REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 10 OF 2009

FRANCIS KINYUA JOHN...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An appeal against the judgment of S.M. Githinji SPM in Nkubu Criminal Case No. 416 of 2006 delivered on 12th January 2009)

JUDGMENT

The appellant was charged before SPM Nkubu with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He was convicted of the charge. He has filed this appeal against his conviction and sentence of death. This is the first appellate court and our duty as such was well set out in the case **Okeno Vs. Republic** [1972] E.A 32 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 Vs. Republic [1957] E.A. 336) 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. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 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 findings and conclusions; 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."

PW1 M'Ikiriena Kirigo was in her house on 18th March 2006 at 7pm having arrived from her shamba. As she was eating supper at 8pm, she heard someone asking her to open the door. She refused. Those people hit the door with a stone and forced it open. The appellant, his brother Rueben and his relative David entered into her house. PW1 knew them because they were her neighbours. The appellant asked her to give him Kshs. 3,000/= she had received from her women's group. PW1 refused. The appellant stabbed her with a knife which caused deep wound reaching to her teeth. The trial court noted that PW1 had a big scar measuring 4cm on the right side of her cheek. She fell down and became unconscious. Later, when she regained consciousness, she was taken to report the matter at Mujwa Police Post. She was issued with a P3 which was filled by a doctor at Meru General Hospital. She made a statement. The appellant was

arrested. The complainant stated that the robbers stole Kshs. 3,800/= from her of which Kshs. 3,000/= belonged to the women's group and Kshs. 800/= was the proceed of a tree she had sold. Present when the incident occurred were her son, L.K and Ellen Kagwiria who had gone to her house to collect milk. On cross examination, she stated that she was in her table room. In that room, there was light which enabled her to see the appellant. In that regard, she stated:-

"I saw you very well. You were not a stranger to me. There was enough light in the house. Your place is very near my place."

PW2 L.K stated that he was a primary school student in standard six. The trial magistrate did not inquire about his age. It is not clear to us whether he was a child of tender years to whom the *voir dire* examination should have been directed. He stated that he knew the appellant because he was from his area. On 18th February 2006 at 8pm he was at home with his mother PW1 and PW3 Ellen Kagwiria. They were eating supper when they heard someone say, *"Open."* When they inquired who it was, they were told, *"It is us thieves."* PW1 locked the door from the inside. The door was then hit with a stone and it opened and three people entered. He named them as Francis Kinyua (appellant), David and Reuben. They demanded money from PW1 which she had gotten from the women's group. This witness saw them beat PW1 with their hands. He then saw the appellant stab PW1 on the cheek with a knife. The robbers then took money from PW1's bed and run away. The matter was reported by PW1 at Mujwa Police Post and PW1 also went to Meru General Hospital for treatment. He said that he saw the robbers by means of a light which was bright in the room. PW3 Ellen Kagwiria recalled that on 18th February 2006 at 8pm she had gone to PW1's house to get milk and salt. She found PW1 in her house. She was served tea and as she drunk it, three men knocked the door to the house of PW1. They announced that they were thieves and they wanted money. They knocked open the door with a stone. When the door opened, this witness hid herself behind the door. She saw the men beat PW1 for refusing to give them money. There was a tin lamp with bright light. That light aided her to see the robbers well. They were people she knew. She named them as David, Francis Kinyua (the appellant) and Reuben. She saw the appellant remove a sword from his hip. He stabbed PW1 on the head. She saw PW1 fall. It was then that the robbers entered into her bedroom. She ran out of the house and hid behind the house whilst the robbers were in PW1's bedroom. When they left, she went back to PW1's house. She assisted PW1 and escorted her to the police post and then to the hospital. She said that PW1 bled a lot. She learnt later that the robbers had stolen Kshs. 3,800/-. On being cross examined, this witness stated in regard to the appellant:-

"I knew you. I saw you. I even heard your voice which I knew. I knew you before. The light was good……………. Yes, yes, I got to see you when you entered the house. ………………. The incident took about 20 minutes……………… I saw you stab the complainant."

PW4 PC Stanley Mwithya was at Mujwa police patrol base. PW4 testified that PW1 came to the base bleeding from her cheek where she had been cut. She could not talk. She was advised to go to hospital. She however managed to mention the names of those who robbed her as the appellant, Reuben and David. PW1 reported that the robbers had stolen Kshs. 3,000/=. She said that she knew the robbers well because they were her neighbours. She named them again as the appellant, Reuben and David. On being cross examined, this police officer stated that the appellant was arrested on 22nd February 2006 because after the incident he had gone into hiding. That even on the day of arrest, he was found hiding in a vehicle under a seat. The trial court found the appellant had a case to answer. In his defence, the appellant gave testimony under oath where he stated that on 18th February 2006 he was on duty as a motor vehicle conductor. Whilst at Nkubu Market, he was called by his mother who told him that his brother was sick. He took his brother to Nkubu hospital and only returned home at 1.30am. On reaching home, he slept. He said that he was arrested 9 days after the incident in this case while he was on duty. That he even thought the reason for his arrest was due to a traffic offence. He confirmed that PW1 was their neighbor and that their parcels of land are adjacent to each other. He said that there had been

disagreement between his family and PW1's family since he was a child. He said that PW1 had threatened to destroy his mother. Whilst awaiting the conclusion of his trial, he said that PW1 had visited him in prison and had demanded Kshs. 10,000/= from him and threatened that if he did not pay he would rot in prison. He further stated that PW3 purchased their family land but had failed to pay the full purchase price. He said that she had refused to pay that balance. PW1 and 3 said on the night in question that they recognized the appellant who was their neighbour. The appellant in his own defence confirmed that they were neighbours. In respect of the evidence of PW1 and 3 it was a case of recognition. They were clear that the incident occurred in one room and that there was a tin light that was sufficiently bright to enable them see the appellant. On identification by recognition, the Court of appeal in the case **Anjononi & Others V Republic** [1980] KLR stated:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs. Republic (unreported)."

We are satisfied that the appellant was recognized by PW1 and 3. In the case of PW3 the appellant was also recognized by his voice. He was the one who stabbed PW1. The defence of vengeance raised by the appellant was not clearly raised in cross examination. The appellant was very graphic in describing the misunderstanding between his family and that of PW1 and 3. He however failed to raise it when he was cross examining those witnesses. We are of the view that the defence raised by the appellant was an afterthought and we reject it. In that regard, we are in agreement with the finding of the trial court. We however fault the trial magistrate failure to indicate the age of PW2. It was not enough to state that he was a standard six pupil. As we said earlier, if he was a child of tender years, there should have been *voir dire* examination. The process that the trial magistrate should have taken if PW2 was a child was set out in the case **Simon Kiprop Lelei vs. Republic** Criminal appeal No. 455 of 2007 as follows:-

"The basic statutory provision relating to the evidence of children of tender years is found in section 19 (2) of the Oaths and Statutory Provisions Act Chapter 15 Laws of Kenya, which states:-

"19(1) Where in any proceedings before any court or person having by or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court, or such person aforesaid, understand the nature of an oath, his evidence may be received though not given upon oath, if, in the opinion of the court, or such person foresaid, understood he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth, and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with the provisions of section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."

*"There is no definition of the expression 'child of tender years' for the purpose of section 19 of the Oaths and Statutory Declarations Act but judges in the case of **Kibageny Arap Kolil vs. Republic** [1959] E.A. 92, took to mean, in the absence of special circumstances, any child of the age, or apparent age under 14 years. The former Court of Appeal for East Africa had occasion to deal with the section in a number of cases most outstanding of which were:-*

a) Nyasani s/o Gichana v. R [1958] E.A. 190

b) ***Kibageny Arap Kolil vs.R [1959] E.A. 92***

c) ***Oloo s/o Gai vs. R. [1960] E.A. 86***

*Lord Goddard C.J. in his Dictum in **R. vs. Campbell** [1956] 2 ALL E.R. stated that:-*

"Whether a child is of tender years is a matter of the good sense of the court……..where there is no statutory definition of that phrase."

*"The procedure to be adopted before taking the evidence of a child of tender years was spelt out in the above cases and re-enforced by the case of **Kinyua vs. R** [2002] KLR 256. The first step is to ascertain if the child rendered understands the nature of an oath. If the answer is in the affirmative, then his/her evidence is received either on oath or under affirmation. But if the answer is in the negative then the court should satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and that he/she understands the duty of speaking the truth. In the second step, the evidence of the witness will be taken as unsworn."*

However, the trial court's failure to carry out the inquiry with regard to the age of PW2 does not defeat the prosecution's case. This is because there is sufficient corroboration of PW1's evidence by PW3. PW1 gave clear evidence of how the appellant and his accomplices forcibly entered her house, demanded money, assaulted her and one of them the appellant in this appeal stabbed her. PW1 lost her money on that day. All this was corroborated by PW3. Just like the trial court, we also say that the prosecution's evidence was cogent and water tight. It is for that reason that the appellant's appeal fails. It is hereby dismissed. We uphold the conviction and confirm the sentence.

Dated and delivered at Meru this 31st day of March 2011.

LESIIT, J.

JUDGE

KASANGO, M.

JUDGE

Read, signed and delivered at Meru this 31st day of March 2011.

In The Presence Of:
Kirimi/Mwonjaru ......……………………. Court Clerks
Appellant ……………………….............. Present
Mr. Kimathi …………………........……… For the State

LESIIT, J.

JUDGE

KASANGO, M.

JUDGE