



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

**(CORAM: CHERERE -J)**

**CRIMINAL APPEAL NUMBER 284 OF 2012**

**CHRISPIN KADUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against conviction and sentence in Criminal Case Number 1047 of 2010 in the Senior Resident Magistrate's Court at Vihiga delivered by Hon. G. A. Mmasi (PM) on 24<sup>th</sup> October, 2012)*

**JUDGMENT**

**Background**

1. **CHRISPIN KADUKU**, the appellant herein has filed this appeal against conviction and death sentence on a charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code allegedly committed on the night of 26<sup>th</sup> and 27<sup>th</sup> October, 2010 against Francis Idia Evidah who was also wounded.

**The prosecution's case**

2. The prosecution called 8 witnesses in support of the charge. **PW1, Francis Idia Evidah**, the complainant herein stated that on the material night at about 11.30 pm, he heard some commotion in the kitchen adjacent to the bedroom. That he went to the kitchen and finding the cattle therein standing concluded that something was wrong but went back to his bedroom. That immediately thereafter, someone entered his house. That the person knocked the bulb that was lighting throwing the room into darkness and called upon him to open the door and that he recognized the voice as that of the appellant. That the appellant and his brother one Johnstone Imayi managed to break into the house and found him in the bedroom whose lights were on and he noticed that the appellant was armed with an iron bar while the other had a panga. He stated that the robbers assaulted him and also stole from him a phone, Kshs. 1,300/-; Barclay, Equity and KCB ATM Cards and ID card after which they escaped. He stated that he reported the matter to police and the appellant was arrested and charged. **PW2, Charles Leparmoricho**, a clinical officer examined complainant on 27.10.10 and produced treatment notes (PEXH. 1) and P3 form (PEXH. 2) which show that he had a swollen head which was bleeding on the right side. **PW3 Pius Musasia**, the complainant's neighbor stated that he heard screams coming from the direction of complainant's house on the material night. He stated that he went out of the house armed with a torch and a rungu and saw two boys, one of whom he identified as the appellant running. That he later met complainant who was bleeding and who informed him that he had been robbed and injured by Chrispine Kaduku and his brother one Johnstone Imayi. **PW4 PC David Otieno**, a scenes of crime officer visited the scene of crime and took 4 photographs which eh produced together with his certificate as PEXH. 6 (a) to (d) and 7 respectively. **PW5 Haggai Asena** stated that on 27.10.10 at about 2,30 am, complainant informed him that he had been robbed and injured by Chrispine Kaduku and his brother one Johnstone Imayi and he in turn reported the matter to police and **PW6 Julias Luduhiza** and **PW8 CPL Patrick Mulombi**. **PW6 Julias Luduhiza** stated that he arrested the appellant on 18.11.10 and handed him over to the police. **PW7 PC Nahashon Kibos**, the investigating officer, received complainant's report, investigated the case and later charged the appellant.

3. When put on his defence, appellant denied the offence and stated that they were arrested and charged for an offence that he did not commit. His wife confirmed that the appellant was arrested on 18.11.10 as stated by PW6.

4. *In a judgment* dated 24.10.12, appellant was convicted and sentenced to suffer death.

**The Appeal**

5. The conviction and sentence provoked this appeal. In the petition of appeal filed on 5.7.12 and supplementary grounds of appeal filed on 7.9.18, the appellant raised 4 grounds of appeal which I have summarized into 6 grounds as follows: -

***1. There was only one witness to the crime***

2. *That there were contradictions in the prosecution case*

3. *That there was possibility of error of visual identification*

4. *That the appellant's defence was not considered*

6. When the appeal came up for hearing on 7.9.18, Ms. Mburu, learned counsel for the appellant wholly relied on the grounds of appeal and the written submission filed on 7.9.18.

7. Mr. Juma, learned State Counsel opposed the appeal and relied on the evidence on record.

#### **Analysis and Determination**

8. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005** where the court stated as follows: -

***“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.*”**

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for both parties.

10. In dealing with this appeal, I will address the 3 grounds summarized above as follows: -

#### **There was only one witness to the crime**

11. Section 143 of the Evidence Act provides as follows:-

***“No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact”***

12. There is no doubt that the complainant was the only eye witness to the crime.

13. More often than not, offences are committed when the victims are unaccompanied. What matters is not the number of witnesses but whether or not a case has been proved to the required standard.

#### **That there were contradictions in the prosecution case**

14. Appellant's counsel in her submission pointed out to the recovery of a shoe allegedly belonging to the appellant's accomplice which complainant allegedly said he took to the police while PW7 said that he recovered it from the scene.

15. No evidence was tendered to link the appellant to that shoe and any inconsistencies regarding its recovery are therefore immaterial.

#### **Did complainant and PW3 recognize the robbers or anyone of them**

16. This is a case of recognition since it is on record that the appellant was well known to the complainant and PW3 who are from the same neighborhood.

17. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court 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. We drew attention to the distinction between recognition and identification in Siro Ole Gitoya Vs. The Republic (unreported.)”***

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

19. Complainant stated that there was electric lighting in his bedroom where he was robbed and injured and that he had recognized the appellant and his brother as the robbers. On the same night, he informed PW3 and PW5 that he had been robbed and injured by the appellant Chrispine Kaduku and his brother one Johnstone Imayi. PW3 on the other hand stated that he had a torch and that it had enabled him to identify the appellant and his brother while they were running away from the scene of crime.

20. Complainant stated that he was with the appellant and his brother for about 10 minutes. I am therefore convinced that the trial magistrate

properly evaluated the evidence on record and came to the conclusion that the appellant had been satisfactorily and more reliably recognized since he was not a stranger to PW1 and PW3.

**Was the defence by appellants considered?**

21. From what is stated hereinabove, I find that the defence by the appellant was duly considered and rightfully rejected.

22. From the above analysis, I have come to the conclusion that: -

**1. This appeal has no merit and it is dismissed**

**2. In view of the Supreme Court decision in *Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR and William Okungu Kittiny v Republic [2018]eKLR* , the appellant's case is hereby remitted to Vihiga Magistrate's Court for mitigation and re-sentence**

**DATED THIS 19th DAY OF September 2018**

**T. W. CHERERE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 26th DAY OF SEPTEMBER 2018**

**WILLIAM M.MUSYOKA**

**JUDGE**

**In the presence of-**

**Court Assistant - Erick/Polycarp**

**Appellant -Present**

**For Respondent - Mr.Juma**