



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 53 OF 2015

JACOB GIKUNDI KARWEGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Nyeri Chief Magistrate's Court Criminal Case No.995 of 2014 of 2013 delivered by S. Ngugi Principal Magistrate on 30th July 2015.

JUDGMENT

1 **Jacob Gikundi Karwigi** the appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars being that on the 9th day of December 2013 at Kiganjo forest road, Kiganjo location within Nyeri county the Appellant jointly with others not before court, being armed with offensive weapons namely panga and rungus robbed Benson Muriuki Wairimu of his motor cycle registration number KMCE 375H make Lion valued at kshs 80,000/-, Samsung Duos valued at Ksh 4,000/- all valued at Kshs 84,000/- and cash Kshs 2,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Benson Muriuki.

2 The matter proceeded to full hearing with the prosecution calling six(6) witnesses. The Appellant gave a sworn statement of defence without calling any witnesses. Upon analyzing the evidence the court found him guilty and convicted him. He was sentenced to death.

3 Being dissatisfied with the judgment he appealed raising the following grounds:

(i) *That the trial magistrate erred in law and order while basing his conviction in reliance of the purported visual identification by recognition without considering that the same was obtained through difficult circumstances since it was during the night.*

(ii) *That the trial magistrate erred in law and order while further basing his conviction in reliance of the advance evidence of PW2 brother to the complainant and PW3 without considering that their evidence was riddled with contradictions and gleering doubts.*

(iii) *That the trial magistrate erred in law and order while becoming impressed with mode of his arrest without putting into consideration that he was being arrested and charged up to his conviction with the evidence of a single witness (PW1) with no supportive evidence at the scene of crime.*

(iv) *That the trial magistrate erred in law and order while being misdirected by the advanced evidence of the whole set of the prosecution witness without considering that as charges were laid down in his respect were not adequately proved.*

(v) *That the trial magistrate erred in law and order while rejecting his defense without putting into consideration that the same was not challenged by the prosecution side.*

4 The prosecution case was that PW1 **Benson Muriuki Wairimu** a bodaboda rider and owner of motorbike no KMDC 375H Lion (blue) dropped a customer at Gikindu on 9th December 2013 at 9pm. On his way back as he changed gear on a steep hill, 3 people emerged. His lights were on and he recognized Jacob Gikundi (the Appellant). These people threw stones at him until he lost control of the motorbike and fell. The attackers then dragged him to the nearby forest.

5 They removed his shoe laces and used them to tie his hands from behind. He was cut twice at the back of his head with a panga and above his mouth with a knife. He was also robbed of his wallet containing kshs 2000/- ID card, Equity bank ATM card and Samsung phone duos. As they demanded for money he said he was able to identify the Appellant's voice. He had known him well from their school days and he was a neighbour.

6 They left with the motorbike and he remained behind. When things had cooled he left for the shopping centre at Kiganjo as he bled

profusely. He met his friend Mwangi PW3 and reported to him.

7 He gave PW3 his brother's number and requested him to call and inform him of what had befallen him. His brother (PW2) responded and came and took him to the Police Station and then to the dispensary and later to Tumutumu Mission Hospital for treatment. He recorded his statement the next day. His motorbike has never been recovered. The Appellant disappeared and was only arrested on 13th November 2014.

8 PW2 **Charles Kamunyu** is the complainant's brother who was called by PW3. He testified that Pw1 informed him that their neighbour (Appellant) was one of those who had robbed him. On 13th November 2014 he spotted the Appellant at Chaka and he reported to some APS who were guarding Equity Bank at Chaka. One of them accompanied him and arrested the Appellant and took him to Chaka Police Post. He also called PW1 and informed him.

9 PW3 **Geoffrey Mwangi Gakombo** confirmed what Pw1 told him about the robbers including mentioning the Appellant as one of the robbers. PW4 **No 235141 APC Mugene Vincent** is the AP who was approached by PW2 and arrested the Appellant. PW5 **No 71505 P.C Anderson Muriithi** received the complaint on 9th December 2013 at 9.30 p.m from PW1 and PW2. He confirmed that PW1 had informed him that he had identified one of the robbers as Gikundi who was his neighbour and with whom he had gone to the same school. The next day him and other officers went to search for the culprit in Nyeri Gatitu area and Majengo area in vain.

10 PW 6 **Dishon Mutiso** is the clinical officer who filled the P3 form in respect of PW1. He confirmed that PW1 had a deep cut wound on the left side of the head, cut on right side of the cheek penetrating to the mouth, marked tenderness on the chest and right shoulder joint. Probable weapon used was sharp and blunt. The p3 form was produced as EXB1.

11 In his sworn statement of defence the Appellant said he was a turn boy. That on the material day he went to work and was to ferry beers to Moyale. He left for Moyale on 8th December 2013 with his boss John Opiyo and returned on 12th December 2013.

12 When the Appeal came for hearing Mr Kiboi for the Appellant submitted that his main contention was the identification. He argued that the circumstances were not conducive for a positive identification. That the time was 10 pm and PW 1 was the single identifying witness. Counsel wondered why the Appellant was arrested after 11 months if indeed he had been identified.

13 He further argued that if the Appellant was known why were the officers looking for him in places that were not his home? He referred the court to the case of **Anjononi v R 1980 KLR 59** where the law on identification and recognition was settled.

14 He contended that the principle in the **Anjononi** case was not applied, in this case and nothing of the stolen items was recovered from the Appellant.

15 Mr Njue for the State opposed the Appeal admitting that there was no recovery in the case and that recovery was never an issue. The conviction was based on recognition and the incident occurred at night. He submitted that PW1 identified the Appellant by voice and use of the Motorbike lights which were on.

16 He contended that PW1 and the Appellant were neighbours and school mates for eight(8) years. Further that whoever he came into contact with, he told him about the Appellant. Though the Appellant resided in Kiganjo, searches were conducted in other places before his arrest.

17 He argued that the Appellant had gone missing and he was arrested the moment he landed. Failure to arrest him did not exonerate him from what he had done.

18 Counsel supported the submission that personal knowledge is key in recognition. For him a neighbour possessed such knowledge, and the identification was therefore proper.

19 This being a first Appeal this court must reconsider and re-evaluate the evidence and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses, and give an allowance for that. The court of Appeal in the case of **Mwangi v R [2004] 2KLR 28** stated the following of this duty:

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts' own decision on the evidence.

The first appellate court must itself weight the conflicting evidence and draw its own conclusions.

It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.”

20 Having considered the evidence on record, grounds of appeal and the submissions, I find the issue falling for determination to be the one of identification.

21 There is no dispute that the complainant was robbed on the material night. He was robbed of the items stated in the particulars of the charge sheet. None of these items was ever recovered. There is also evidence from PW1-PW3, PW5 and PW6 in respect to the injuries he sustained.

22 What falls for determination is the issue as to whether the Appellant was identified by PW1 as being among the robbers.

23 It is not disputed that this incident occurred at night to be precise around 10.00 pm. PW1 was the sole identifying witness. As observed by the Court of Appeal in **Karanja & Anor v R [2004] 2 KLR 140,147** (Githinji, JA, Onyango Otieno & Deverall Ag JJA).

“The law as regards identification under difficult conditions is now well, settled. In the case of Cleophas Otieno Wanunga v R Court of Appeal No 20 of 1989 at Kisumu this court states as follows:-

“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized that appellant among the robbers who attacked and robbed them..... what we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R VS Turnbull [1976] 3ALL ER 549 at pg 552 where he said:-

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

24 Further in the case of **Kiilu & Anor v R [2005] 1KLR 174** the Court of Appeal (Tunoi, Waki & Onyango Otieno JJA) stated this of such a witness:

“ Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

It follows that PW1’s evidence must be tested with a lot of care.

25 According to PW1 he identified the Appellant by use of the light from his motorbike and he also recognized his voice when demands for money were made. I will first deal with the identification. Were the conditions favourable for a positive identification? This is PW1’s narrative:

“On my way back as I changed gear as there is a steep hill, 3 people emerged. My lights were on and I recognized one as Jacob Gikundi. They threw stones at me and I was hit on my chest. I lost control and fell as did on the motorcycle.”

26 PW1 was riding his motorbike going down a steep slope and changing gear, and his lights were on. He does not say whether the lights were full or dim. He adds that three people emerged and he identified Jacob Gikundi his neighbour. Where did these people emerge from and to where? Did they emerge from his right, left or centre and where did they go to? I ask all these questions as they are part of testing the veracity of his identification. Since he claims to have been able to identify the Appellant with the light from the motorbike, that light should have enabled him to see how and from where these people emerged from.

27 He said they threw stones at him making him together with the motorbike to fall down, and he was then dragged to the nearby forest. On this element of identification I find that the trial court should have inquired into the intensity of the light i.e. whether it was full or dim. In re-examination he said they emerged from his front. If the lights were on as he claims, then he should have seen them from far if indeed they were in front of him. I refer to what the Court of Appeal stated in the case of **Simiyu & Anor v R [2005] 1KLR 192**

“ In the present case, neither of the two courts below demonstrated any caution further, there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error.

28 PW1 further testified that he recognized the Appellant through voice identification. He added that he knew the Appellant well because they went to primary school together std 1-8 and he was his neighbour. He recognised his voice when he demanded for money. In the absence of evidence on the brightness or otherwise of the light.

29 In the cases of **Choge v R [1985] and Karani v R [1985] KLR 290** the Court of Appeal has held that:

“Evidence of voice identification is receivable and admissible and it can depending on the circumstances, carry as much weight as visual identification. It has further said that in receiving such evidence however care and caution should be exercised to ensure that the witness was familiar with the appellant’s voice and recognized it and that the conditions obtaining at the time the recognition was made were such that there was no mistake in testifying to that which was said and who had said it.”

30 There is no dispute that PW1 and Appellant are neighbours and were in primary school together. Their voices in primary school cannot be the same in their present state of adulthood. Coming to Pw1's evidence this is what he said.

“They asked me for money. I recognized Jacob Gikundi's voice as he demanded for money.”

I will pose there.

31 Nowhere else in his evidence does PW1 say anything about the Appellant's voice. The question is how did he identify the voice? He was under siege by three people. They asked him for money. He does not state what words were spoken by the said Jacob Gikundi that distinguished him from the other two, since they were all demanding for money from him. For him to have identified the Appellant's voice the Appellant must have uttered certain words. What words did he speak that he can attribute to him alone? Did he not just assume that because he had purportedly identified him then he was the one talking? Such errors occur at times. That distinction by telling the court what the Appellant had said held the key to this puzzle.

32 The report in respect to incident was made on the same night by PW1 and PW2 before the former could be taken to hospital. The police were given the Appellant's name. They never took any action that night. The appellant and PW1 come from Kiganjo. PW5 stated that when they acted on the report the next day, they went to look for the Appellant in Nyeri-Gatitu and Majengo areas. There is no evidence that they ever went to the Appellant's home and missed him, before going to other places to look for him.

33 The prosecution has given the impression that the Appellant disappeared after the commission of this offence. There was no evidence laid before the court to show that the Appellant disappeared from home soon after commission of this offence since no Officer went there to look for him. In his defence he said he was away from home on duty from 8th December 2013 and returned on 12th December 2013. That he was away with his boss called John Opiyo. Nothing stopped the prosecution from applying for leave to adduce rebuttal evidence, on this.

34 Upon analysis and re- evaluation of this evidence, I find that the alleged visual and voice identification by PW1 who was a single identifying witness was not up to the required standard of such evidence. The Appellant may or may not have been the one the complainant saw that night. He will benefit from the doubt created in the mind of the court.

35 I find merit in the appeal which I hereby allow. The conviction is quashed and the sentence set aside.

Orders accordingly.

Dated, signed and delivered this 28th day of November 2018 in open court at Nyeri.

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HEDWIG I. ONG'UDI

JUDGE