REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Appeal 90 of 2010

(From original conviction and sentence in Criminal Case No. 162 of 2009 of the Senior Resident Magistrate's court

at Maralal – A.K. ITHUKU, SRM)

DENYAM LEKUPUNY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Denyam Lekupuny was jointly charged with Lobina Lembirikan for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** before the Senior Resident, Maralal A.K. Ithuku in Criminal Case No. 162 of 2009. The particulars of the charge were that on the night of 5/8/2009 at Maralal in Samburu Cetnral District, jointly with others not before the court, robbed Jemima Leleruk of assorted clothes, curtains, utensils, and other household items, Nokia 1200 all worth Kshs.23,000/- and immediately before the said robbery, wounded the said Jemima Leleruk. After a full trial, Lobina Lembirikan was acquitted but the appellant was convicted and sentenced to death. The appellant is aggrieved by both conviction and sentence. The grounds upon which he brought the appeal are that:-

1. The court based the conviction on the previous relationship between the accused and the complainant;

2. That the conviction was based on the uncorroborated evidence of one witness;

3. That the prosecution did not prove its case to the required standard;

4. That the charge sheet was defective;

5. That the court erred by shifting the burden of proof to the appellant.

The grounds were contained in the memorandum of appeal and further grounds were contained in the submissions filed in court.

In opposing the appeal, the learned counsel for the State submitted that at the time of the attack, there was a hurricane lamp in the house; the appellant was not disguised; PW1 recognised the appellant who had worked for him as a watchman; PW1 also knew the appellant's voice as he shouted to his group; that PW1 led to his arrest and gave his name to the police soon after the attack.

The brief facts of this case are that PW1, Jemima Leleruk and her mother, PW2, Dukan Leleruk were in PW1's house at about 8.00 p.m. on 5/8/2009. The door was suddenly broken; four people entered. One hit her on the right hand and head with a piece of wood and she fell down and lost consciousness but she saw the appellant who used to work for her as a watchman. Her mother raised alarm and the people ran away. PW1 said that the appellant was shouting and she did recognize his voice as he had worked for her.

PW2, recalled that after she raised an alarm, two vehicles came and one had police officers. One took PW1 to hospital. When she went back to the house she found the appellant who informed her that he was guarding the house and she left the house with 3 people when she went to check on PW1 in hospital. When she returned next day, she found their properties named in the charge sheet stolen. PW2 said she saw the appellant after the robbery but not during the robbery.

Ngala Ngutunih, PW3, is a clinical officer at Maralal District Hospital. He examined PW1 on 12/8/09 and filled the P3 form. He found that she had a 2cm long wound, a wound on the right side of the head, bruises on right hand which had a fracture. He classified the injury as harm and produced the P3 in evidence. PW4, APC Ali Noor arrested the appellant on 11/8/09 after PW1 identified him as having assaulted her. PW5, PC Bernard Waswa of Maralal Police Station when PW1 and 2 administration police brought the appellant to the police station and later she led to arrest of the second accused.

When called upon to defend himself, the appellant said that he trades in livestock and on 13/8/09, he had gone to the market at Maralal. At Jamaru Restaurant, he was accosted by two police officers who arrested him for no reason and he was charged.

We have now considered and evaluated the evidence on record as we are required to, being the first appellate Court, the submissions by both the appellant and the State Counsel. No doubt the complainant is the only identifying witness. The offence was committed at night. PW1 and PW2 said the house had a hurricane lamp. However, the court was not told how big the room was or where the hurricane lamp was in relation to PW1. PW1 told the court that the attack was sudden because the door was knocked open and immediately one of the robbers descended on her, injuring her as a result of which she became unconscious. The prosecution did not endeavour to determine how long it took for the assailants to strike PW1. PW1 being the only witness who claimed to have seem the assailant, the trial court should have warned itself of the danger of relying on the evidence of a single identifying witness under those unfavourable circumstances. In **R. v Turnbull & Others (1973)3 ALL ER 549,** the court considered what factors the court should take into account when the only evidence turns on identification by a single witness. The court said:-

"…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?

….

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 that where the conditions for identification are difficult, there is need for other evidence, circumstantial or direct pointing at the guilt of the accused to be produced. In **Gerald Kuria Matahe V R. CRA 69/2008**, the court held that there was need for an inquiry to be made on the proximity and brightness of the source of light. In this case, the prosecution did not seek to establish where the complainant was in relation to the light or the door from where the attackers entered. In our view, without any further enquiry being made by the prosecution, the circumstances disclosed could not have accorded with proper identification of the robbers.

Mr. Nyakundi submitted that PW1 properly identified the robbers because she gave the appellant's name to police soon after the attack. We find no such evidence on record. PW4 told the court that PW1 led them to the arrest of the appellant on 11/8/09. There is no evidence that the police had received any report of the robbery which had taken place 5 days earlier, on 5/8/09.

PW1 also said that she recognized the appellant's voice because he had worked for her as a watchman. PW1 did not disclose how long the appellant worked for her and whether she was familiar with his voice. Besides, all that PW1 said in answer to a question in cross examination is **"I saw you, you were shouting. I could recognize your voice. You had worked for me."** PW1 never told the court what the appellant was shouting about, what he said or for how long. In the case of **Julius Waititu Muthuita v R. CRA 229.05**, the court cited the case of **Mbella v Rep. (1984)KLR 626** where the court said:-

"In dealing with evidence of identification by voice the court should ensure that:-

(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.

This court has no idea what the appellant said, if at all and whether PW1 was familiar with appellant's voice. In the end, we come to the conclusion that the evidence adduced by PW1 cannot be said to be positive identification of the appellant's voice.

The appellant also alleged that the charge sheet was defective in that some of the items named in the charge sheet as having been stolen were not named by PW1 and PW2 i.e. 2 pairs of shoes, 2kgs cooking fat, 3 pairs of suits and mobile phones. PW2 said that when she returned home on the next morning, all items lamp and utensils had been taken away while PW1 said that clothes, bedsheets and curtains were taken. The fact is that there was a theft in PW1's house. There was no recovery made. Failure to include some of the allegedly stolen items in the charge sheet would not render it defective so as to quash a conviction because of such omissions. Besides the appellant should have pointed out that anomaly during the trial which could have been cured by amendment.

It was the appellant's other complaint that the trial magistrate shifted the burden of proof to the appellant. He said that the court said **"He did not say anything about 5/8/09, the date of arrest is not in dispute."** In criminal cases, the burden of proof always remains with the prosecution to prove its case beyond any doubt. All that the accused person is required to do is to give a plausible explanation.

Having found that the appellant was not properly identified and there is possibility of mistake, and that raises doubt in our minds as to whether the identification was proper, we exercise that doubt in favour of

the appellant. We find the conviction to be unsafe, it is hereby quashed, sentence set aside and the appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 8th day of June, 2012.

R.P.V. WENDOH

JUDGE

W. OUKO
JUDGE
PRESENT:
Appellant – in person

Mr. Nyakundi for the State

Kennedy – Court Clerk