REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 25 of 2011

COSMAS MUGIRA IRAKU……...…….. APPELLANT

VERSUS

REPUBLIC……...…….RESPONDENT

(Criminal Appeal against both conviction and sentence by Hon Kiarie W. Kiarie PM at MERU CM Criminal Case No. 211 of 2011 delivered on 6.6.2011)

J U D G M E N T

The Appellant **COSMAS MUGIRA IRAKU** is charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence are that on the 5th day of March 2011 at Kathurine Market, Nkabune Meru County, jointly with another within Meru County, jointly with another not in court and while armed with an offensive weapon namely a panga robbed Edward Gitonga Kinyua a mobile make Kapambe phone eight sportsman cigarettes and cash Ksh.200/- all valued at Ksh.2239/=, and immediately after the time of such robbery used actual violence on the said Edward Gitonga Kinyua. The Appellant was found guilty and convicted of the charge and sentenced to death. He was sentenced to death. He has now appealed to this court challenging the conviction. The Appellant was represented by counsel Mr. Kimathi Kiara. Counsel relied on the petition of appeal dated 6th June, 2011 in which the following four grounds are raised:

1. **The learned trial magistrate erred in law and facts in convicting the Appellant of an offence not disclosed by evidence.**

2. **The learned Magistrate erred in law and facts in convicting the Appellant on insufficient and contradictory evidence.**

3. **The learned magistrate erred in law and facts in convicting the Appellant against the weight of evidence.**

4. **That the learned Magistrate erred in law and fact in sentencing the Appellant excessively under the circumstances of this case.**

The appeal was opposed. The state was represented by Mr. Motende, learned State Counsel. We shall get back to this at a later stage.

The facts of the case are that the complainant PW1 and his friend Jotham PW2 were walking home on a path in between coffee bushes at 7.30 pm when 2 people emerged. The complainant and Jotham said that

they knew both men very well before as one Cosmas Mugira the Appellant herein, and one Muthuri Francis. The complainant and Jotham testified that the two men approached them; that the Appellant held the complainant with a piece of wood on the throat while Muthuri ransacked his pockets and took 5 cigarettes and Ksh.200/-. Jotham ran away soon after the Appellant and Muthuri appeared and did not witness the incident.

The Appellant put forward an alibi as his defence. He said that at the alleged time of the offence, he was sleeping at home because he was very tired after working in his shamba the whole day.

This is a first appellate court. As expected of us, we have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn our own conclusions while bearing in mind that we neither saw nor heard any of the witnesses. We are guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding 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 has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

Mr. Kiara for the Appellant urged that there was contradiction in the prosecution evidence and that the evidence was insufficient to convict. Counsel raised issue with the Complainant's evidence that the Appellant slapped him while holding a piece of wood and machete and urged that it was not possible to hold both objects and slap someone at the same time. Counsel also raised issue with the evidence of recognition by voice urging that what was said and in which language it was said was not disclosed.

Mr. Motende learned State Counsel opposed the appeal and urged that the Appellant was properly recognized by PW1 and 2 by virtue of light from the moonlight. Counsel urged that the complainant knew the Appellant since childhood and easily recognized him. Counsel urged us to confirm the conviction.

We shall deal with the issue of visual recognition and also recognition of voice. Issue of recognition can only be possible if there is sufficient light at the scene at the time of the attack. The way to test whether the evidence of identification was correct was discussed in the case of **Cleaphas Otieno Wamunga Vrs. Republic 1989 KLR 424**, where the Court of Appeal stated as follows:-

"The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges 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 (3) All E.R. 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.'"

The other case we wish to cite is the celebrated case of **CHOGE -V- REP 1985 KRL 1** where Hancox Nyarangi JJA and Platt Ag JA held:

"In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it"

The evidence by PW1 and 2 was that there was moonlight at the scene of attack. The strength of the moonlight was not mentioned. In fact the complainant and PW2's evidence that there was moonlight was given at the end of their evidence in chief which appears to us to have been an afterthought. The trial court had a duty to inquire into the nature of lighting and the circumstances at the scene in order to satisfy itself that there was no possibility of mistake or error. This it did not do.

We have considered that the complainant was walking between coffee trees just before the attack. The height of the trees was not given but we know that coffee bushes can grow higher than the height of most men. There was a possibility that the complainant's and PW2's view was obstructed. There is no evidence of the width of the road on which both witnesses were walking. If they crossed through a coffee farm it is possible the road was narrow. The height of the coffee trees and the width of the road are all crucial when considering identification at night. It was important that the prosecution gave details of each of these factors in order to give the court material by which to test the correctness of the evidence of recognition. This was not done.

We now turn to the evidence of recognition by voice. The leaned trial magistrate in his judgment cited an authority on voice recognition that is **SIMEON MBELLE V. REPUBLIC [1982] IKAR 578:-**

"In relation to the identification by voice, one it would obviously be necessary to ensure:-

(a) That it was the accused person's voice;

(b) That the witness was familiar with it and they recognized it and

(c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

That is a very good case as it sets out the principles that should be applied when testing the evidence of recognition by voice.

The learned trial magistrate then sets out what his considerations were as follows:

"In relation to the identification by voice, one would obviously be necessary to ensure (a) that it was the accused person's voice (b) that the witness was familiar with and recognized it and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which he was said and who said it."

We think that the learned trial magistrate misapprehended what he was required to look into in regard to voice identification which was ably set out in the case he cited. In order to test whether what a witness heard was the accused person's voice, the actual words spoken must be stated in evidence. That way the court can test whether the words spoken were sufficient to enable a correct identification of the voice. The fewer the words the more difficult it would be to identify the voice correctly. There is no record in any part of the proceedings which disclose the actual words spoken by any of the assailants. In fact the complainant merely narrated what was allegedly said to him but did not put it in the actual words spoken to him. The complainant stated:

"Cosmas slapped me on the right cheek while I was still down. He told me that I was boasting a lot and threatened to kill me."

With respect those words were not the actual words spoken. The court was therefore denied an opportunity to test the sufficiency of the words to enable correct identification.

Having carefully considered the matters before us we have come to the conclusion that the circumstances of identification were not shown to be positive for correct identification of the assailant. The evidence adduced was also too scanty to enable the court test its sufficiency to aid in identification. We therefore find the conviction entered against the Appellant unsafe. **Accordingly we quash the conviction and set aside the sentence. The Appellant should be set at liberty unless otherwise lawfully held.**

DATED AT MERU THIS 22ND DAY OF NOVEMBER, 2012.

LESIIT, J
JUDGE.

J.A. MAKAU
JUDGE.