



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO (P), KARANJA & SICHALE, JJA

CRIMINAL APPEAL NO. 90 OF 2016

BETWEEN

DAN KENNEDY OMONDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi

by (Achode & Ngugi) dated 11th December, 2013

IN

HC. CRA NO. 692 OF 2010)

JUDGMENT OF THE COURT

The background facts giving rise to this appeal portray a sad state of affairs. P.W.1, **MERCY WAMBOI KIMANI** left the city of Nairobi at around 5 p.m. on **10th December, 2008** in the company of her husband, the late **PATRICK KIMANI MBUGUA**. Her husband was driving motor-vehicle registration No. KBD 570 W. They got to their gate at around 7.30 p.m and she alighted to go to **NANCY MUGECHIE**'s house, a neighbor, for prayers. She left her husband proceeding to park the motor-vehicle. No sooner had she reached the neighbour's house than she heard gunshots emanating from the direction of her house. She also heard her husband calling her loudly. Shortly thereafter, she saw their motor-vehicle being driven out of the gate at high speed. She found her husband having been shot. She together with others made haste to Aga Khan Hospital where her husband later died in the morning of **11th December 2008**. On **14th January, 2009**, she was summoned to Kasarani Police Station and she identified the deceased's phone, a Nokia 2100 which he had had for a long time. The deceased's mobile number was [.....]

The phone had been sold to the deceased by **PETER ODHIAMBO OCHIENG** (P.W.2), a colleague who used to work with the deceased. This was in **April, 2005**. P.W.2 had made 2 marks on the notch where hooks are strapped. He had also inscribed his ID number [.....] as well as his name, **PETER OCHIENG** inside the phone.

P.W.4, **Sgt JOHN SHEGO** carried out the investigations. He obtained the deceased's cell phone No. **0724[....]** from P.W.1. In liaison with Safaricom, he was able to track the deceased's phone at Huruma in possession of the appellant who had inserted his sim card barely 18 minutes after the deceased was gunned down.

In his sworn statement of defence, the appellant denied being in possession of the phone. He also denied the commission of the offence.

On **30th November, 2010**, Hon. **Lorot**, the then Senior Resident Magistrate, Makadara, found the appellant guilty of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced him to death as by the law then prescribed. The appellant was dissatisfied with the said outcome. His first appeal to the High Court was dismissed on **10th December, 2013** by **Achode & Ngugi, JJ**. Dissatisfied, the appellant filed the appeal before us.

During the plenary hearing before us on **15th May, 2019**, **Mr. Amutalah**, learned counsel for the appellant relied on the supplementary

memorandum of appeal dated 20th April, 2017 and the appellant's list of authorities filed on 25th April, 2017. In urging the appeal, counsel urged us to find that it was not conclusively proved that the deceased's phone was found with the appellant; that no witness was called from Safaricom to authenticate the use of the deceased's phone after it was taken away from him; that the appellant's alleged mobile number 0728[.....] was not conclusively proved to be that of the deceased; that no call data report was produced; that the appellant's arrest was on account of an incident that occurred one month after the alleged robbery where the deceased met his death.

In the alternative, counsel submitted that the sentence of death was too severe given the fact that the appellant was a first offender.

In opposing the appeal, **Ms Maina**, the Senior Principal Prosecution Counsel (SPPC) urged us to find that the charge of robbery against the appellant was proved beyond reasonable doubt as he was found in possession of the deceased's mobile phone; that P.W.1 and P.W. 2 positively identified the deceased's phone; that the appellant's sim card was inserted barely 18 minutes after the robbery; that P.W.4 used the information from Safaricom to track down the appellant and the non-availability of a witness from Safaricom was not fatal to the prosecution's case as there was overwhelming evidence.

On the issue of sentence, SPPC was of the view that given the circumstances, a sentence of not less than 15 years would be well deserved.

On our part, we have considered the record, the grounds of appeal, the rival oral submissions made before us, the authorities cited and the law.

As this is a second appeal, section 361 of the CPC limits our jurisdiction to matters of law only. In **Dzombo Mataza vs. Rep. [2014], eKLR**, this Court reiterated as follows:

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v. Republic [1972] E.A. 32. By dint of the provisions of section 361 (1) (a) of the Criminal Procedure Code, our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong”.

Both courts below arrived at concurrent findings that the appellant committed the offence of robbery with violence contrary to section 296 (2) of the Penal Code. In **Adan Muragori Mungara v. Republic Criminal Appeal No. 347 of 2007 (Nyeri)**, this Court stated:

“As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere”

On our part, we do not discern such misgivings. The deceased was gunned down as he entered his compound. He was robbed of a phone which was later traced to the appellant. The appellant's sim card was inserted onto the deceased's phone barely 18 minutes after the deceased was shot at and killed. In its judgment, the High Court considered this aspect of the evidence and stated:

“In the present case, the evidence before the trial court was that the phone stolen from the deceased on the night of the robbery was traced and found with the appellant about a month from the date of robbery. However, the appellant's Sim Card number [.....] was inserted in the phone about two hours after the robbery. It was the second Sim inserted into the phone, the first, inserted some twenty minutes after the robbery, being that alleged to be that of the 2nd accused. The phone was positively identified as being the one that P.W. 2 had sold to the deceased, who was his colleague. Thus, the evidence points to the appellant as having been in recent possession of the phone stolen during the robbery within hours, if not minutes, of the robbery at which the deceased was shot and subsequently died of his injuries”.

We too are of the considered view that the evidence against the appellant was overwhelming as the phone he was found with belonged to the deceased. We see no reason to disturb the findings of the trial court and the first appellate court.

On severity of the sentence, we note that the appellant was a first offender. However, the circumstances relating to the commission of the offence were grave. It led to the death of the deceased who was gunned down upon entering his compound. We reiterate that the decision of the Supreme Court in **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR** did not outlaw the death sentence but it removed the mandatory nature of the death sentence.

In our view, the deceased's life was removed in a callous manner and without due regard to the sanctity of human life. The deceased offered no resistance and in spite of this, he was gunned down in cold blood, thus leading to his death. It is in view of this that we dismiss the appellant's appeal on both conviction and sentence.

It is so ordered.

Dated and delivered at Nairobi this 8th day of November, 2019.

W. OUKO (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR