



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 334 OF 2010
KIHARA MWAURA MATHAGA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Kihara Mwaura Mathaga was charged with the offence of grievous harm contrary to **Section 234** of the **Penal Code**. The allegation against the appellant was that on 12/12/09, at Ngenyilel village, Laikipia West District, he did grievous harm to Anthony Njuguna Kanyoro. After a full trial, the court found the accused person guilty of the charge and convicted him and sentenced him to 4 years imprisonment. The appellant was aggrieved by the said conviction and sentence. The firm of Wagiita Theuri filed a petition of appeal. The appellant's counsel did not attend the hearing. The appellant abandoned the appeal on conviction and only pleaded with the court for leniency on sentence as he was unwell.

The learned state counsel, Mr. Nyakundi, conceded to the appeal for the following reasons; that the conviction is unsafe because the complainant was attacked at night, there was no evidence of how long he stayed with the attacker, no evidence on the lighting, it was not disclosed how close the complainant came to the appellant; thought the complainant said that the appellant spoke to him and he knew him to be his neighbour, he did not state whether or not he recognized the appellant's voice; that the trial court did not caution itself of the danger of convicting on a single witness's evidence who was drunk and who identified under difficult circumstances. Mr. Nyakundi relied on the decision in **R v Turnbull and Others (1976)3 ALL ER 549** where the only evidence turns on identification and **Gerald Kuria Matahe v R CRA 69/08** on voice identification and **Julius Waititu Muthuita v R CRA 229/05**, on what the court should consider in evidence of voice identification. In **Sammy Kanyi Mwangi v R CR 60/06**, where the court held that the court needs to caution itself on the danger of basing a conviction on the evidence of a sole witness. When called upon to defend himself, the appellant opted to remain silent in his defence which is his right.

The complainant Anthony Njuguna Kanyoro (PW1) a resident of Kiambogo Gituamba Location, was

going home from Nganyilel trading centre on 12/12/08. He had drunk four bottles of beer. He passed through a maize plantation on a foot path. He was suddenly hit on the head with a stick and he tried to block more blows with his hand. He noticed that it is appellant who was his neighbour. When PW1 enquired why he was beating him, the assailant responded that PW1 had been abusing him. PW1 was cut on the head, fell down unconscious. He later came to and crawled home and asked his wife, Agnes Wairimu (PW2) to seek help. PW2 called the neighbour Zachary Mwangi (PW3) who used a donkey and cart to take PW1 for treatment.

PW2 and PW3 recalled that on the night of 12th and 13th December 2008, they did take PW1 to hospital following an attack in which PW1 was seriously injured. PW2 said PW1 informed him that it is Kihara, the accused, who had attacked him.

PW4, PC Boniface Onyango of Ngarua police station received the assault report on 13/12/08. He said that PW1 reported that he was assaulted by somebody known to him and he issued PW1 with a P3 form. It is PW4 who arrested the appellant after he was pointed out to him by the complainant. Yakish Peter Eyapan (PW5), a Clinical Officer at Ngarwa Health Centre examined the complainant on 7/1/09, found that the degree of injury was a ‘**maim**’ and filled the P3 form.

PW1 was alone when he was attacked. The incident occurred in a maize plantation. The complainant admitted that he had taken four beers. What the court was not told is the time this incident occurred; was it at night or during the day? This court can only guess from PW1’s testimony in cross examination by the appellant PW1 said that he identified the appellant and that they even talked. PW1 also said that he later crawled home at about 1.00 a.m. It seems therefore that the incident took place at night and it is only PW4 who said that it took place in the night. That being so, the court should have warned itself of the dangers of relying on, and convicting on the evidence of a single witness especially where the conditions of identification were not conducive. In the **Turnbull** case (supra) the court set out what should be considered where the case against the accused depends wholly or substantially on identification if the accused which is challenged by the defence. The court said in part (pg 552):-

“...the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given in all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence. 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.”

In **Abdala Bin Wendo v R (1953)20 EA CA 166**, the court said:-

“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 is circumstantial or direct, pointing to guilt, for 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 possibility of error.”

In **Gerald Kuria Mataha** (supra) the court held that there was need for an enquiry to be made on the

proximity and brightness of the source of light. In the instant case, the prosecution never sought to establish that PW1 was able to see the appellant. Whether the incident occurred during the day or night, how far PW1 was from the assailant, how long did he observe the assailant, how much light was at the scene. There is no evidence on how PW1 managed to see and identify the appellant.

PW1 also told the court that the accused whom he knew as a neighbour actually spoke to him alleging that the complainant had been abusing him. PW1 did not specifically state that he recognized the appellant's voice but that is the basis of the conviction. The trial court said:-

“...after he was attacked by accused person when he identified. He asked him why he was killing him. He said he had abused him severally. He was out to finalise the abusive language once and for all. The allegations are corroborated by the question put to the complainant by the accused person. On this ground in my view, I believe the accused person was unhappy when the complainant was set free by police having reported him. He decided to take the law into his own hands.”

It is obvious that the court believed that PW1 identified the appellant by his voice. In **Julius Waititu Muthuita v R CRA 229/05**, the court considered what the court should consider in accepting evidence of voice identification which are:-

- (a) the voice was that of the accused;**
- (b) the witness was familiar with the voice and recognized it;**
- (c) the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.**

In this case the complainant merely stated having heard the appellant speak to him. PW1 did not state that he was familiar with the voice or that he recognized the appellant's voice. Further to the above, although PW1 said that he identified the appellant as the assailant and told his wife that it was the appellant, when the first report was made to the police on the same day, 13/12/08, the assailant's name was not disclosed. PW4 said that PW1 reported that he had been assaulted by a person known to him. If he was sure it was the appellant he would have given the police the appellant's name.

In the end, I find that even though the appellant may be a prime suspect because of the relationship between him and PW1, it seems the identification by PW1 was not full proof, the conviction is unsafe and it is hereby quashed. The sentence is hereby set aside and the appellant is set free forthwith unless otherwise lawfully held.

DATED and DELIVERED this 25th day of May, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Appellant – in person

Mr. Omari for the State.

Kennedy – Court Clerk