Kimea v Republic (Criminal Appeal 010 of 2020)
[2022] KEHC 104 (KLR) (18 February 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL 010 OF 2020

JM MATIVO, J

FEBRUARY 18, 2022

BETWEEN

SIMON SAMMY KIMEA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentence in Criminal case number 349 of 2018, Voi, R v Simon Sammy Kimea, Mutuku Mwania, and Harun Kioko Mutisya delivered by Hon. F. M. Nyakundi, SRM on 22.4.2020)

JUDGMENT

Introduction

1. The appellant seeks to overturn the judgment, conviction and sentence in Voi CMCR case No. 549 of 2018 in which the appellant was sentenced to serve 15 years imprisonment for the offence of Robbery with violence contrary to section 296 (2) of the *Penal Code*.[1] His two co-accused persons were acquitted under section 215 of the *Criminal Procedure Code*.[2]

Duty of a first appellate court

2. The principles to be kept in mind by a first appellate court while dealing with appeals are:[3]

    a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.

1 Cap 63, Laws of Kenya.

2 Cap 75, Laws of Lenya.

3 See *Ganpat vs. State of Haryana {2010} 12 SCC 59*.

b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.

c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.

d. When the trial Court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

The trial at the lower court

3. It was alleged that on the 7th day of February 2018 at around 2100hrs at Bachuma area in Voi Sub County, within Taita Taveta County, jointly with others not before court, while armed with dangerous weapons namely panga, knives, rungus and pistols, the accused persons robbed Mohamed Hemed Ali a transit unit motor vehicle Make Toyota townance, white in colour engine number 35-01747, chassis number SR-40-0126154, a bag of assorted clothes and cash Kshs. 2,500/= all valued at Kshs. 430,000/= and during the time of such robbery wounded the said Mohamed Hemed Ali. The prosecution case rested on the evidence of 4 Witnesses. The defence rested on the appellant's sworn evidence. He did not call any witnesses.

4. PW1, Mr. Mohammed Hemed Ali recalled that on 7th February 2018, in the course of his duties as an employee of a one Osman of Transit Transflight Company while driving a Toyota Noah KG 5670 from Mombasa to Kampala at or around Miasenyi area, a passenger in a probox pointed a pistol at him, said he is a Police officer and asked him to stop. He obliged and the man demanded documents but as he tried to open the dashboard, the engine stopped running and as he tried to find out what happened, the man hit him with his fist at his chest. He said it was around 9.30pm and he had switched on the light in the vehicle, so, he saw the attackers very well. He said the attacker was the 1st accused. He said his hands were tied at the back with a rope and they put him in the space behind the driver's seat and they continued beating him and stabbed with a knife.

5. He said the vehicle was driven to a direction he could not tell and he lost consciousness but when he came to, he was in the bush. He managed to find his way to the main road and sought help and a canter stopped and took him to Mackinnon police station where the officers recorded his statement, escorted him to the scene and took him to the hospital. They referred him to Taru Police Station where he made a further report. He said the people who attacked him were speaking Kamba language which he understood. He said they took his navy-blue bag with his Italian Made sunglasses worth Kshs.10,000/=, techno phone and cash Kshs. 3,600/=.

6. On 19th May 2018, he received a phone call from Voi Police Station asking him to attend a Police Identification parade. He went to the Station on 22nd May 2018 with a Mr Osaman from the said company. He was called into a room with 8 people and asked to identify the accused and he identified the 6th man (the 1st accused) by touching him on the shoulder. He said the officers also asked him whether he could recognize his voice and he was taken outside and spoke to him by greeting him in Kamba and he responded. He said he saw the attacker very well, that he was elderly and he saw him using the lights in the vehicle. He said he was unable to identify any other person. He said his right leg was stabbed. On cross-examination, he said the incident lasted 2 minutes, that he was shocked after seeing a pistol, he panicked after the attack, he was in very bad shape and he lost consciousness and did

not know what happened. He said that at the time of recording the statement, he did not mention that he was able to identify any of his attackers.

7. On 19th February 2019, the trial magistrate dismissed the prosecution's application to withdraw the case against the 2nd and 3rd accused persons for want of sufficient evidence.

8. PW2 PC xxxx CI Joseph Michuki, attached to the DCI Office recalled that on 22nd May 2018 he notified the appellant he was about to conduct an identification parade and he said he had no objection and he had no friend or counsel, and he opted to stand between numbers 2 and 3. He said PW1 asked the parade members to talk and he identified the suspects voice and he also identified him by touching him. He stated that after the parade, the suspect said he was not satisfied and stated that he had been taken to court and his photos had been taken. He said he signed the identification forms. He said the suspect is the appellant in these proceedings. PW2 was recalled on 28th August 2019 for further cross-examination. He said that he was not told that the appellant had been arrested. He said when the parade was done, the appellant had no hair. He said he conducted the parade as per the procedure.

9. PW3, Mr. Walter Churchill Ouma a resident of Mwakingali in Voi and an employee of the Kenya Revenue Authority under the Customs and Border Control Department in a Unit called Transit Mounting Unit testified that his duties entail minuting transit goods which have been cleared to move from Kenya to other countries. He said most of the minuting is done by Cargo Tracking using devices attached to the goods or used to seal the containers where the goods are moved. He testified that on 8th February 2018, their officers received a phone call from a one Caroline manning towers in Nairobi to the effect that some two seals which were used to track an unregistered motor vehicle in transit to Southern Sudan had been tampered with. He said they were given the seal numbers ie 60D5005733 and 0000007870 belonging to Kenya Revenue Authority and Uganda Revenue Authority, and the 2nd one belonged to Borderless Tracking Ltd which is contracted to offer electronic cargo tracking services.

10. He stated that the details given is the Chassis number since the vehicles are not registered yet. He said the chassis number is SR 400126134. He said they were given the GPS coordinates transmitted by the seals as at the time being 3.6784,38.9549 from the google application. He said that in the company of his colleagues Victor Njogu, Amos Mburu and their driver Samuel Ndolo they went past Mackinnon, and between Machinon and Buchma, they received a voice notification that they had arrived at the destination and after 3 minutes, they noticed the seals on the left side of the road towards the direction to Mombasa, approximately 10 meters apart. He stated that they took photographs of the location including the serial numbers. He said they marked the position on the ground. Also, he said they used a piece of paper to pick the seals, wrapped them and went to Mackinnon Police Post.

11. He said on arrival at the Police Post they were informed that a report of robbery with violence had been made at the station by a person who was the driver of the vehicle who was injured in the incident. They referred them to Kings Highway Medical Clinic where they found Mohamed Hemed Ali who had injuries on the chest and legs. They went to Taru Police Post where they were referred to Voi Police Station because the incident took place within its area of jurisdiction. At Voi, they recorded their statements and handed over the seals to the DCI Officers. They went back to the scene accompanied by a Police Officer and recovered two more seals, one for KRA and URA, a magnetic seal which is patched on any metallic suffice and if removed, it sends an alert. He said the second seal is for borderless tracking ltd, and, it has a cable, which, if removed, it sends an alert of temper. He produced the GPS Coordinates showing the backward movement of the KRA seal.

12. PW4 No. xxxx Sgt George Otuoma attached to DCI Office was the Investigating Officer. He recalled that KRA Officers told him that a tracking device was seen by the roadside at Bachuma and he and the scenes of crime officer PC Shem went to the scene and PC Shem took photographs of the gadgets

and they recovered a gadget from KRA Serial number 60D5005733 and another gadget belonging to borderless tracking company number 0000007878. He produced both gadgets as evidence. He said at Mackinnon where the incident was first reported they were informed that a Toyota Vehicle which was on transit belonging to Transflight co ltd driven by PW1 was intercepted by a probox, white in color bearing no registration number and 4 men armed with knives, guns and pangas emerged from the vehicle, beat up the driver, stabbed him with a knife and tied him using ropes and placed him by the road side and escaped with the vehicle. He said the driver was taken to Kingsway Mdical Clinic for treatment where he was treated and referred to Mombasa. He said the incident took place on 7th February 2015 at 9pm. He said they took the medical records of the driver, contacted him and recorded his statement.

13. He produced a letter from Transflight company showing the chassis number as SR 400126134; an invoice from Kawasaki Japan; the Bill of Lading; the Export Certificate; PW1's driving license; a copy of his identity card; KPA Gate Pass; his treatment notes and P3 form.

14. He stated that on 19th May 2018 the three accused persons were arrested by Police Officers, namely PC Kokani, PC Cheruiyot and Sgt Lengima. He said the three had a previous case, and that Mutuku Mwania had a warrant of arrest issued against him by court and after they were arrested, he was informed that the robbers were in the cell. He said he called the complainant to attend an identification parade and he said he could only identify one person, that the assailants were speaking Kikamba, and one stabbed him with a knife. He said PW1 told him that the man was big, black and PW1 was able to identify him at the parade and also, he was able to recall his voice. He said that a report from the mobile telephone service providers on the accused's cell phone numbers did not link the 2nd and 3rd accused with the offence. He said it is only the identification parade which connected the 1st accused with the offence. He was recalled for further cross-examination on 4th June 2019 and he admitted that in his statement, PW1 did not state he saw a huge, black man speaking Kamba. PW4 was recalled on 25th September 2019 for further cross-examination. He essentially reiterated his earlier evidence. He said he met the appellant at the cells.

15. In his sworn defence, the appellant said he is a business person and he buys charcoal at Meli Kubwa which he sells at Gikomba, Nairobi. He stated that on 19th May 2018, he was at Meli Kubwa where he arrived at 4am from his rural home. He went to take supper at High Fort Hotel, but on his way back he was confronted by a man with a jacket in a black trouser holding a phone. He said he asked him why he was blocking him and he said he is a police officer. He said his phone rang and before he could answer the officer picked it and searched him. He said the officer took his wallet which had Kshs. 1,000/= and Kshs. 1,000/= Ugandan currency and 2 notes of 500 each. He said the officer took his 3 ATM Cards (KCB, Equity and Barclays) and his house keys with key holders. He also took his receipts in the leather wallet given to him by his sister who stays in German.

16. He said the Police officer warned him to leave his girlfriend otherwise he would shoot him if he does not. He said the officer took him to a land cruiser and the vehicle stopped on the road facing Meli Kibwa and the officers demanded he secures his freedom by paying Kshs. 50,000/=. He said they took him to his house where the officer took his 3 phones, NHIF and NSSF and a copy of his identity card. On thw way to Voi, they demanded Kshs. 30,000/= which he did not have, so, they took him to the police station.

17. He said on 20th August 2018 the police beat him seriously injuring his right shoulder, broke his ribs and his lower teeth got loose, and later he was taken to Voi referral hospital. He was in the cell till 21st May 2018 and the court gave the police 14 days to complete investigations. On 22nd May 2018 he was taken to the identification parade and his photo was taken and sent to the complainant.

18. In his judgment, the trial Magistrate acquitted the 2nd and 3rd accused persons for lack of evidence. However, he was persuaded the PW1 was able to see the appellant. The learned Magistrate concluded that the identification parade was properly conducted and concluded that the prosecution had established its case against the appellant beyond doubt, convicted him and sentenced him to serve 15 years in prison.

The Appeal

19. The appellant seeks to upset both the conviction and sentence on grounds:- absence of proper identification; conviction was based on a defective charge sheet; deprivation of a fair trial under Article 50 of the Constitution; offence was not proved to the required standard; failure to recall PW1, failure to call the arresting officer; shifting burden of prove to the appellant; the finding was premised on erroneous evidence; and, failing to appreciate the inconsistencies and contradictions.

The submissions

20. The appellant faulted the trial Magistrate for holding that he was properly identified, yet the identification was not properly conducted. (Citing R v Turnbull). He also faulted the trial Magistrate for holding that the appellant was identified by voice recognition. He also wondered why it was only him alone who was asked to speak in Kamba.

21. He also submitted that its improper to frame a charge of robbery with violence under section 295 and 296 (2) of the Penal Code[4] because this would amount to a duplicity. (Citing *Joseph Njuguna & others v Republic*[5] and *Joseph Kaberia and others*[6]). Additionally, the appellant argued that the trial court contravened Article 50(2) (b), 27 (c) and 25 of the Constitution. Also, he argued that the offence was not proved to the required standard. In addition, he argued that the Prosecution never called the arresting officer.

22. The Respondent's counsel submitted that the prosecution adduced consistent, cogent and corroborated evidence. Regarding the argument that a crucial witness was not called, he cited section 143 of the Evidence Act[7] which provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. Regarding identification, he argued that PW1 was able to put the light in the vehicle and also submitted that the appellant was positively identified. On the submissions that the investigations were poor, he submitted that the investigations pointed to the culpability of the appellant. Further, he submitted that the appellant has not demonstrated how his rights under Article 50 were violated. Lastly, on the submission that the charge sheet was defective, he submitted that the appellant was charged with an offence known to the law and if at all there was any defect, the same is curable under section 382 of the Criminal Procedure Code.[8]

23. In his submissions in reply, the appellant argued that the evidence tendered was contradictory. He argued that PW1 said that he identified the 6th person while PW2 said the appellant was between

4 Cap 63, Laws of Kenya.

5 Criminal No. 5 of 2008.

6 Petition No. 618 of 2016.

7 Cap 80, Laws of Kenya.

8 Cap 75, Laws of Kenya.

numbers 2 & 3. He relied on *Augustino Njoroge Ritho & another v Republic*[9] which held that contradictory and inconsistent evidence is unreliable and cannot convict. Additionally, in support of his argument that crucial witnesses were not called, he cited *John Kenya v Republic*[10] where the appellant was acquitted because some witnesses were not summoned. He also cited *Daitany v Republic*[11] in support of the proposition that if a crucial witness is not called, the court can presume that his evidence would have been averse to the prosecution case.

Determination

24. First, I will address the issue whether the appellant was properly identified as the offender. In this regard, PW1's testimony is crucial. Equally pertinent is the manner in which the trial court evaluated his testimony. PW1 said that it was around 9.30pm. He said he had switched on the light in the vehicle, so, he saw the attackers very well. He said the attacker was the 1st accused. He said his hands were tied at the back with a rope and they put in the space behind the driver's seat and continued beating him. He said he was stabbed with a knife. Upon cross-examination by the appellant, he said the incident took only 2 minutes. He said he was shocked after seeing a pistol. He admitted he panicked after the attack. He also said he was in very bad shape. He said he lost consciousness and he did not know what happened. He said that at the time of recording the statement, he did not mention that he was able to identify any of his attackers.

25. Interestingly, while evaluating the above evidence, the learned Magistrate went on a frolic of his own and dangerously descended into the arena of the dispute and introduced in his judgment evidence which was not adduced before him. The learned Magistrate stated: -

> " He said the "probox being a head of PW1 must have parked in front of the vehicle that was being driven by PW1 and hence at the time of parking his vehicle lights were on and behind the probox which was to park in front of him and at the time the lights of the probox were on as the driver had also to park off the road. It was not possible for the lights of the probox to be off as this could have created suspicion about the people who were in the problem (sic) and make Pw1 either run away of knew that the people were not good people. It is normal practice also that vehicles driven by police officers on duty on a busy high way at night upon stopping any vehicle, must have all the lights of the police vehicle on.
>
> At this stage PW1 stopped and waited for the people from the probox and he noted clearly that the accused came out of the probox from the passengers seat. What of course allowed him to see that were both headlights of the two vehicles that has (sic) stopped off the road on the same direction and the pro box being in front while the vehicle of PW1 behind that probox at a reasonable distance.....
>
> That movement from the probox to where pw1 was took sometime and he was able to see the first accused person very well as both lights of the two vehicles were on..."

26. The learned Magistrate imagined how and where the vehicles were parked. He even imagined that the lights were on. So innovative was the Magistrate that he dangerously concluded that it was not possible for the probox to be parked without lights otherwise this could have attracted suspicion and make PW1 run away or attract other people's attention. So creative was the Magistrate that he said police cars are always parked with lights on. She again imagined that what enabled PW1 to see was the lights

[9] Cr App No. 99 of 1986.

[10] Criminal Appeal No. 181 of 1984.

[11] 1950 EACA 493.

from the vehicles. Even PW1 said the incident lasted 2 minutes, the Magistrate said the incident lasted some time.

27. The above account as narrated by the learned Magistrate is not supported by the record. On the contrary, the PW1's testimony is clear on the duration and the brief encounter. The learned Magistrate converted himself into a prosecution witness, manufactured evidence and proceeded to convict. The function of the court is not to usurp the role of witnesses by descending into the arena of to the dispute, as it were. This is a serious misdirection.

28. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered to play the role of either the defence of the prosecution by adding information not placed before it. It is a well-accepted and settled principle that a court must discharge its statutory functions - whether discretionary or obligatory - according to law in dispensing justice because it is the duty of a court not only to do justice but also to ensure that justice is being done. The learned Magistrate fell into a serious misdirection by introducing evidence which was not presented before him and converted himself into a state witness to the prejudice of the appellant. On this ground alone, the conviction cannot be allowed to stand.

29. The other key question is the identification at the parade. It is important to recall that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration.[12] Human memory is not foolproof. It is not like a video recording that a witness needs only to replay to remember what happened. Memory is far more complex. Memory has been described as consisting of three stages: acquisition –

> " the perception of the original event"; retention - "the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval - the "stage during which a person recalls stored information."[13]

30. At each of the above three stages the "information ultimately offered as 'memory' can be distorted, contaminated and even falsely imagined."[14] At each of these stages, memory can be affected by a variety of factors such as was held in S v Henderson:-[15]

    a) whether the witness was under a high level of stress. Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification.

    b) whether a weapon was used, especially if the crime was of short duration. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of the subsequent identification if the crime is of short duration.

12 *S v Henderson 27 A 3d 872 (NJ 2011).*

13 Lirieka Meintjes van der Walt, Judicial understanding of the reliability of eyewitness evidence: A tale of two cases, Fort Hare University, South Africa.

14 Ibid.

15 27 A 3d 872 (NJ 2011).

c) how much time the witness had to observe the event. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.

d) whether the witness possessed characteristics that would make it harder to make an identification, such as the age of the witness and the influence of drugs or alcohol. An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who consumed a small amount of alcohol.

e) whether the perpetrator possessed characteristics that would make it harder to make an identification. Was he or she wearing a disguise? Did the suspect have different facial features at the time of the identification. The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification. Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.

f) how much time elapsed between the crime and the identification? Memories fade with time. The more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.

g) whether the case involves cross-racial identification. Research has shown that people may have greater difficulty in accurately identifying members of a different race.

h) whether the observation of the perpetrator was close or far. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.

i) whether or not the lighting was adequate during the observation. Inadequate lighting can reduce the reliability of an identification.

j) the confidence of the witness, standing alone, may not be an indication of the reliability of the identification, but highly confident witnesses are more likely to make accurate identifications. Even an identification made in good faith could be mistaken.

31. The fundamental aim of eyewitness identification evidence is reliably to convict the guilty and to protect the innocent. Is important to bear in mind the types of identification evidence. The common law recognized several categories of identification evidence because the potential dangers of identification evidence differ between the categories. One is Positive Identification Evidence which is evidence by a witness identifying a previously unknown person as someone he or she saw on a prior relevant occasion. Such evidence may be used as direct or circumstantial proof of an offence.[16]

32. The second category is Recognition Evidence, which is evidence from a witness that he or she recognizes a person as the person he or she saw, heard or perceived on a relevant occasion. As stated above, upon cross-examination, PW1 said the incident took only 2 minutes. He admitted he was shocked after seeing a pistol. He admitted he panicked after the attack. He also said he was in very bad

16 *See Festa v R (2001) 208 CLR 593.*

shape. He said he lost consciousness and he did not know what happened. He said that at the time of recording the statement, he did not mention that he was able to identify any of his attackers. This piece of evidence, evaluated using the lens of the tests enumerated above raises serious doubts as to the credibility or reliability of the alleged identification.

33. In *Donald Atemia Sipendi v Republic*[17] this court stated that identification evidence is evidence that a defendant was or resembles a person who was present at or near a place where an offence was committed, or an act connected with the offence was committed. Decisional law is in agreement that there is a special need for caution before accepting identification evidence. Significant considerations which largely depend on the facts of the case and may include the circumstances of the sighting; whether the person was known to the witness; the time that elapsed between the sighting and the reporting to police and any differences between the description of the person and their actual appearance.

34. Evidence from eyewitnesses plays an important role in all contested cases. However, as alluded to earlier, the memory is a fragile and malleable instrument, which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in injustices. Our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. However, the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

35. PW1's testimony on identification was the sole testimony upon which the appellant was convicted. As was held in *Charles O. Maitanyi v Republic*,[18] it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care. In *Kariuki Njiru & 7 others v Republic*[19] the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

36. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

37. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution. While testing identification evidence of a single witness, great care and caution should be taken to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. Authorities are

17 {2019} e KLR.

18 {1988-92} 2 KAR 75.

19 Criminal Appeal no. 6 of 2001 (Unreported).

in agreement that these include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the complainant knew the accused. Such evidence may be reinforced by sufficient collaboration. In absence of collaboration, the court needs to treat it with caution. In evaluating the accuracy of identification testimony, the court should also consider such factors as: -

a) What were the lighting conditions under which the witness made his/her observation?

b) What was the distance between the witness and the perpetrator?

c) Did the witness have an unobstructed view of the perpetrator?

d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e) For what period of time did the witness actually observe the perpetrator?

f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g) Did the witness have a particular reason to look at and remember the perpetrator?

h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

38. PW1 by his own admission spent barely two minutes with the assailants. He was beaten at his chest, stabbed with a knife, was tied with a rope and pushed behind the seat. In his own words he was shocked when he saw a gun. Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises, the trial court has to satisfy itself, before convicting. The evidence must be such that threshold set by the rules and decided case law has been met. The evidence must leave no doubt that the suspect was positively identified.

39. The central element of the cautionary approach is that identification evidence by an 'eyewitness should not be accepted unless it has been rigorously tested. Where such identification rests upon the testimony of a single witness and the accused was identified at a parade which was conducted in a manner which did not guarantee the standard of fairness observed in the recognised procedure, but was calculated to prejudice the accused, such evidence standing alone can have little weight. To me, PW1's evidence does not and cannot meet the tests for a credible and reliable identification. It was unsafe for the Magistrate to premise the conviction on such scanty evidence in absence of corroboration. On this ground alone, this appeal succeeds.

40. The other issue worth addressing is the "purported voice identification." PW1 said that he recognized the appellant's voice. He said the attackers spoke Kamba. It was his testimony that after identifying the appellant in the parade, "he went outside and greeted him in Kikamba, and he answered." He says he was able to recognise his voice. To me the reverse should have been the best approach. The appellant

should have been put in a room with others and asked to speak. PW1's role ought to have been to listen to the voice and identify it. Not to call the appellant or "purport" to greet him as if executing a pre-arranged exercise to achieve a desired goal. Such an approach is impermissible and cannot pass the test of a proper voice identification.

41. The evidence of voice identification is at best suspect, if not, wholly unreliable. Accurate voice identification is much more difficult than visual identification. It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction. Therefore, the courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification. Precautions are necessary to be taken in placing any reliance on the evidence of voice identification. The Court of Appeal in *Karani v Republic*[20] stated:-

> " Identification by voice nearly always amounts to identification by recognition. Yet here as in any other case care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions favouring safe identification."

42. The incident as PW1 stated lasted 2 minutes. He admitted he was in distress. Other than recalling that the attackers spoke Kamba, he did not say how and why he could remember the appellant's voice after such a brief and distressing moment. It is my finding that the evidence of voice recognition was the most reliable and incredible evidence presented in this case. It was totally unsafe to found a conviction on such evidence. Again, on this ground, I allow this appeal.

43. The other notable gap in the prosecution case is that whereas PW1 was called to identify the appellant at the Police Station, no evidence was adduced to suggest where, when or why he was arrested and whether he had been arrested in connection with the offence. The arresting officer was not called nor was the court told the basis of the conviction. This omission in my view created a missing link which could have corroborated the scanty evidence of PW1.

44. I am alive to the fact that section 143 of the Evidence Act[21] provides that "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact." I am also aware of the existence of jurisprudence such as *Julius Kalewa Mutunga v Republic*[22] in ehich Court of Appeal held that"...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

45. The Court of Appeal reiterated the same position in the case *Alex Lichodo v Republic*.[23] Perhaps the leading authority on this issue is the case of *Bukenya & Others vs Uganda*[24] where the East African Court of Appeal held: -

    i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

20 {1985} KLR 290

21 Cap 80, Laws of Kenya.

22 Criminal Appeal No. 31 of 2005.

23 Criminal Appeal No. 11 of 2015-Visram A, Karanja W, and Mwilu P. JJJA.

24 {1972}E.A.549.

ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

46. However, in the above case, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. But, in the instant case, the Prosecution case rested on the uncorroborated and shaky evidence of PW1. One wonders why the Prosecution opted to base its case on such wobbly evidence and opted not to call the arresting officer to link the arrest with the offence at hand. Where a crucial witness is not called and the testimony adduced is weak and requires corroboration as in the instant case, then the court can make adverse inference. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. It will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

47. The rule behind the rationale for making an adverse inference laid down in *Jones v Dunkel*[25] which outlines the circumstances under which an adverse inference may be drawn. This rule is grounded on common sense. First, the prosecution has discretion to assess the importance the testimony of a witness would play, or would likely have played in relation to the issue concerned.

48. Second, the unexplained failure by a party to give evidence or call a witness may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Third, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of the drawing of the inference. Fourth, the absence of a witness or document cannot be used to make up any deficiency in the evidence. The defence cannot use the absence of the said witnesses to fill deficiencies in their defence. The basis for the need to call such witnesses must flow from the evidence adduced right from cross-examination to the defence. Thus, it cannot be used to support an inference that is not otherwise sustained by the evidence. Fifth, the rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference.[26]

49. Whether the failure to call a witness gives rise to an inference depends upon a number of circumstances. In *Fabre v Arenales*[27] Mahoney J. said that the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. The foregoing position was cited with approval by Miler JA in *Hewett vs Medical Board of Western Australia*[28] and also the same position has authoritatively been stated in *Cross on Evidence.*[29]

25 {1859} HCA 8; {1859}101 CLR 298, 308, 312

26 See *Schellenberg vs Hesse Tunnel Holdings Pty Ltd {P2000} HCA 18.*

27 {1992} 27 NSWLR 437, 449-450,Priestly and Sheller JJA agreeing)

28 {2004} WASCA 170.

29 *7*th Edition, Page 1215, by Heydon J D.

50. The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; Schellenberg v Tunnel Holdings,[30] *Ronchi v Portland Smelter Services Ltd*[31] and *Hesse Blind Roller Company Pty Ltd v Hamitovski*[32] and its also reiterated in Cross on Evidence.[33]When no challenge is made to the evidence of witnesses who are called, the principle in Jones v Dunkel cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.[34] A look at the record shows serious gaps in the prosecution case that required collaboration. It also shows a serious challenge on the prosecution's account by the the appellant. This is a proper case for the court to draw an adverse inference on account of the prosecutions failure/omission to call the arresting officer.

Conclusion

51. Flowing from my analysis and conclusions on the issues discussed above, it is my finding that the trial court misdirected itself in returning a verdict of guilty. I find that the conviction was not supported by the evidence tendered. Accordingly, I quash the conviction and sentence imposed upon the appellant in Criminal case number 349 of 2018, Voi, R v Simon Sammy Kimea by Hon. F. M. Nyakundi, SRM on 22.4.2020 and order that the said Simon Sammy Kimea be released from prison forthwith unless otherwise lawfully held.

    Right of appeal 14 days

SIGNED, DATED AND DELIVERED VIRTUALLY AT VOI THIS 18TH DAY FEBRUARY 2022

JOHN M. MATIVO

JUDGE

18.2.2022

Before Mativo J

Appellant.....Present

N/A for the Respondent

30 Cubillo (No. 2) 355.

31 {2005} VSCA 83.

32 {2006} VSCA 121 28.

33 Supra at page 1215.

34 See Cross on Evidence, Supra.