



CRIMINAL

Ø Voice identification

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 81 OF 2008

NJIRU BENSON APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO. 80 OF 2008

ELIAS NKONGE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the judgment of P. Ngare SRM in Chuka Criminal Case No. 820 of 2007 delivered on 10th December 2008)

JUDGMENT

The appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. They were convicted by the senior resident magistrate as charged and were sentenced to death. The shop of PW2 was broken into on 25th May 2002 at 1am. At that time, her father PW1 was managing the shop for her. On the evening before, that is, 24th May 2002, PW1 said that he put Kshs. 21,000/= in a drawer. This was money that was the proceeds of sale. He slept in the shop. Later, in the early hours of 25th May 2002, he heard voices of someone demanding money. He heard people breaking the windows of the shop. He locked himself in one of the bedrooms. The robbers gained access to the shop. PW1 screamed. The robbers left after stealing money and shop goods. It seems that many people gathered at the scene. PW1 did not recognize any of the robbers. PW2 confirmed that she had given PW1 in total Kshs. 71,000/= to enable him buy merchandise for the shop. The money and the shop goods were stolen by the robbers. PW4 was a driver of PW2. At about 2am, on 25th May 2002 he heard screams at Ndunguru Market. He in the company of others responded to the screams. He realized that the screams were of PW1. On getting closer to the scene, the robbers chased them away. He then said:-

“I was able to recognize the voice of accused herein. I was not able to see the faces at the time and I decided to go and hide in maize plantation near there. They were following one another and I was also able to see the people with the help of the moonlight. They wore heavy jackets. One of them had an axe and another iron bars.”

On being cross examined, he was able to confirm that the first appellant was carrying the iron bar when he saw him. He also stated in respect of the 2nd appellant that he was shouting. PW5 recalled that as he slept on 25th May 2002 he heard a bang at the market area. It was a shop that was being banged. With five other people, they went to the market. He heard PW1 screaming. He was by the aid of the moonlight able to see the appellants. He too hid in the maize plantation and was able to recognize the appellants. He saw the appellants at the distance of 20ft. He knew the appellants before that incident. He said that he recognized the voice of the 1st appellant. He was familiar with his voice because he saw him daily when he went to purchase items for his kiosk. He also recognized the voice of the 2nd appellant whom he had known since childhood. PW6 also recognized the voice of the 2nd appellant. He said of the 2nd appellant:-

“I know (sic) him very well there before.”

PW6 and 7 confirmed that on that night there was moonlight. Both appellants were found to have a case to answer. The 1st appellant in his defence stated that he was framed for the offence by the police for failing to pay a bribe. He also said that he had business connection with PW2. 2nd appellant in his defence also alleged that he was framed for the offence. He alleged that he had blocked PW2 from purchasing land and that he said was the basis upon which he was framed. Mr. Kimathi the learned state counsel in response to this appeal stated that he did not oppose the same on the basis that the voice identification by the different witnesses did not correspond in the words that they heard spoken by the robbers. He also stated that the physical identification of the appellant was on the basis that they were neighbours. Those submissions in our view were far from correct. Voice identification has been accepted by the courts as a means identifying an accused person. In the case **Chogo Vs. Republic** [1985] KLR 1 the Court of Appeal stated:-

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. 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 had said it.”

It should however be noted that the court has to ensure that the identification by voice was free from possible error. In this case, the learned state counsel was correct in saying that none of the witnesses who heard the appellant’s voice narrated similar words. But then, it should be recalled that the recognition was at the time of the robbery. It seems that as a means of intimidation the robbers were talking not only to PW1 who was under siege but also to those who responded to his screams. In those circumstances, it is understandable that the witnesses who responded to his screams recollected having heard different words spoken. On our part, we are satisfied that the witnesses recognized the appellants’ voices. The recognition was because some said they knew them since childhood. Further to the voice recognition, the witnesses also said that they saw the appellants. We find that the voice identification is safe and reliable. On the issue of physical identification, it ought to be noted that it was not identification by a single witness. It was identification by more than one witness. There is clear evidence that on that night there was moonlight. The witnesses were able to see what weapons the robbers were carrying and were even able to describe clothing of the appellants. Although the physical identification was under difficult circumstances, we are satisfied that the appellants were identified and that identification can be relied upon. The appellants in support of their appeal argued that the charge they faced in the lower court was defective. We have looked at the charge and are unable to discern the defect. We therefore reject that argument. The learned trial magistrate clearly indicated the language in which each witness gave evidence as required by section 198 (1) of the Criminal Procedure Code and Article 50 (M) of the Constitution contrary to the submissions made by the appellants. The appellants argued that an inspector of police Omondi having failed to give evidence in their case weakened the prosecution’s case. We reject that submission. Although the prosecution has a duty to assist the court to reach a just decision, that duty does not require the prosecution to call any particular number of witnesses. The issue is the quality and not the quantity of the evidence that is important. In our view, the lack of evidence from that witness did not weaken the prosecution’s case. The said inspector of police was not present at the time of the robbery like the witnesses who were called to testify. The appellant are correct in submitting that they had no obligation in law to prove their alibi. That being so, we have examined their defences in which they allege that their prosecution was due to grudges they had either with the police or PW2. We however note that that line of defence was not raised during the cross examination of the prosecution witnesses. We therefore can only conclude that they raised that line of defence as an afterthought. In the face of the evidence of the prosecution, we find that the defence raised by the appellant cannot be supported. We find that there is no merit in the appellant’s appeal and the same are hereby dismissed.

Dated and delivered at Meru this 29th day of October 2010.

LESIT, J.

JUDGE

KASANGO, M.

JUDGE

Read, signed and delivered at Meru this 29th day of October, 2010.

In The Presence Of:

Kirimi/Mwonjaru Court Clerks

Both Appellants Present

Mr. Kimathi For the State

LESIT, J.

JUDGE

KASANGO, M.

JUDGE