



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 262 of 2008**

JOHN CHEGE GACHERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

§ EVIDENCE - *Voice recognition evidence - admissibility - and how such evidence received by court.*

JUDGMENT

The Appellant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code (Cap 63 Laws of Kenya). He pleaded not guilty and the matter went to full trial. The prosecution called five witnesses excluding the Investigating Officer and closed its case. The Appellant was put to his defence and gave an unsworn statement. After considering the prosecution's evidence, and the Appellant's unsworn statement, the trial court found the Appellant guilty, convicted and sentenced him to death as by law provided.

The Appellant was aggrieved by his conviction and sentence and has appealed on the grounds *inter alia* that as the Investigating Officer was not called, and that failure to call the investigating officer rendered the case unproved, relying upon the case of GEOFFREY NGURU VS. REPUBLIC (Criminal Appeal No. 108 of 1988 at Kisumu) where the Court of Appeal held that - the evidence of the investigating officer is very vital and failure to call him as a witness renders the prosecution case unproved.

The other ground, which was argued by Mr. Gitahi learned counsel for the Appellant during the hearing of the Appeal was the contention by the Appellant that he was not properly identified by PW2 upon whose evidence of identification by voice, the trial court relied in convicting the Appellant.

Mr. Gitahi also took issue with the failure by the prosecution to call both the arresting and investigating officers, and by so doing denied the Appellant the opportunity to cross-examine them on what they had to say. Mr. Gitahi submitted that a Mr. "Murefu" should have been called, and failure by the trial court to warn itself on the danger of relying on evidence of a single witness would mean that the conviction was unsafe.

Mr. Mugambi learned State Counsel did not share this view. He opposed the appeal and told the court that there was adequate evidence upon which to found a conviction and that calling the investigating officer would not have added any new evidence to what the prosecution had already adduced. According to Mr. Mugambi there was a conversation between the complainant and the Appellant, that the Appellant had a torch, that there was a struggle between the Appellant and the complainant, and in the course of which the Appellant flashed the torch on his own face.

Mr. Mugambi also told us that the complainant informed PW3 immediately after the incident that he was beaten by Chege the Appellant, and that PW4 testified to the same effect, that "murefu" was not called because they had parted ways. Finally Mr. Mugambi submitted that the evidence of the Appellant was a mere denial, that he never gave evidence of where he was at the material day and time. In other words was no plea of "alibi."

It is both the statutory duty of this court, and the command of judicial precedent from the Court of Appeal, to review the evidence before the lower court and making our own findings and conclusions. Mr Gitahi focused our attention to the evidence of identification by "voice recognition".

The Court of Appeal laid down rules for receiving evidence of voice recognition in the case of MBELLE vs. REPUBLIC [1984] KLR 626. The court said that in dealing with identification by voice, the (trial) 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.*

Taking these guidelines into account, the issues in this appeal are whether -

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

The evidence of PW2, the complainant is set in the Market or place called Laya Centre. The time was 8.00 p.m. He had been looking for Chege. PW1 was in the company of a Maasai called "Murefu" or "Mlefu". PW1 walked with Murefu for some distance, and Murefu parted on his home, as PW1 proceeded on his own way home. He had walked for about 20 minutes after parting with "Murefu". PW2 met 4 people who flashed a torch at him and ordered him to lie down-

"... I heard the voice to be Chege's. I asked Chege - what is it? He said "lala chini". He came closer, I got hold of him. The others set on me. They beat me, took Kshs 5,800/=. I was beaten with rungu on both hands, leg - they left me on the ground. I really screamed for help
It was near Chege's home. I tried to run. I fell and lay there for a while ..."

In cross-examination by the Appellant, PW2 the complainant testified as follows -

"I have known you for more than 10 years. You are a farmer. I am a Chairman of the Youth and you are a member .. I was with "mlefu" I was attacked after we had parted, I did not have a watch but it could not have been more than 20 minutes after we parted."
And

...

... you and I grabbed each other. You were in front of me. You were holding a rungu. When a torch is flashing in your eyes - you see torch light. I was able to identify you because we got hold of each other. I saw you well. When I saw you did not have a gun is when I grabbed you I identified you further from the torch light - the torch faced up as we struggled. In fact your colleagues tried to save you"

In further cross-examination, by the Appellant, PW2 testified -

"You are the exhibit that I was robbed. I heard your voice. Your voice is yours. No one can speak in your voice. I do not have any other exhibit other than your voice ..."

Against this graphic evidence the Appellant gave an unsworn statement. He gave his name - John Chege Gacheru, his occupation

(as a farmer), his residence (Skuroi), recalled the charges facing against him, denied any knowledge about the case, and said that he was not there, was arrested at his place of work, in " *I was Put into this case*" (framed up). *I have never been arrested.*

With the evidence of PW2 with that of PW3 (whom he told immediately after the attack that it was Chege who had attacked and robbed him), trial court concluded in these words -

"Clearly therefore the prosecution has established that the complainant was robbed, he identified his assailant who was arrested - which arrest is not disputed by the accused and charged with the offence ... I therefore find that the accused person is guilty as charged and convict accordingly."

We find no reason for interfering with the learned trial magistrate's finding. So far as the principles of identification by voice recognition is concerned the evidence of PW2 meets all the three requirements; there is no doubt the voice was that of the Appellant. The complainant had known the Appellant for over 10 years, the Appellant was a member of a youth group of which the complainant was Chairman. Although the time was at night there was no mistake in testifying to what was "said and who said it" The Appellant and the complainant were near each other, the complainant clearly saw the face of the Appellant, as they struggled, and having made his intentions clear by commanding the complainant to lie down, and the complainant having declined to do so, what ensued is the struggle in which the Appellant nearly lost had it not been for the help of his accomplices, who decided to disable the complainant by beating him on his legs and hands.

In the result therefore we find and hold that the investigating officer evidence would not have added anything to what PW2 said and certainly "*Mrefus*" or "*Mlefu*" would not have helped the Appellant he was not there when the complainant was attacked.

We therefore uphold the trial court's findings and judgment, and find no merit in this appeal. The same is dismissed.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 12th day of March 2010

D. K. MARAGA

JUDGE

M. J. ANYARA EMUKULE

JUDGE