



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. E006 OF 2021**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. E007 OF 2021**

**CRIMINAL APPEAL NO. E008 OF 2021**

**CRIMINAL APPEAL NO. E009 OF 2021**

**AND**

**CRIMINAL APPEAL NO. E108 OF 2021**

**BETWEEN**

**DANIEL MUTHOMI MARIGU.....1<sup>ST</sup> APPELLANT**

**EDWARD MURIMI KAKABU.....2<sup>ND</sup> APPELLANT**

**PETER KIMENCHU MUGITA.....3<sup>RD</sup> APPELLANT**

**JOSEPH MAORE NCHEBERE.....4<sup>TH</sup> APPELLANT**

**JOHN MIRITI KAILEMIA.....5<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in Criminal Case Number 620 of 2017 in the Chief Magistrate's Court at Maua by Hon. T.Gesora (CM) on 13.01.2021)*

**JUDGMENT**

**Background**

1. DANIEL MUTHOMI MARIGU, EDWARD MURIMI KAKABU, PETER KIMENCHU MUGITA, JOSEPH MAORE NCHEBERE and JOHN MIRITI KAILEMIA (1<sup>st</sup> to 5<sup>th</sup> Appellants respectively) who were the 3<sup>rd</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, 1<sup>st</sup> and 5<sup>th</sup> Accused persons respectively were jointly charged with robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code committed on 21.02.2017 against Kenneth Ngugi Murungi who was also wounded

2. In the alternative count, 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Appellants and another were charged with handling stolen property contrary to section 322(1) of the Penal Code the particulars being that they were on 22.02.2017 found in possession of 27 goats and 13 sheep knowing or having reason to believe they were stolen or unlawfully obtained.

**The prosecution's case**

3. The prosecution called eight (8) witnesses in support of the charges. Complainant testified that on the night of 21<sup>st</sup> and 22<sup>nd</sup> February, 2017 at about 23.00 hours, he was at his employer's farm with 5 of his co-workers when he saw a group that had bright torches approaching the farm. That fearing for their lives, they ran in different direction but he was not lucky as he was shot with an arrow that pierced through his left leg. That from his hiding place, he saw 3<sup>rd</sup> Appellant whom he knew before and three others driving away his employer's goats and sheep. He said he identified the 3<sup>rd</sup> Appellant from the light of his own torch which was bright. PW3 Justine Mwenda Kahiga who was in company of PW1 stated that on the material night, he identified the 1<sup>st</sup> and 3<sup>rd</sup> Appellant who had a torch and was armed with a bow and arrows but did not identify the person that wounded PW1. He also stated that there was moonlight on that night. PW2 Peter Kirimi Mbogo was informed about the robbery of his 39 goats and 15 sheep by his manager Joseph Miriti Mburia. He later identified the 27 goats and 13 sheep that were recovered in his absence by the police. PW4 Nthenya Antony Gitonga stated that at the time of their arrest on 22.02.2017, the 2<sup>nd</sup> and 6<sup>th</sup> Appellant were neither armed nor in possession of any goats or sheep. PW6 Geoffrey Nthatu Kaisu stated that on 22.02.2017 at about 6.00 pm, he saw 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants running from Kamiramba village where 39 goats and 15 sheep were abandoned. Suspecting that the animals could be stolen, he reported the matter to police. PW7 APC Charles Mwangi stated that he arrested 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> Appellants and another on 22.02.2017 at about 12.15 am after they were identified by members of public among them one Lucy Karimi Gatuto who said that she had seen them with suspected stolen goats and sheep. CPL Christopher Njue tendered as PEXH. 1 (a) to (e) the photographs of the sheep and goats that were recovered.

#### **Defence case**

4. All the Appellants denied the offences. The trial court after considering the evidence found the prosecution case proved, convicted and sentenced each of the Appellants to serve 25 years' imprisonment.

#### **The Appeal**

5. The conviction and sentence provoked this appeal. In his petition of appeal and written submissions, Appellants argues that the prosecution neither proved robbery with violence nor possession of the stolen property.

#### **Analysis and Determination**

6. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See **OKENO – VS – REPUBLIC (1972) E.A. 32**).

7. Concerning, 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Appellants, PW6 Geoffrey Nthatu Kaisu stated he called police after he saw the three running away from where 39 goats and 15 sheep were abandoned. PW7 APC Charles Mwangi was categorical that when he arrested the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> Appellants and another, they were not in possession of any goats or sheep. Appellant's denied having been at the scene where the goats and sheep were recovered from and since the evidence by PW6 that 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Appellant had the goats was uncorroborated, 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Appellants ought to have been given the benefit of doubt.

8. The trial court after considering the evidence by PW1 and PW3 stated that he was satisfied that they had positively identified the 1<sup>st</sup> and 3<sup>rd</sup> Appellant because of the powerful torches the robbers had, that there was moonlight and that they also recognized 3<sup>rd</sup> Appellant's voice as they were calling out names.

9. It is trite that evidence of visual identification should always be approached with great care and caution (see **Waithaka Chege v R {1979} KLR 271**). Greater care should be exercised where the conditions for favourable identification are poor. (**Gikonyo Karume & Another v R {1900} KLR 23**). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See **Abdalla bin Wendo & Another v R, {195} 20 EACA 166; Wamunga v R, {1989} KLR 42; and Maitanyi v R, 1986 KLR 198**).

10. The Court of Appeal in the case of **Joseph Muchangi Nyaga & another v Republic [2013] eKLR** stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.

11. The difference in approach between identification and recognition was expressed thus by Madan J.A in **Anjononi and Others vs The Republic [1980] KLR**;

**“.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”**

12. That is not to suggest of course, that cases of misrecognition cannot occur (See **Karanja & Anor vs. Republic [2004] KLR 140**) and courts are still duty-bound to examine such evidence with great care.

13. PW1 and 3 stated that he 1<sup>st</sup> and 3<sup>rd</sup> Appellants were well known to them. 1<sup>st</sup> and 3<sup>rd</sup> Appellants denied that they were at the scene of crime. The offence was committed at 11.00 pm. The only source of light according a torch that was in possession of 3<sup>rd</sup> Appellant and moonlight.

14. That being the case, the trial court had a duty, which it failed to discharge, to test the reliability of identification by recognition at night by considering the intensity of the torchlight and moonlight, the location of the light in relation to the 1<sup>st</sup> and 3<sup>rd</sup> Appellants and time taken by PW1 and 3 to observe the 1<sup>st</sup> and 3<sup>rd</sup> Appellants so as to be able to recognize them. I am of the considered view that the purported recognition and identification of the 1<sup>st</sup> and 3<sup>rd</sup> Appellants at night was not free from error.

15. PW1 stated that he also identified the 3<sup>rd</sup> Appellant by voice. This type of identification has received judicial consideration on several occasions, In **Libambula v Republic [2003] KLR 683** this Court held that:

**“Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.”** (Our emphasis). See also **Choge v Republic [1985] KLR 1**.

16. PW1 did not specifically tell court what the 3<sup>rd</sup> Appellant said from which he recognized that to be his voice. The conditions at the time the voices were being heard were marked with fear and confusion by PW1 who had already been shot with an arrow and was in pain. In my considered view, I find that hardly any conditions conducive to the positive and safe identification of a voice existed at the time. Accordingly, the 3<sup>rd</sup> Appellant cannot be said to have been positively identified by voice and the question of identification was not therefore settled beyond reasonable doubt. See **Wanjohi & 2 Others v Republic [1989] KLR 415**.

17. Further to the foregoing, the 3<sup>rd</sup> Appellant raised the defence of alibi that he was at home with his family. He called his wife as a witness.

18. The Supreme Court of Nigeria in the case of **Ozaki & Anor Vs The State (1990) LCN/2449(SC)** held as follows:

**“it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability” and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.**

19. Our own Court of Appeal in the case of **Kiarie v Republic [1984] KLR** held THAT: -

**“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”**

20. The trial magistrate rejected 3<sup>rd</sup> Appellant’s defence on the ground that he made about 117 calls on the material night and could therefore not have been asleep. With due respect, no evidence was tendered by prosecution to prove that the calls were made elsewhere other than from 3<sup>rd</sup> Appellant’s home.

21. Accordingly, and for the reasons set out hereinabove, I find that the prosecution did not prove its case against the Appellants on both the main and alternative counts beyond any reasonable doubt. The conviction and sentences are against the weight of evidence. This appeal succeeds. The conviction of each of the Appellants is quashed and the sentences set aside. Unless otherwise lawfully held, it is ordered that the Appellants be set at liberty.

**DELIVERED AT MERU THIS 25<sup>th</sup> DAY OF November 2021**

**WAMAE. T. W. CHERERE**

**JUDGE**

**In the presence of-**

**Court Assistant - Kinoti**

**1<sup>st</sup> Appellant - Present**

**2<sup>nd</sup> Appellant - Present**

**3<sup>rd</sup> Appellant - Present**

**4<sup>th</sup> Appellant - Present**

**5<sup>th</sup> Appellant - Present**

