Mburu)** were operating taxis at Kitale Township. They used to park their vehicles outside Rajani Building. On 11th November, 2007 at about 8 p.m., two people approached the deceased and hired his taxi motor vehicle reg. No. KAP 353 E Toyota to be taken to Misiku. The two boarded the deceased's motor vehicle and they were driven away. The deceased did not return to his home and a search for him by **Mburu** and others on the following day was in vain. They reported at Kitale police station on 14th November, 2007.

[3.2] On 14th November, 2007, **Mburu** and others went to Equity Bank Bungoma. They were informed that the deceased's ATM card was used to withdraw Shs. 40,000/- from his account. They reported at Bungoma police station.

[3.3] On 25th November, 2007, the body of the deceased was seen floating in River Nzoia near Toro Shopping Centre, Bungoma. It was recovered by **Cpl. Frank Anunda** and other police officers. It was identified by **Mburu** and **Mary Wanjiru**, the deceased's wife. On 26th January, 2007, a postmortem of the body of the deceased was performed by **Dr. Steven K. Ngigi** at Webuye District Hospital. The body had

bruises on both cheeks, the upper limb had been chopped off; there was a fracture at the base of the skull and on the left knee. The Doctor concluded that the cause of death was cardio pulmonary collapse due to head injuries and multiple injuries on the lower limb. The postmortem report was produced at the trial by **Dr. Edward Bilembwa** as **Dr. Ngige** had gone on transfer.

[3.4] The police approached **George Maloba** of Equity Bank, Bungoma and obtained the deceased's bank statement. It showed that Shs. 20,000 was withdrawn from the ATM each, on 11th and 12th November 2007. An attempt to withdraw more money on 13th November 2007 failed as the ATM card was captured by the ATM machine. The police obtained from the bank images of the person who withdrew the money on the two occasions and of the image of the person who attempted to withdraw the money on the third occasion. The statement of the account and the images were produced at the trial.

[3.5] On 12th November, 2007, the appellant and another person took one set for number plates bearing Reg. No. KAN 753F to **Joseph Shikuru Wekesa**, a sign writer at Bungoma for repainting.

[3.6] On 5th December 2007, **Cpl. Frank Anunda** went to Chepkube market within Bungoma town on tip off. At about 3 p.m. he saw the appellant driving motor vehicle Reg. No. KAN 753F Toyota. **Yusuf Amani Owino**, the co-accused, was in the vehicle. When the vehicle stopped at a bus park the appellant and the co-accused were arrested. Investigations, including a copy of the records from the Registrar of Motor Vehicles revealed that motor vehicle Reg. No. KAP 353E belonged to the deceased and that Reg. Number KAN 753F fixed on it were fake number plates.

[4] The appellant testified at the trial that he operates a matatu, motor vehicle Reg. No. KZF 801 Peugeot 504 station wagon at Bungoma town and that on 4th December 2007 he towed a customer's vehicle to Kitale arriving there at 11 p.m. He stated further that on his way back and at the junction to Bungoma his vehicle was blocked by a police vehicle and he was arrested. He denied committing the offence.

[5] In convicting the appellant, the trial magistrate made findings of fact that; the appellant was in possession of the deceased's ATM card which he used to withdraw money from the deceased's bank account; that the images captured by CCTV camera at the ATM belonged to the appellant; that the appellant took two sets of number plates to **Joseph Shikuku Wekesa** for repainting; that the appellant was found in possession of the motor vehicle on which the two number plates were fitted and that the appellant was found in possession of the deceased's car. In respect to CCTV images captured by the camera at the ATM, the trial magistrate said:

“I also had an opportunity to look at the three images and I have forwarded (sic) an opinion that the images are true likeness of the 1st accused”.

[6] The High Court relied on the same set of facts and made a finding that there was credible and cogent circumstantial evidence establishing that the appellant was involved in the commission of the offence. The appeal of the co-accused was allowed because the prosecution case did not link him to the offence other than the fact that he was inside the vehicle of the deceased when it was recovered.

[7] **Ms. Emmal Sitenei**, learned counsel for the appellant relied on the grounds in the memorandum of appeal filed by the appellant. The appeal is opposed by the State. By the grounds of appeal, the appellant in essence complains that the High Court did not properly re-evaluate the evidence and if it had done so, it would have found that the appellant was not identified as no identification parade was held and the finger prints were not dusted and because **Joseph Shikuku Wekesa** was not a credible witness.

[8] There was ample evidence that the deceased was robbed of his motor vehicle and ATM bank card on the night of 11th November 2007 by persons who hired his motor vehicle. There was ample evidence that the deceased was killed and his body thrown into the Nzoia River in Bungoma. There was also ample evidence that the deceased's ATM card was used at Equity Bank ATM Bungoma to withdraw money from the deceased's account on the same night and on the following day, and that the ATM card was captured by the ATM machine on the third day. Further, there was cogent evidence that the deceased's ATM card was recovered from the Bank and that the deceased's motor vehicle was also recovered in Bungoma town on 5th December 2007. The images of the person who withdraw the money from the deceased's account at the ATM were retrieved. The three retrieved images were identified by **George Maloba**; **Cpl. Frank Anunda** and **Cpl. David Makau** as those of the appellant. The trial magistrate studied the three images and formed the opinion that they are the true likeness of the appellant. That evidence shows that the appellant was in possession of the deceased's ATM card on the same night of the robbery.

[9] The appellant states that **Joseph Shikuku Wekesa** was coached. This witness described how the appellant and another person brought two sets of number plates to him for repainting on 12th November 2007 and he charged the appellant Shs. 850 for the work. He stated that he knew the appellant as a taxi driver and that it is the appellant who brought police to him and he was arrested. The trial magistrate and the High Court believed these witnesses. The question of visual identification does not arise because **Mburu** did not identify the two people who hired the deceased's motor vehicle. Indeed, the prosecution case was dependent entirely on circumstantial evidence. The trial magistrate considered the evidence of the appellant that he was arrested when driving his own vehicle and rejected it as evasive. The High Court also considered the appellant's defence and made a finding that his evidence was rebutted by the evidence of **Cpl. Anunda** and **Cpl. Makau**.

[10] The two courts below appreciated that the prosecution case was dependent on circumstantial evidence. They made concurrent findings of fact constituting the circumstantial evidence. They found that the appellant did not give a reasonable explanation of how he came into possession of the deceased's ATM card and the deceased's motor vehicle.

[11] The appellant was in possession of the deceased's ATM card on the same night that the deceased was robbed and killed. He was in possession of the fake number plates three days after the robbery. He was also in possession of the deceased's motor vehicle on which the fake number plates were fitted approximately three weeks after the robbery. We agree with the finding of the High Court that the circumstantial evidence was credible, cogent and irresistibly pointed at the appellant as one of the people who robbed and killed the deceased.

[12] As regards the sentence, the appellant was sentenced to death. Although this court has in numerous decisions applied to robbery with violence cases the decision for the Supreme Court in **Francis Karioko Muruatetu v Republic [2017] eKLR** that death sentence is not mandatory, the death sentence is deserved in the circumstances of this case. The appellant not only robbed the deceased of his motor vehicle and stole his money but also killed him in an extremely cruel manner.

[13] For the foregoing reasons, the appellant's appeal is dismissed in its entirety.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR