



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL APPEAL NO. 6 OF 2015**

**MUIA MUTINDA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in **Kitui Senior Principal Magistrate's Court Criminal Case No. 299 of 2012** by **Hon. B. M. Kimemia P M** on 09/04/14)*

**J U D G M E N T**

1. The charge against **Muia Mutinda**, the Appellant, as framed is **Robbery** contrary to **Section 296**, amended to read **Subsection (2)** of the **Penal Code**. Particulars being that on the **21<sup>st</sup>** day of **May, 2012** at about **02.30 a.m.**, at **Ithumula Location**, in **Kitui County**, jointly with others not before court, robbed of **Mary Syengo 1000/= Kshs.** and/or immediately before or immediately after the time of such robbery used actual violence to the said **Mary Syengo**.

2. Facts of the case were that on the **21<sup>st</sup>** day of **May, 2012**, at about **2.30 a.m.** PW1, **Mary Syengo** (Complainant) was asleep when she heard someone calling her telling her that he had arrived. She believed the voice was for the Appellant a person she had known as her customer for about **3 months**. She realized the person was next to her bed. She lit a torch and flashed it. The person was wearing a mask. He hit her with an object on the foot, leg, knee and cut her leg and hands. He demanded for money. She gave him **Kshs. 1,000/=** and he left. She stayed until **5.00 a.m.** The matter was reported to the police. PW2 **Maithya Muasya** who performs community policing duties arrested the Appellant. Subsequently he was charged.

3. In his defence the Appellant denied having committed the offence in issue. He stated that he was with his uncle on the fateful night who later died. He went with him to **Kitui** where he took a motor-vehicle to the garage. They returned home arriving at **8.30 p.m.** They ate and slept until **6.00 a.m.** The following day while on his way home four people emerged from the bushes and informed him that they had been sent to arrest him by the Assistant Chief a person he had disagreed with since 2007. He was taken to the police station and later charged.

4. The learned trial Magistrate considered evidence adduced and found that the Complainant could not have framed up the Accused as he had no grudge with her. Further she found that the Complainant identified the Appellant by voice and also saw him using her torch therefore convicted him of the offence of **Robbery with Violence**.

5. The Appellant being dissatisfied with the conviction and sentence appealed on grounds that:

- Convicting the Appellant having relied on a single witness identification was erroneous and unsafe.
- The robbers had masks therefore the trial court should not have appreciated the voice identification.
- Critical witnesses were not called which left the Prosecution's case unproved.
- No reason was given why the Appellant's defence was disregarded.

6. The Appellant who canvassed the appeal by way of written submissions stated that the learned Magistrate failed to consider and evaluate all evidence adduced. There was no basis of recognition. No voice identification was made as there was nothing peculiar or different from other voices. The Complainant did not point out any peculiarity in the manner of the speech. Failure to record the name of the Appellant in the Occurrence Book at the outset was evidence that the Complainant did not know the person who robbed her.

7. In response thereto the State through learned counsel, **Ms. Amojong** opposed the appeal. She submitted orally that the Appellant was not a stranger to the Complainant. And having known him for over a month she knew his voice and physique therefore failure to conduct an identification parade was not prejudicial.

8. This being a first appellate court, I am duty bound to reconsider evidence adduced at trial afresh and come up with my own conclusions bearing in mind the fact that I had no opportunity of either seeing or hearing witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

9. This is a case where the Complainant, the only witness to the act was woken up by the perpetrator of the offence at night. The person had a mask on his face but according to her she did recognize his voice. The **Court of Appeal** in the case of **Karani vs. Republic (1955) KLR 290** dealt with the issue of voice identification where it stated thus:

***“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 favourable to safe and positive identification.”***

10. The Complainant stated that she had known the Accused as a person who used to purchase items from her for about **3 months**. She identified him by virtue of spoken word as the person said that he had gone there and also demanded for money from her. Having woken up from sleep at **2.30 a.m.** there was a possibility of confusion due to a state of being unclear in mind as a result of sleep which could not be ruled out. Therefore the accuracy of what she heard may be in doubt. This called for treating of her evidence with caution. The learned Magistrate should have in the circumstances gone further to enquire into the characteristics of the voice that made her believe it was the Appellant's voice. This was not the case.

11. It was argued that since there was no grudge between the two (2) of them there was no possibility of framing him up. This may have been the case but there was also a possibility of being mistaken as to his voice. For this reason additional corroborative evidence may have helped.

12. Having reconsidered evidence adduced it is clear that it was unsafe to convict on evidence adduced.

13. In the premises I find the appeal being meritorious and proceed to quash the conviction and set aside the sentence imposed. The Appellant shall be set free unless otherwise lawfully held.

14. It is so ordered.

**Dated, Signed and Delivered at Kitui this 19<sup>th</sup> day of May, 2016.**

**L. N. MUTENDE**

**JUDGE**