



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CR. APPEAL NO. 42 OF 2011

KIMBIYA MBITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the conviction and sentence in Criminal Case No. 1116/2009 in the Senior Principal Magistrate's Court at Kitui (Hon. G. Kibiru, PM))

Judgment

1. On 23rd September, 2009, at about 3:00 a.m., David Ndingu Kasesa (“David”) was asleep in his house at Masoa Village, Kavutei Sub-location, Kaliku Location in Kitui District. His wife, Lydia Mwikali Ndingu (“Lydia”) was beside him. A loud bang rudely awoke the couple.
2. David and Lydia were quick to realize that the loud bang was on the wooden door to their house, which gave way and three assailants stormed in two their two-roomed house. According to both David and Lydia, the assailants were half-masked: they had covered half of their faces with scarves. However, their eyes and foreheads remained unconcealed. In addition, one of the assailants had tied a flashlight on his forehead using a string that went round his temple region.
3. Immediately the assailants stormed into the house, the first assailant demanded for money from David. He stabbed him on the face several times all the time barking orders to him to produce more money. The assailant seemed unimpressed by the amounts produced by David. When David gave him Kshs. 8,000, for example, he threw it down in disgust and demanded for more by stabbing David’s left jaw and threatened to kill him. David obliged and produced Kshs. 20,000 more. The assailant was still unimpressed. He stabbed David on the left shoulder and demanded for more money.
4. At this point, David remembered that he had given Lydia Kshs. 12,000 to keep in the Kiosk outside their residence and so told the assailants. It is at this point that the assailants left to get the extra money from the Kiosk.
5. As Lydia was handing over the money, she discovered that one of the assailants was not masked. As the flashlight banded to the head of the first assailant shone its light on this assailant, Lydia thought she recognized him as Sammy Vathej, their immediate neighbor. Upon the realization that Lydia had recognized him, that assailant took to his heels. The ephemeral confusion allowed Lydia to escape and run away wailing for assistance from neighbours. The assailants fled into the night.
6. Meanwhile, David, was sure he had recognized the first assailant; he who had banded a flashlight on this head and he who had barked orders for him to produce money inside the house. David testified that that assailant was a distant relative, Kimbiya Mbiti (“Kimbiya” or “Appellant”), who is the Appellant in this case. Aside from familial relations, according to David, Kimbiya was a fellow businessman who engaged in livestock sales like he (David) did. Indeed, they had traded previously. As such, David not only knew his facial features but also his voice. David testified

- that Kimbiya was standing only a few feet from him during the ordeal and that the light from the flashlight illuminated onto his face and forehead sufficient enough for him to recognize him.
7. Additionally, David testified that he distinctly recognized the voice of Kimbiya as that of his assailant. He had known Kimbiya for more than ten (10) years at the time of the attack.
 8. On her part, Lydia was similarly sure that she had recognized Sammy as one of the attackers. This evidence appeared to have been corroborated by the evidence of tracked foot prints and bicycle track from the scene of the attack which led to the house of Sammy. Mulevi Muli (“Mulevi”), a neighbor to David and Lydia, who responded to the alarm and cries for help from the home, participated in the search which led to Sammy’s house. He positively testified to that effect.
 9. The foregoing was the critical evidence produced by the State at the Senior Principal Magistrate’s Court at Kitui in seeking the conviction of Kimbiya and Sammy for the offence of robbery with violence contrary to section 296(2) of the Penal Code. The other critical witnesses were the Investigating Officer, PC Charles King’ori (“PC King’ori”), and a Clinical Officer, Michael Makau. The former testified about the investigations and arrests of Kimbiya and Sammy, and the latter confirmed that he treated David for the injuries sustained during the attack. As we analyze shortly, the Appellant contests the account of PC King’ori but finds no fault in the narrative of the Clinical Officer. Indeed, in both his oral and written submissions on appeal before us, the Appellant concedes that there is no doubt that David was robbed and injured during the robbery. The only issue, the Appellant argues, is the identity of the assailants.
 10. In response to the allegations against him, the Appellant offered an unsworn testimony. The thrust of his defence in the court below is an alibi: on the material day, he says he was at home with his wife after a day’s work at a canteen where he sells vegetables. He promptly reported to the same canteen the day following the day of the robbery and only then did he learn about the robbery from David. Later, the Appellant accounts, David and two other people returned to the Kiosk and asked him to testify against Sammy in a criminal case. When he declined, they arrested him. At trial, the Appellant asked the Court to take note of the fact that he had met David, the Complainant, earlier in the day and he had not disclosed that he (Appellant) was part of the criminal gang that had attacked him.
 11. The Learned Trial Magistrate, who had an opportunity to hear and observe the demeanour of all the witnesses, returned a verdict of guilty on the single count of robbery with violence. In doing so, the Learned Trial Magistrate found the prosecution witnesses’ testimonies to have been categorical. She disbelieved the alibi defence by the Appellant and dismissed it as an afterthought. Even after warning herself of the dangers inherent in relying on the evidence of a single-identifying witness, the Learned Trial Magistrate found the evidence sufficiently categorical to make a finding that the Appellant was, indeed, the assailant who was recognized by David, and that, therefore, that the Prosecution case was proved beyond reasonable doubt. The Learned Trial Magistrate proceeded to convict the Appellant and sentenced him to death, as stipulated by law.
 12. The Appellant is aggrieved by the conviction and sentence and has appealed before us. On analysis, he raises three main grounds of appeal:
 - a. First, and more significantly, the Appellant objects that the identification evidence as sufficient to warrant a return of a verdict of guilty.
 - b. Second, the Appellant complains that the P3 form which was introduced in evidence was impermissibly accepted since it was produced by a Clinical Officer who was incompetent to produce it; and
 - c. Third, the Appellant asserts that the Learned Trial Magistrate did not appropriately appraise the evidence in the case. Had she done so, the Appellant argues, the Learned Trial Magistrate would have come to a different conclusion.
 13. The Appellant is right that our jurisprudence has recognized the unreliability or fallibility of eyewitness identification and the danger of allowing it to be the sole basis for a criminal conviction. This is especially so when the evidence is that of a single identifying witness. In the case of ***Paul Etole & Another v R (C.A. Crim. App. No. UR 24 of 2000)***, the Court of Appeal expressed this legal principle thus:

[Evidence of visual identification] can bring about a miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an

accused depends wholly or substantially on the correctness of one or more identification of the accused, the Court should warn itself of the special need for caution before convicting the accused.

Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made.

Finally, it should remind itself of any specific weakness which had appeared in the identification evidence.

It is true that recognition may be more reliable than recognition of a stranger; but even when a witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good, and remains good at the close of the accused's case, the danger of mistaken identification is lessened but the poorer the quality, the greater the danger...

14. As we begin our analysis of the case before us, we note that the Learned Trial Magistrate was keenly aware of these legal principles and adverted his mind to them as he reached his verdict.
15. However, as a first appellate Court, we have an opportunity and a duty to re-evaluate the evidence afresh and determine for ourselves whether the evidence taken at the trial can sustain the conviction. We draw our marching orders in this regard from the case of **Okeno v Republic [1973] E.A. 32** where the predecessor to the Court of Appeal instructed:

An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] E.A. 386 and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh 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 Court's findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's Court'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 witnesses.

16. From a careful reading of the record, there is little doubt that David and Lydia were violently robbed on 23rd September, 2009, at about 3:00 a.m. by three assailants. The only question for determination, then, turns to whether the Appellant was one of the assailants as the Learned Trial Magistrate found. The evidence which the Learned Magistrate used to convict turned on two issues: Visual recognition and voice recognition. Since the former is also the Appellant's first main ground of appeal, we will now consider both.
17. On identification, we take our cue from the **Paul Etole Case** cited above. In particular, we note that a careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential (see **Joseph Ngumbao Nzavo v Republic (1991) 2 K.A.R. 212**). Reading through the records, we note the following. First, the Learned Magistrate did explicitly warn himself before relying on the evidence of a single identifying witness. We have, also, abundantly prescribed that warning to ourselves. Yet, like the Learned Trial Magistrate, even after such warning, we are persuaded that the evidence of David would still stand. We note that David had known the Appellant, who is a distant relative, being a member of Lydia's clan, for more than ten years. David testified that he saw and heard Kimbiya for some time as Kimbiya demanded for money from him. All this while, Kimbiya was hardly two feet away from David, since he was close enough to severally stab him. While the general visibility could not have been great at 3:00 am at night, the flashlight tied to Kimbiya's forehead illuminated the room. According to David, the fact that Kimbiya's face was only half-masked made it easier for him to recognize Kimbiya. We also note that David named the Appellant as the assailant shortly after the robbery.

- 18.If David's testimony of visual identification and recognition was the only evidence linking the Appellant to the crime, despite the analysis of the *Turnbull* factors we have provided above, we would have entertained the possibility of error (see ***Regina v Turnbull (1976) 3WLR 445*** which laid down nine comprehensive guidelines for judicial officers in trials where identification evidence is an issue.) However, in our view, another crucial piece of evidence puts the link between the Appellant and the crime beyond reasonable doubt. This is the evidence of voice identification.
- 19.Under our law, the general rule is that testimony by a witness that he recognized an accused person by his voice is admissible in evidence provided only that the witness can lay the basis for comparison of the accused's voice with the voice which he identifies as the accused's. In other words, evidence of voice recognition is a competent means of identification and the distinguishability of the voice is an acceptable basis of conviction even standing alone. This is because voice recognition is a statement of a conclusion reached directly and primarily from an operation of the sense of hearing; it is a statement of fact to be weighed by the fact-finder.
- 20.In this case, the credibility and probative value of the evidence of voice recognition is enhanced by two important factors. First, the voice recognition is based on ten years of pre-existing relationship. This pre-existing relationship was not seriously challenged on cross-examination. Second, the voice recognition evidence is proffered to corroborate evidence of visual identification. Hence, the evidence of visual recognition and that of voice recognition mutually reinforce each other.
- 21.We have also taken a serious look at the Appellant's complaints that there were contradictions in the testimonies of the Prosecution witnesses and that a proper weighing of the dueling accounts of the Prosecution and Defence evidence should have entitled him to a verdict of not-guilty on account of reasonable doubt. After combing through the record, we have not found any evidence that there were material inconsistencies and contradictions among the Prosecution Witnesses that would warrant us to entertain reasonable doubts as to the veracity of their accounts. We note that the Learned Trial Magistrate carefully weighed the testimony of the Appellant and disbelieved his alibi. We are unable to say that the Learned Trial Magistrate was wrong in his analysis of the facts. Similarly, we find that nothing arises out of the complaint that PW5 was not competent to fill in P3 form since he was not a registered Clinical Officer.
- 22.The question whether a Registered Clinical Officer is competent to fill a P3 form, we think that the Court of Appeal has supplied sufficient answer. In **MARK WANJALA WANYAMA v REPUBLIC [2008] eKLR (Crim. No. 69 of 2006)** the Court of Appeal pronounced itself on the issue thus:

As to whether the clinical officer's evidence should have been admitted, we observe that that evidence was on the medical condition of the complainant when she was handled by the clinical officer. It was based on facts and on the expert knowledge of the witness. The weight of evidence attached to such evidence could be different from the weight attached to the evidence of a qualified doctor but that is beside the point. That evidence, whatever weight was given to it, could not, in our view, be ignored merely because it proceeded from a witness covered by a different Act from that under which the doctors are specified. If the evidence of the clinical officers were to be declared inadmissible in law, then we are at a loss as to how many such cases of rape, and assault, would see justice done to them in Kenya? We say so because we take judicial notice of the fact that in Kenya, very few medical facilities are manned by qualified doctors. We do not see any merit in that ground.

- 23.If this decision enunciated in 2006 left any doubts on the question whether, in Kenya, Clinical Officers are competent to fill P3 forms and testify in court, the decision in **RAPHAEL KAVOI KIILU v REPUBLIC [2010] eKLR (Crim. App. No. 198 of 2008)** should put to flight any such doubts. The Court of Appeal held thus:

The challenge touching on the clinical officer's qualification is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that

the appellant did not lay any factual basis for his allegation in the first place. Under section 2 of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.”

Section 7(4) of the Act states:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.

24. We need not add to these authoritative statements by the Court of Appeal on the competence of Clinical Officers to testify before Kenyan courts. We, therefore, have no hesitation in confirming the conviction handed out by the trial Court after our own independent re-evaluation of the evidence presented. We therefore dismiss the appeal filed herein.

DATED, SIGNED AND DELIVERED this 28th day of January 2014.

JOEL M. NGUGI, Judge

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B. T. JADEN, Judge

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