REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 141 & 143 of 2005 (Consolidated)

BERNARD KIPKURUI CHEPKWONY…....1ST APPELLANT

GEOFFREY KIPLANGAT KORIR…….....…2ND APPELLANT

VERSIS

REPUBLIC……...……RESPONDENT

JUDGMENT

BERNARD KIPKURUI CHEPKWONY and **GEOFFREY KIPLANGAT KORIR** were upon trial on two counts of capital robbery convicted on one count and handed the mandatory death sentence. The particulars of the count on which they were convicted were that on the 12th day of August, 2004, at Umoja Farm Rongai in Nakuru District within Rift Valley Province, jointly with others not before court, while armed with iron bars and rungus, they robbed Peter Chege of cash of Kshs. 2000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Chege. They have appealed against both that conviction and sentence.

The first Appellant has listed 4 grounds of appeal while the second Appellant has listed 6. as they are fairly similar we wish to summarize and combine them as follws. They are to the effect that the learned trial magistrate erred in relying on PW1 and PW2's identification by recognition of the voice of the Appellants; that the learned trial magistrate erred in failing to write a judgment as required by **Section 169** of the **Criminal Procedure Code** (the CPC)**;** that the trial court ignored their defences; and that their conviction was based on insufficient and contradicted evidence.

In his written submissions the first Appellant contended that the purported recognition of their voices by PW1 and PW2 cannot be relied upon. Whereas PW1 claimed that he recognized the voices of both the Appellants he did not give their names to PW4 to whom he first reported the offence. He cited the cases of **Peter Ochieng Okumu Vs Republic Cr. App. No. 185 of 1985** and **Tekerali s/o Kilongozi Cr. App. No. 182 of 1953** and submitted that that failure is fatal. As a matter of fact, he said, PW1 told PW5, to whom he also reported the matter, that he recognized the voice of one of the robbers. If he knew his name he wondered why he did not give it straightaway. He further contended that PW1 did not say where the first Appellant resided and if he knew his voice before. He said no voice identification parade was held to test the veracity of PW1's evidence.

Relying on the case of **Bukenya & Others Vs Uganda Cr. App. No. 68 of 1972** he submitted that the court erred in not calling, as it was under duty to, his mother to say whether or not he had disappeared soon after the robbery as was alleged. On the whole he dismissed the prosecution evidence as a mass of contradictions. On his defence he cited the case of **Uganda Vs Ssebagala [1969] EA 204** and submitted

that the learned trial magistrate erred in ignoring his alibi defence and shifting the burden of dislodging it to him.

The second Appellant made submissions fairly similar to those of the first Appellant. His additional points were that the evidence of PW2 who claimed to have recognized his voice cannot be relied upon as she did not say in what language he spoke, what exact words he used and how far he was when he spoke. Moreover, he said, PW2's allegation that she identified the voice of Geoffrey without giving the police his surname is not enough as there are many people known as by that name. As nobody took police to his residence, he said, his alleged disappearance cannot hold.

For the Republic Mr. Mugambi submitted the the Appellants' conviction was based on overwhelming evidence of PW1 and PW2 who knew them since 1986 and that the Appellants spoke to them for quite sometime while demanding money and keys to the kiosk. He dismissed as of no basis the second Appellant's allegation of being framed up because of a grudge with PW1 and urged us to dismiss these appeals.

This being the first appeal the law requires us to carefully re-evaluate the evidence on record and be satisfied that there is no miscarriage of justice. That was made clear in the case of Okeno =Vs= Republic [1972] E.A. 32 followed in Mwaniki =Vs= Republic [2001] 1 E.A. 158 and in David Masinde Simiyu& Another Vs Republic Criminal Appeals Nos. 33 & 34 of 2004. In the latter the Court of Appeal stated:-

"It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice."

Pursuant to this legal requirement we have carefully read and re-evaluated the evidence on record in this case.

The offence in this case was committed at night. The robbers are alleged to have gone to PW1's home and demanded for money. When PW1 hesitated they smashed the window panes on the front windows of his house and on realizing that they meant serious business he gave them some Kshs. 2500/= and keys to his kiosk through one of the smashed window panes. The robbers did not go into the house and the witnesses did not see them but they recognized their voices.

The main evidence against the Appellants therefore is the alleged recognition of their voices by PW1 and PW2. As was stated by the Court of Appeal in **Maghenda Vs Republic [1986] KLR 255,** "Identification by voice can be a sound and reliable method of identification." Like visual identification, "it can be equally safe and free from error, more so if the identification takes place at night"-- **Njeri Vs Republic [1981] KLR 156 at p. 159--**when there is no likelihood of any noise from any quarter. However, care should always be taken to ensure that there is no possibility of error and that the voice that was heard was actually that of the accused. In **Mbelle Vs R. [1984] KLR 626,** while sounding this caution, the Court of Appeal laid down guidelines to be followed when receiving the evidence of voice identification or recognition as follows:

"**In relation to identification by voice, care would obviously be necessary to ensure (a) that it was the accused person's voice, (b) that the witness was familiar with it 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 what was said and who said it."**

These guidelines were follwed **in Choge Vs Republic [1985] KLR 1 at p. 52 & 53** and in **Libambula Vs Republic [2003] KLR 683.**

Applying these guidelines to these appeals was the trial court right in finding that the Appellants' voices were properly identified and basing their conviction solely on that identification?

As we have said, the evidence of voice identification was given by PW1 and PW2. PW1 who owns a kiosk at his home said that on 12th August at about midnight he was woken up by his barking dogs. He

thought those were their customers as some used to go shopping at night. Then he heard the first appellant demanding for money. When he refused to comply they smashed all the window panes on the front windows. On realizing that they were not joking he gave Kshs. 2500/= to his wife who in turn gave it to them through one of the smashed windows. After taking the money the second Appellant ordered him to surrender the keys to his kiosk which he threw to them through the broken window pane but they did not take them. He said he knows well the Appellants' voices as they have lived together since 1986 and they used to buy things from his kiosk. He gave first Appellant's name as Geoffrey and the second Appellant as Bernard to the police. When he reported the matter the following day the Appellants disappeared but he led police to second Appellant's house that night and they arrested him. The first Appellant was traced to Bomet's home where he was arrested after two weeks. He denied harbouring any grudge against either of the Appellants.

Ann Chege PW2, corroborated that evidence. According to her when their dogs barked she checked and saw two people outside who ordered them to open the door. They demanded Kshs. 10,000/= but she gave Kshs. 2,500/= in a tin which had been handed over to her by her husband. She said the first Appellant talked allot as he is the one who demanded the money. The second Appellant demanded for the kiosk keys.

That was the only evidence against the Appellants.

Though a court can base a conviction solely on the evidence of voice identification of even one witness, it should, however, always warn itself of the danger of doing so. This is because, like in the case of visual identification, mistakes can and do occur in the identification of the voice of even close friends and relatives. Therefore before basing a conviction solely on the evidence of voice identification, the court should first rule out any possibility of error.

Bearing this in mind, and having carefully examined the evidence on record, we are uncomfortable with the identification by voice of the Appellants. Although, like in the case of **Njeri Vs Republic (supra),** the witnesses in this case said the Appellants were their customers and they had known them for a long time, in his evidence PW1 gave the name of the first Appellant as Geoffrey and the second Appellant as Bernard, which was wrong. We also find it difficulty to understand why they did not give the Appellants' names to police when they made the report. Of course those witnesses said they gave their names but the police did not say so. The evidence of PW4 and PW5 was that PW1 told them that he identified one of the robbers. If they had indeed given the Appellants' names then it was a grave error on the part of the police to have failed to give those names in their testimony. When names of the suspects are given to the police, they should, in their evidence in court, say that the complainant said so and so attacked him. It is not enough to simply say that the complainant said he could identify his attackers if he had given their names.

Besides this PW1 and PW2 in this case did not give the Appellants' names to PW3 whose help they enlisted in tracking down the Appellants. In **Choge Vs Republic (supra)** the evidence of the voice identification witness was rejected because he did not give the name of Choge, whose voice he claimed to have heard and identified, at the earliest opportunity.

Taking all these factors into account, we find that though PW1 and PW2 were definitely honest witnesses, they may very well have been mistaken on the identification of the Appellants' voices. In the circumstances we allow this appeal quash the conviction and set aside the sentence. The Appellants shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Nakuru this 4th day of July, 2008.

D. K. MARAGA

JUDGE

M. MUGO

JUDGE.