



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CRIMINAL APPEAL NO. 48 OF 2016

BETWEEN

MWALIMU WASI KALUME.....1<sup>ST</sup> APPELLANT

AMANI SAID KIBAO.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe & Muya, JJ.) dated 5<sup>th</sup> November, 2015*

in

H.C.CRA No. 128 & 131 of 2011)

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JUDGMENT OF THE COURT

1. **Mwalimu Wasi Kalume (1<sup>st</sup> appellant)** and **Amani Said Kibao (2<sup>nd</sup> appellant)** were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars were that on 9<sup>th</sup> December, 2009 at Timboni Village in Malindi District within the then Coast Province while armed with offensive weapons namely, an iron bar, the appellants jointly robbed Alex Katana Jackson (deceased) of a motorcycle Bajaj registration number KMCF 158A valued at Kshs.80,000/= and immediately after the time of such robbery killed the deceased. After trial, they were convicted and sentenced to death. Their convictions and sentences were confirmed by the High Court (*Chitembwe & Muya, JJ.*) sitting as the first appellate court.

2. The concurrent findings of fact by the two lower courts were that the deceased was last seen on 9<sup>th</sup> December, 2009 at around 10:00 a.m. in the company of the appellants. Juma Mzungu (PW7) saw the three aboard the deceased's motorcycle registration number KMCF 158A heading towards Gede. The following day, the deceased's uncle, Alfred Kalume (PW1), reported him missing at Watamu police station. Later on, Juma went to the 2<sup>nd</sup> appellant's house and inquired about the whereabouts of the deceased. The 2<sup>nd</sup> appellant informed him that he had alighted at Gede leaving the deceased with the 1<sup>st</sup> appellant. Aware of the report lodged at the police station, Juma compelled the 2<sup>nd</sup> appellant to accompany him to Watamu police station. The 2<sup>nd</sup> appellant repeated what he had told Juma to PC Charles Ruto (PW6) and PC Peter Okal (PW9). He was arrested pending further investigations.

3. Thereafter, on 11<sup>th</sup> December, 2009 the police were alerted that the deceased's motorcycle had been recovered and was at the Ganze chief's camp. PC Charles and PC Peter in the company of the 2<sup>nd</sup> appellant went to the chief's camp where the deceased's motorcycle was identified. It transpired that on 9<sup>th</sup> December 2009, Fatuma Ndere (PW3) saw two men pushing the motorcycle, one of them ran into the bush leaving the other who she later identified as the 2<sup>nd</sup> appellant. Fatuma asked the 2<sup>nd</sup> appellant why his companion had ran and apparently, the 2<sup>nd</sup> appellant told her it was because he was afraid.

4. Suspicious of the 2<sup>nd</sup> appellant, Fatuma continued walking with him until they met Kahindi Kalume (PW8). Kahindi also found the 2<sup>nd</sup> appellant shifty and took him to the chief's camp. At the chief's camp, the 2<sup>nd</sup> appellant identified himself as Alex Katana Jackson, the deceased. He told APC Isaac Hussein (PW5) that the motorcycle belonged to his uncle. He was released to go and collect the logbook before the motorcycle could be released to him. At that point, the 2<sup>nd</sup> appellant changed his story and alleged that after breaking into a house the deceased and the 1<sup>st</sup> appellant ran away leaving him with the motorcycle.

5. Unfortunately, the deceased's decomposed body was recovered in a cave at Ganze on 15<sup>th</sup> December, 2009. The post mortem report revealed that the cause of death was a fracture of the neck. This time round, the 2<sup>nd</sup> appellant stated that it was the 1<sup>st</sup> appellant who killed the deceased. Eventually, on 25<sup>th</sup> March, 2010 the 1<sup>st</sup> appellant was arrested at Kikambala after he was rescued by APC Kennedy Isanda Chweya (PW4) from being lynched by a mob. Subsequently, the two appellants were charged with the offence of robbery with violence.

6. In his defence, the 1<sup>st</sup> appellant testified that on 25<sup>th</sup> March, 2010 he was at a construction site when he met someone from his village. The person informed him that he had been implicated in the deceased's death. The said person then asked him to accompany him to the police station and when he refused to do so, he started shouting that the appellant was a thief. As a result, a crowd gathered around him and started assaulting him until he was rescued by a police officer. He was later charged with an offence he hadn't committed.

7. On the other hand, the 2<sup>nd</sup> appellant not only denied committing the offence but also knowing the 1<sup>st</sup> appellant. He stated that on 10<sup>th</sup> December, 2009 Juma Mzungu went to his house to ask for the deceased. He informed him that he had departed with the deceased the previous day at Gede and had not seen him again. Juma asked him to accompany him to the police station to record a statement which he willingly did. Upon his arrival at the station he was arrested and later charged.

8. Faced with the foregoing, the trial court found that the prosecution had proved that the appellants were the last persons seen with the deceased and the 2<sup>nd</sup> appellant was found in possession of his motorcycle. In the trial court's opinion, the circumstantial evidence was sufficient to justify conviction of the appellants. They were both sentenced to death. Their first appeal to the High Court was dismissed vide a judgment dated 5<sup>th</sup> November, 2015.

9. This second appeal is premised on the grounds that the learned Judges erred in law by-

*a) Convicting the appellants on the basis of circumstantial evidence which did not meet the required legal standards.*

*b) Convicting the appellants on the basis of contradictory and inconsistent evidence which did not give rise to inference of guilt.*

*c) Failing to re-evaluate the evidence on record.*

10. Relying on the case of *Suleiman Kamau Nyambura vs. Republic [2015] eKLR*, Ms. Chala, learned counsel for the appellants, submitted that there are three essential ingredients that ought to be proved in a charge of robbery with violence. She set out those ingredients in the following manner: -

*i. If the offender is armed with any dangerous or offensive weapon or instrument or*

*ii. If he is in company with one or more other person(s) or*

*iii. If, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.*

11. According to her, the prosecution did not prove the first ingredient, that is, that the appellants were armed with an iron bar as indicated on the charge sheet. Equally, the two other ingredients were not established due to the inconsistencies in the witnesses' evidence. Elaborating further, she contended that despite Juma testifying that he had seen the deceased in the appellants' company on 9<sup>th</sup> December, 2009 his evidence was contradicted by that of Edward Kalama Gona (PW2) who indicated that the deceased's body was discovered on 1<sup>st</sup> December, 2009. The inconsistency raised doubt as to whether firstly, the body recovered was that of the deceased and secondly, whether indeed the appellants were together with the deceased. She argued that contrary to Fatuma's evidence that she was alone when she saw the appellants pushing the motor cycle, Kahindi stated that she was together with another lady by the name Saumu. Further, Fatuma's evidence to the effect that she followed the 2<sup>nd</sup> appellant until she met with Kahindi was contradicted by Kahindi who said that after meeting the two ladies, he walked towards the direction they had indicated the 2<sup>nd</sup> appellant was and he met him. Therefore, the circumstantial evidence did not warrant the appellants' conviction.

12. Mr. Wangila, Senior Prosecution Counsel, in opposing the appeal, submitted that the inconsistencies raised did not go to the root of the matter and could be ignored. As far as he was concerned, the circumstantial evidence met the requisite threshold of justifying a conviction.

13. This being a second appeal and by dint of **Section 361** of the **Criminal Procedure Code**, this Court is restricted to addressing itself on matters of law only. In the discharge of this function we bear in mind a cardinal principle of law that enjoins us not to interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Mwita vs. Republic [2004] 2 KLR 60*.

14. It is not in dispute that the appellants' convictions were based on circumstantial evidence. In *James Mwangi vs. Republic [1983] KLR 522*, this Court set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of the guilt of an accused person. In that case it was held as follows:

***“In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference ...”***

15. Did the circumstantial evidence meet the above criteria? The first piece of evidence that linked the appellants to the deceased was that they were the last persons seen with him. Juma was categorical that on 9<sup>th</sup> December, 2009 he saw the deceased in the company of the appellants. In our view, the fact that Edward testified that the deceased's body was discovered on 1<sup>st</sup> December, 2009 was more likely a typographical error and/or inconsistency capable of being cured under **Section 382** of the **Criminal Procedure Code**. This is because it was crystal clear from the evidence of PC Charles and PC Peter that his body was discovered on 15<sup>th</sup> December, 2009. This Court in **Joseph Maina Mwangi vs. R- Criminal Appeal No. 73 of 1993(unreported)** aptly expressed itself on the issue of discrepancies as follows:-

***“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”***

Moreover, it was not in dispute that Juma was well acquainted with the appellants and the deceased prior to the material day and his evidence in that regard was unshaken during cross-examination.

16. The second piece of circumstantial evidence was that the 2<sup>nd</sup> appellant was found in possession of the deceased's motor cycle six hours later. Similarly, we find that the inconsistencies as to whether Fatuma was in the company of another lady when she saw the 2<sup>nd</sup> appellant pushing the motor cycle or whether she followed the 2<sup>nd</sup> appellant until she met Kahindi did not prejudice the appellants and was capable of being cured. These inconsistencies in no way cast doubt that Fatuma saw the 2<sup>nd</sup> appellant in the company of another pushing the deceased's motor cycle and that Kahindi also found the 2<sup>nd</sup> appellant in possession of the motorcycle in question. In fact, APC Isaac confirmed that on the material day the 2<sup>nd</sup> appellant was brought to the chief's camp in possession of the motor cycle in question; he was only released to avail ownership documents of the same. Consequently, we find that the doctrine of recent possession applied, and that the said inconsistency did not prejudice the appellants and it was inconsequential to their convictions.

17. Looking at the chain of events cumulatively coupled with fact that the 2<sup>nd</sup> appellant had given varied accounts of what happened on the material day, we concur with the High Court that the circumstantial evidence irresistibly pointed to the guilt of no other than the appellants. It was the appellants that had robbed and killed the deceased.

18. The upshot of the foregoing is that we see no reason to interfere with the concurrent findings of the two lower courts. Accordingly, the appeal lacks merit and is hereby dismissed.

**Dated and delivered at Mombasa this 12<sup>th</sup> day of October, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**