



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**

**Criminal Appeal 363 of 2003**

**(From Original conviction and sentence in Criminal Case No. 456 of 2003 of the Senior Resident Magistrate's court at Limuru)**

**PAUL MWANTHI SUNG'U.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The Appellant **PAUL MWANTHI SUNG'U**, (hereinafter referred to as “the Appellant”) has appealed to this Court from the Judgment of the Senior Resident Magistrate’s Court, at Limuru dated 15th April, 2003. By that judgment the court convicted the Appellant of the offence of Robbery with violence contrary to section 296(2) of the Penal Code. Accordingly the Appellant was sentenced to death.

Briefly the facts of the case were that on 1st February, 2003 at about 1a.m., the complainant, Mary Wanjiku Gitau was sleeping in her house when her window was hit. As a result of the impact, the window glasses broke and fell on her bed. She started screaming. She was ordered to stop screaming. She heard the voice as that of Paul, the appellant herein. The robbers gained entry into the complainant’s house. The robbers went to the sitting room and took away a T.V. Set, Video and Cash Kshs.50,000/-. In the meantime, the complainant and her house girl PW2 had retreated into the kitchen and locked themselves therein. The robbers soon thereafter left using the front door. After 30 minutes the complainant and PW 2 came out and called a neighbour and police who came to the scene after 30 minutes. The complainant also stated that she saw something like a gun, when she was threatened that she would be shot. The complainant further testified that the Appellant was to assist her in the exportation of flowers and had earlier in the day together counted Kshs.50,000/= for that purpose. The Appellant therefore knew that the Complainant had that kind of money in her possession. PW 2 also stated that she recognized the voice as that of Paul, the Appellant. She was a house girl to the complainant. It was infact the Appellant who caused the Complainant to employ P.W. 2. That it was P.W. 2 who led P.W. 3 to the Residence of the Appellant from where he was arrested and subsequently charged.

In his defence the Appellant stated that he was a florist by profession. He narrated how he was arrested and a search conducted in his house. That he had nothing to do with the robbery. That all that he had endeavored to do was to assist the complainant in her budding flower business.

The Appellant advanced various grounds in his petition of appeal. However they can broadly be reduced into four to wit, identification, that the prosecution case was not proved beyond reasonable doubt, that the ingredients of the offence were not proved and finally that the Appellant’s defence was not given proper consideration. When the appeal opened for hearing before us, the Appellant who had hitherto been

represented by Counsel requested that he be allowed to prosecute the appeal in person as he did not wish to have the appeal adjourned as had been requested by his Counsel. His application was granted, and the firm of Messrs. Kandie Kimutai & Co. was allowed to withdraw from acting for the Appellant. The Appellant then with the permission of the Court, presented written submissions in support of his appeal. We have had opportunity to carefully read the said submissions.

The state was represented by Ms Gateru. She submitted that the prosecution had proved its case against the Appellant beyond reasonable doubt. That there was sufficient evidence to support the conviction. That according to the evidence of P.W.1 and P.W.2, the robbers were more than one. That they gained entry in the complainant's house through the window. When the complainant started to scream, she was ordered by one of the robbers not to scream. It was then that P.W. 1 recognised the voice of the Appellant as he had known him previously for 2 months. Counsel further submitted that there was evidence on record that P.W. 1 and the Appellant were supposed to export flowers and had together counted money in the day. It was the submission of Counsel that the Appellant knew that the complainant had money with her. Learned State Counsel further submitted that P.W. 2, the complainant's house girl also identified the Appellant's voice. According to her, she even wanted to call the Appellant by his name and ask him not to kill P.W. 1 but P.W. 1 restrained her. That the Appellant was instrumental in getting P.W. 1 to employ P.W. 2.

Regarding contradictions in the prosecution evidence, Counsel submitted that there were no such contradictions. That the evidence tendered was corroborative in material particulars. However, even if there were any contradictions, they were minor and the court should ignore them. Consequently counsel urged the court to dismiss the appeal. In reply, the Appellant submitted that the cut grill of the window should have been photographed and the photographs tendered in evidence to show that indeed the grills were cut. The Appellant further submitted that P.W. 2 only knew him when he took her to P.W. 1 for employment. That the two had only known the Appellant for 2 months which was too short a period for one's voice to be known and or recognized. The Appellant further submitted that the day after the robbery, he visited the complainant's house but was not arrested and yet the police station was only 200 yards away. He further stated that P.W. 2 knew his house and yet it took her 4 days to show it to the police whereat he was arrested. He also complained that the words that he allegedly spoke which helped the complainant to identify his voice were not stated. He also contended that there was contradiction as to whether it was the door or the window of the complainant's house that was hit. Whereas P.W. 1 said it was the window, P.W. 2 said it was the door and yet the two were in the same house. Finally, the Appellant submitted that in the commotion that ensued coupled with the doors/windows being hit and a lot of screaming, it was difficult to recognize the voice of the Appellant. In **OKENO – VS – REPUBLIC (1972) E.A 32 AT PAGE 36**, the Court of Appeal for Eastern Africa stated:

***“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. Ruwala – Vs- Republic (1957) E.A. 570). It is not the function of the 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....”***

The above sets out the duty of the first appellate court. We are of the view that it is upon the first appellate court to carry out that duty by actually re-evaluating the evidence. On the question of identification, the only relevant evidence was tendered by P.W.1 and P.W. 2. P.W. 1 testified that:-

***“My window was hit and glasses fell on my bed. I started screaming and one told me not to scream. I just heard the voice. It was the voice of Paul. I knew him very well a lot.... Then we entered the kitchen with the girl, the girl also told me that the voice is that of Paul....”***

***He further stated in his evidence categorically:- “Two people entered with strong sport lights. I did not see their faces....”***

During cross-examination, P.W. 1 stated:-

***“.....I just heard your voice. I did not see you....” As for P.W. 2, this is what she stated in her evidence:- “They broke the window and two entered I recognized the voice of Paul who is the accused. I wanted to tell Paul not to kill us, then I was restrained by P.W. 1 not to mention his name.....”***

From the foregoing it is quite clear that apart from the voice recognition the two witnesses never saw the Appellant with their own eyes at the scene of crime. Was the evidence of voice recognition water tight and free from possible mistake? We entertain our own doubts in this regard. Both witnesses did not state the exact words uttered by the Appellant that could have galvanized them into recognizing that the voice was the Appellant's. Further the witnesses did not state in what language if at all were the words uttered by Paul and finally the witnesses never told the court, how many times they heard the alleged voice for easy recognition during the incident. It is also noteworthy that soon after the incident, P.W. 1 called her neighbour and also the police. However, the two witnesses never volunteered the information regarding the recognition of the Appellant's at the scene of crime. They never gave out the name of the Appellant to either the neighbour or the police officers.

In the case of **PETER OCHIENG OKUMU – VS- REPUBLIC (1987) CR. APP. NO. 185/87** the court held:

***“ failure to make a prompt first report and giving the assailants’ names in the first instance causes uneasiness in believing the witnesses evidence....”***

This is what precisely happened in the instant case. Further a day after the alleged robbery, the appellant visited the home of the complainant. In this regard P.W. 3 stated:-

***“The maid knew your house. The robbery was on Friday night and I was told that you went there on Saturday.....”***

The complainant stated in his evidence that her home was a mere 200 yards from the Police Station. Surely if they had recognized the Appellant through his voice as being among the robbers, how come they never took the necessary action to have him arrested when he presented himself in their house? Further we are told that the P.W. 2 knew where the appellant resided. However it was not until 4 days after the incident that the witness caused the Appellant to be arrested. She could have led the Police Officers to have the Appellant arrested on the same day the crime was committed since the police station was next to her house. We also doubt whether the Appellant knowing that he had committed the offence and had been recognised by PW1 and PW2 would visit PW1's house the following day knowing very well that it was next to a Police Station.

Still on the issue of identification it would appear that P.W. 1 started screaming when her window was hit and glasses fell on her bed. She must have been in a state of panic as her life was in danger. P.W. 1 testified that she heard a voice ordering her to stop screaming and by the time she alleged to have heard the voice she was still screaming as per the recorded evidence. It would appear then that the circumstances were difficult at the scene of crime for easy recognition of the voice. In **REGINA – VS – TURNBALL (1976) 3 ALL E.R. 549**, the court observed:

***“Recognition may be more reliable than identification of a stranger, but even when witnesses are purporting to recognize someone who she/he know the jury should be reminded that mistake of recognition of close relatives and friends are sometimes made....”***

The statement applies with equal force to voice recognition as in the instant case bearing in mind

that occasionally voices belonging to different people are at times identical. On our own re-evaluation of the evidence, we are constrained to hold that the evidence of voice recognition was not watertight as to sustain a conviction. Indeed it would appear as argued by the Appellant that the evidence of voice recognition was just a mere afterthought.

As regards whether the prosecution case was proved beyond reasonable doubt, the Appellant submitted that, there were so many glaring contradictions in the prosecution case such as to render the case unproved. The Appellant referred the court to the evidence of P.W. 1. That whereas P.W. 1 stated that she was attacked on 1. 2. 2003 at 1a.m., P.W. 3 a police officer testified that he received the report of robbery on 31. 1. 2003. Further that whereas P.W. 1 testified that it was the window which was hit, P.W. 2 testified that infact it was the door which was hit. As regards the first alleged contradiction, it is common ground that P.W. 1 was attacked and robbed. It is also common ground that the robbery happened on the night of 31st January, 2003 at 1a.m. We think that a reference to the night of 1st February, 2003 was but a typographical error and as rightly submitted by learned state counsel, this is a minor contradiction that did not really affect the prosecution case. As regards whether it was the window or the door that was hit first during the commencement of the robbery, all we can say is that it was a matter of perception between P.W. 1 and P.W. 2. After all they were not sleeping in the same room. Whereas P.W. 1 was in the bedroom P.W. 2 was sleeping in the sitting room. Further we do not think that anything much turns on this discrepancy any way.

Were the ingredients of the offence of robbery with violence proved in the instant case?

The Appellant says they were not. The state on the other hand takes the view that it did. The court of appeal in the case of JOHANA NDUNGU – VS – REPUBLIC CRIMINAL APPEAL NO. 116 OF 1995 stated inter alia:-

***“In order to appreciate properly as to what acts constitute an offence under Section 296(2), one must consider the subsection in conjunction with Section 295 of the penal Code. The essential ingredients of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately before or after and further in any manner the act of stealing. Thereafter the existence of the afore-described ingredients constituting robbery are presupposed in three sets of circumstances prescribed in Section 296(2) which we give below and any one of which if proved will constitute that offence under Subsection:***

- 1. If the offender is armed with any dangerous or offensive weapon or instrument.***
- 2. If he is in the company with one or more other person or persons or,***
- 3. It at or immediately before or immediately after the time of the robbery he wounds, beats, strikes, or uses any other violence to any person....”***

In this case there is the evidence that P.W. 1 was robbed by a group of people in excess of one. Indeed P.W. 1 testified that:-

***“Two people entered with strong spotlights. I did not see their faces.... I saw something like a gun....”***

P.W. 2 also testified that:

***“.....They broke the window and two entered.....”***

In this case therefore, a group of more than one person robbed P.W. 1. The evidence of P.W. 1 and P.W. 2 testified positively to the existence of at least two people who forcefully entered the house of P.W. 1. We do not, with respect, agree with the Appellant that there was no evidence of the existence of another person or persons during the robbery. There was overwhelming evidence on that aspect which

was not in anyway challenged. Further, there was evidence that the intruders had something which looked like a gun with which they threatened to shoot P.W. 1 if she continued screaming for help. In our mind, the offence of robbery with violence under Section 296(2) was complete and the ingredient being that the robbers were more than one. Further ingredient of the offence and which was proved was that said robbers were armed with a dangerous weapon or instruments.

Finally, regarding the Appellant's defence, it would appear that his complaint that his defence was not properly considered seems to have merit. From the judgment, the learned trial Magistrate, merely repeated what the Appellant had stated in his unsworn statement. The learned trial magistrate did not endeavour to evaluate the Defence offered and make a decision thereon whether to believe it or reject it.

We must reiterate that an accused person is entitled to expect that his defence put forth as a whole subjected to an exhaustive examination and to the court's own decision and the reasons thereof. This was not the case here. We think that that was a fatal omission on the part of the trial magistrate and which as persuasively argued by the Appellant occasioned the Appellant miscarriage of justice.

The upshot of the foregoing is that this appeal is allowed, the conviction quashed and the sentence of death imposed on the Appellant set aside.

We order that the Appellant shall be set free forthwith unless otherwise lawfully held.

Dated at Nairobi this 20th September, 2005

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**LESIIT J.**

**JUDGE**

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**MAKHANDIA J**

**JUDGE**