



**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: BOSIRE, GITHINJI & AGANYANYA, JJ.A.)
CRIMINAL APPEAL NO. 318 OF 2009**

BETWEEN

MSANZI KARISA.....APPELLANT

AND

REPUBLICRESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Mombasa (Azangalala & Odero, JJ.) dated
2nd December, 2009*

in

H.C.Cr.A. No. 175 of 2005)

JUDGMENT OF THE COURT

Msanzi Karisa, the appellant and *Mwanasiti Msanzi* accused 2, his wife, were charged in the Senior Resident Magistrate's Court at Kwale with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The appellant was also charged alone with the offence of giving false information to a person employed in the public service contrary to **section 129(a)** of the Penal Code while the 2nd accused was separately charged with an alternative count of handling stolen property contrary to **section 322(2)** of the same Code. The particulars of the first count were that on the night of 17th/18th day of April, 2004 at unknown time at Bang'a Village in Puma Location of Kwale District within Coast Province the appellant with others not before the court, while armed with dangerous weapons, namely, knife and walking stick robbed *Mangale Nyawa* of two cows valued at Kshs.10,700/= and at or immediately before or immediately after the time of such robbery used violence to the said *Mangale Nyawa*, the deceased.

On the second count it was alleged that on 18th day of April, 2004 at about 6.10 a.m. at Kinango Police Station, Kinango Location in Kwale District within Coast Province the appellant informed No. 82121 Pc. Charles Oyoo a person employed in the public service that they *were* attacked and robbed which information he knew or believed to be false intending thereby to cause or knowing it to be likely that he would thereby cause the said No. 82121 Pc. Charles Oyoo to investigate the allegation which the said No. 82121 Pc. Charles Oyoo ought to have not done if the true state of facts respecting such information as given had been known to him. As regards the alternative charge the particulars thereof were that on 22nd day of April, 2004 at 0050 hours at Kifyonzo village, Puma Location in Kwale District of Coast Province the 2nd accused otherwise than in the course of stealing dishonestly handled or retained two heads of cattle knowing or having reason to believe them to have been stolen or unlawfully obtained.

The case was heard by *Mbatia*, a Principal Magistrate, who wrote the judgment which was delivered on 10th September, 2005 by *D.M. Ochenja*, Senior Resident Magistrate. In that judgment, the

appellant was found guilty, was convicted of the two counts against him and he was thereafter sentenced to death on the first count, the only sentence prescribed by law for that offence and 3 months imprisonment on the second count. The 2nd accused though found guilty of the alternative charge, was not sentenced as she did not appear in court on the date of the sentence and there is no record to show what happened to her case.

The facts as narrated by the prosecution witnesses in the trial court were that the appellant and one Mangale Nyawa (*deceased*) left their respective homes to buy cattle at an auction at Samburu Market on 17th April, 2004. While the appellant purchased one cow, the deceased purchased two. As the two headed back home with the cows on the night of 17th/18th April, 2004 they were allegedly attacked by robbers at 11.00 p.m. and their cows stolen. In the course of the robbery the deceased was strangled and killed. The appellant escaped and later reported the incident to **Pc. Charles Oyoo** (PW1) at Kinango Police Station at 5.00 a.m. on 18th April, 2004. Upon investigations into the incident, it emerged that on 18th April, 2004 the 2nd accused had driven two cows to the home of **Juma Chimbonya** (PW3) – where **Mbodze Nzai** (PW1) wife to PW3 kept them until PW3 returned from safari. When he returned from safari two days later and saw the cows in his compound, he returned them to the appellant's home the following day as he had not been informed about this arrangement by PW3 beforehand. It, however, emerged that these were the same cows the deceased had bought from Samburu market auction on 17th April, 2004 before they were stolen from him in the alleged robbery. The appellant was arrested and taken to his home by police where the two cows were recovered. He was charged with the offence as herein before stated.

When placed on his defence, the appellant admitted to have met the deceased at the cattle auction at Samburu market on 17th April, 2004 where he bought one cow while the deceased bought two cows. That on the way home at 11.00 p.m. they met four people who attacked them but he ran away and escaped to the forest where he hid until 5.00 a.m. when he went to Kinango Police Station and made a report of the robbery. He was given a letter to go to hospital for treatment because he had been injured during the confrontation with the robbers and told to be reporting to the police daily. But when he reported there on 24th April, 2004 he was held and told to accompany police to the home of PW3 where it was alleged the stolen cows were. However, PW3 in his evidence stated that the appellant had taken the two cows to his home, for safe custody without prior consent from him, but he returned the cows to the home of the appellant.

The learned Principal Magistrate considered the evidence before him, accepted the evidence of the prosecution witnesses and disbelieved the appellant's story. He found the appellant guilty, convicted and sentenced him as earlier stated. His appeal to the superior court was dismissed hence the present appeal. And being a second appeal only points of law fall for our consideration – see **section 361(1)** of the Criminal Procedure Code.

The main issue in this appeal is whether the appellant's conviction is sustainable in law in view of the fact that there were no eye witnesses to the alleged murder of the deceased.

The evidence adduced and accepted by the two courts below was that the two cows which had been bought by the deceased and which disappeared during the alleged robbery were traced to the appellant's home. Nothing was said about the one cow the appellant bought at the auction. PW1 told the trial court that the two cows the deceased had bought had been brought to her home by accused 2 on 17th April, 2004. No time was indicated. By then her husband, PW3, was not at home and when he came back two days later he saw the cows in his compound. No proper explanation was offered as to why they had been taken there; he returned them to the appellant's home on 20th April, 2004 at 8.00 p.m. PW1, PW3 and the appellant were close relatives and the trial court found no reason why PW1 and PW3 could concoct such story against the appellant.

The alleged robbery was committed at 11.00 p.m. on 17th April, 2004. The last person seen with deceased before his death was the appellant. He did not say what time they parted company. The appellant testified that he went to report the robbery to Kinango Police Station at 5.00 a.m. That Police

Station was about two kilometres away from the scene of the alleged robbery. **Section 111** of the Evidence Act provides thus:-

111 (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence”.

In the circumstances of this case there was no doubt in the mind of the trial and first appellate courts that the appellant was aware of the special circumstances surrounding the death of the deceased. He was the best placed person to explain how and where they parted company. The appellant’s explanation as to how the deceased might have met his death is not believable considering his conduct after the deceased’s disappearance.

The deceased’s two cows were recovered from the home of the appellant soon after the alleged robbery; thus satisfying the doctrine of “*recent possession*”. An attempt by the appellant to say that in fact these cows were recovered from PW3 was rejected by the trial court. These were incriminating circumstances which were incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of the appellant’s guilt; see ***Kantilal Jivraj & Another v R. [1961] E.A. 6***. There are no co-existing circumstances to weaken or destroy the inference of guilty - see ***Simoni Musoke v. R. [1958] EA pg. 715***.

It is true the superior court did not address its mind to **section 200(4)** of the Criminal Procedure Code in its judgment but it is our view that this omission did not cause any prejudice to the appellant. It was an irregularity which is curable under **section 382** of the Criminal Procedure Code.

We dismiss this appeal and confirm the decision of the trial and the first appellate courts.

Dated and delivered at Mombasa on 4th day of March, 2011

S. E. O. BOSIRE

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR