IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, M'INOTI & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 273 OF 2012

BETWEEN

KAHINDI FURAHA KAHINDI

KAINGU KAMBI MWAZONGI .....APPELLANTS

AND

REPUBLIC ….....RESPONDENT

(An appeal against the judgment of High Court of Kenya at Malindi (Omondi & Odero, JJ.) dated 7th November, 2011

in

H.C.Cr. A. Nos. 16 & 17 of 2010)

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JUDGMENT OF THE COURT

The appellants, ***Kaindi Furaha Kahindi*** and ***Kaingu Kambi Mwazongi*** were charged with the offence of robbery with violence contrary to ***section 292(2)*** of the Penal Code. The particulars were that:

> ***"On the 27th day of December, 2008 at Borabora Village, Gongoni Location in Malindi District within the Coast Province, jointly while armed with crude weapons, robbed*** *John Nzombo Shume* ***of one motorcycle make Bajaj Boxer Engine Number DUMBRF 46879 valued at Kshs.85,000/= the property of*** *Samson Thoya Mwakwaya* ***and at or immediately before or immediately after the time of such robbery caused the death of the said John Dzomba Shume."***

In count II one Danstan Kingi Baya was charged with the offence of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars were that:

> ***"On the 29th day of January, 2009 at Gongoni Location in Malindi District within the Coast Province, otherwise than in the course of stealing dishonestly received or retained one motorcycle make Bajaj Boxer Engine Number DUMBRF 46879 knowing or having reason to believe it to be stolen or unlawfully obtained."***

The trial proceeded before ***D.W. Nyambu,*** the then Principal Magistrate Malindi. At the end of the trial, the two appellants were convicted and sentenced to death as prescribed by law whilst the 3rd accused was acquitted of the charge of robbery with violence but found guilty of the alternative charge of handling stolen property with the knowledge that it was stolen and sentenced to 2 years imprisonment.

The two appellants were dissatisfied with the conviction and sentence by the trial court and they filed an appeal in the High Court. On 7th July, 2011 ***Omondi & Odero, JJ***. dismissed the appellants' appeals and hence this appeal. Each of the appellants filed grounds of appeal which were argued before us by ***Mr. Kimani*** the learned counsel for the appellants.

Mr. Kimani faulted the particulars of the charge as it did not state that the appellants were in possession of a "*dangerous weapon*" as provided in ***Section 296(2)*** of the Penal Code. Instead, the particulars of the charge made reference to a "*crude weapon*." It was the learned counsel's contention that the '*plank'* or '*piece of wood*' was not a dangerous weapon.

Secondly, the learned counsel contended that the motorcycle which was allegedly stolen at the time of the robbery was not identified using its registration numbers and that the chassis number given by ***Pc. Gabriel Kosgei*** PW2 is different from that given by ***Samson Thoya Makwaya,*** PW1. According to him there was no conclusive proof that the motorcycle belonged to PW1. He pointed out that ***Neema Maiza*** PW6 had been arrested and confined for three (3) days. He relied on the case of ***Daniel Muthomi M'Arimi vs R. Nyeri Cri. A. No. 166 of 2011 (UR).***

In response***, Mr. Oyiembo***, the learned Assistant Director of Public Prosecutions opposed the appeal and supported the conviction and sentence. He urged us to find that the omission of the wording "*dangerous weapon*" on the charge sheet was not fatal to the conviction and that it was this *"crude weapon"* that was used to inflict the fatal injuries. As to the ownership of the motorcycle, the learned counsel submitted that the 3rd accused who was found in possession of the motorcycle and explained that he had obtained it from the 1st and 2nd appellants.

This is a second appeal and by dint of ***Section 361(1)(a***) of the Criminal Procedure Code we are mandated to consider only matters of law. In ***Kados v R Nyeri Cr. Appeal No. 149 of 2006 (UR)*** this Court delivered itself thus on the issue:

> ***"... This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."***

In ***David Njoroge Macharia v R [2011] e KLR*** it was stated that under ***Section 361*** of the Criminal Procedure Code:

> ***"Only matters of law fall for consideration and the court will not normally interfere with 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 also ***C****hemagong v Republic [1984] KLR 213****).***"

In the present case, the appellants are faced with a charge of robbery with violence contrary to ***Section 296(2)*** of the Penal Code. A charge under this section has three essential ingredients that must be proved by the prosecution. In ***Johana Ndungu v R. Criminal Appeal No. 116 of 1995***, the ingredients for the charge of robbery with violence were stated to be:

(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 or persons 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."

We are alive to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction on under ***Section 296(2)*** of the Penal Code. In the case of ***Juma v Republic, [2003] E.A. 471***, it was held that

> ***"where the prosecution is relying on an element or ingredient of being armed, it must be stated that in the particulars of the charge that the weapon or instrument which the appellants was armed was a dangerous or offensive one."***

It is our duty to examine if the two courts below erred in law in finding that the prosecution had proved the essential ingredients of the charge of robbery with violence. We have examined the evidence on record as regards the weapon that was used to cause the death. PW6 ***Neema Maiza*** saw the 2nd appellant hit the deceased on the head using a wooden plank. The two appellants left the deceased for dead and both got on to the motorcycle, the 1st appellant riding it. They caught up with PW6 who fled from the scene on seeing the deceased being attacked. PW7 ***Pc. Andrew Wekesa*** visited the scene of crime on 28th December, 2008. He observed that the scene was bloodied. He also found the plank of wood that was used to inflict injury on the deceased's head. It is this plank that was used to cause the fatal blow. It is our considered view that a *"plank of wood"* can be a dangerous weapon depending on how it is used. We are also of the considered opinion that although the plank was described as a *"crude weapon"* as opposed to a *"dangerous weapon"* no prejudice was occasioned to the appellants by his description. We also find that the circumstances of this case are distinguishable from the case of ***Daniel Muthomi M'Arimi vs R.*** (supra) cited by the appellants' counsel as in the latter, there was no evidence of the dangerous weapons to wit *"pangas and rungus"* as stated in the charge sheet. In the instant case, there was evidence of the dangerous weapon used although it was christened *'crude'* weapon. As stated above, we find that no prejudice was occasioned to the appellants by the said reference.

As regards the failure of the High Court to re-analyse and re-evaluate the evidence by failing to find that it was not proved that the motorcycle belonged to PW1, this is what we have to say; PW1 Samson Thoya Makwayo purchased a black motorcycle make Bajaj from Galexon Malindi on 1st December, 2008 for a sum of Kshs.85,000/=. He was issued with receipt No. 0578 which indicated the engine number as 46879 and the chassis number was MD 2 DDD NZZ RWF 01740. Although PW1 had registered the motorcycle, the number plate was yet to be issued. PW2 Pc. Gabriel Kosgei from the Scenes of Crime took pictures of the motorcycle. In particular, he captured the chassis number as NZZ RWF 01740. In the morning of 23rd December, 2008 the deceased ***John Nzombo Shume*** who was a relative of PW1 collected this motorcycle for purposes of carrying out *'boda boda'* business. At about 7.45 p.m. PW1 called the deceased and asked him to retire early. This was to be the last time he was to talk to him. In the meantime PW6 approached the deceased as she had been sent by the two appellants to go fetch a motorcycle. The 1st appellant who used to live with PW6 together with her husband had indicated to her that he wished to visit his girlfriend. It was on the same day that the 1st appellant introduced the 2nd appellant to her as Mantall. She was given Kshs.500/= by the 1st appellant. She paid Kshs.50/= to get to Marereni where she found the deceased. She paid the deceased Kshs.450/= and the two rode to Borabora where she had left the two appellants. She saw the 2nd appellant hit the deceased using a plank of wood, a sight she could not withstand and she fled away. The appellants caught up with her, the 1st appellant riding the deceased's motorcycle and carrying the 2nd appellant as a passenger. The appellants forced PW6 to ride with them failing which, they threatened to kill her.

After the commission of the offence, the 1st appellant and PW6's husband locked her in the house for about two weeks. It was not until 16th January, 2009 that the motorcycle was spotted at a palm wine club and the person who was in possession of it was arrested. This was Danstan Kingi Baya the 3rd accused. The 3rd accused revealed that the motorcycle had been leased to him by the two appellants and he led PW3 ***APc. Jackson Mwadera*** to the two appellants who were then arrested in earnest. PW1 was able to identify his motorcycle because of the chassis number.

PW8 ***Dr. Hussein Abdukadir*** conducted the post-mortem and ascertained the cause of death to be a head injury. On our part we find that the High Court properly evaluated and re-analyzed the evidence. The evidence against the appellants was sacrosanct. We see no reason whatsoever to disturb the findings of the trial court as well as of the High Court. Be that as it may, one more issue is deserving of mention. In the judgment, the trial court found the 3rd accused guilty of handling stolen property for the reason that he failed to interrogate the appellants to satisfy himself that the duo were the owners of the motorcycle. We find that this conviction was unfounded in law as it was enough for the 3rd accused to have named the persons who hired the motorcycle to him. He needed not to have interrogated the two on the ownership. Besides, the 3rd accused evidence was corroborated by the evidence of PW6 that is it is the two who robbed the deceased of the motorcycle. He should not have been found guilty. However, we note that he did not file an appeal and the sentence of two years imposed on 2nd February, 2010 is long served.

In the circumstances, we find no merit in this appeal and the same is hereby dismissed.

Dated and delivered at Malindi this 27th day of March, 2014

H. M. OKWENGU

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR