



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 174 OF 2014

GEOFFREY KISIKWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. S. Mokuu, Senior Principal Magistrate in Eldoret Chief Magistrate's Criminal Case No. 2179 of 2012 delivered on 7th day of November 2014)

JUDGMENT

1. On 12/05/2012 the Appellant herein, **Geoffrey Kisikwa**, was arraigned before the Eldoret Law Courts in **Magistrate's Criminal Case No. 2179 of 2012** (hereinafter referred to as '**the Case**') facing the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. He denied the charge and a trial was ordered. The Appellant was unrepresented.
2. The particulars of the charge of robbery with violence were that '*on the night of 10th and 11th day of May 2012 at Matisi village Nzoia Location, Likuyani District Western Province, jointly with others not before court, while armed with offensive weapons namely pangas, robbed PETRONILA SUMBA 2 Mobile phones make Nokia 1200, 1616, 1 hurricane lamp and 1 radio make sonitec S/no. Not known all valued at Kshs. 6, 500/= and immediately before the time of such robbery used actual violence wounded the said PETRONILA SUMBA.*'
3. The trial began before **Hon. Obina, E.A.** Senior Resident Magistrate where the complainant testified before the Magistrate was transferred from the station. Upon compliance with **Section 200(3)** of the **Criminal Procedure Code** as required, the hearing of the case began *de novo* before **Hon. S. Mokuu**, Senior Principal Magistrate where seven witnesses testified.
4. The complainant testified as **PW1**. She was one **Petronila Sumba**. **PW2** was **Onesmus Wanjala** who stayed with **PW1** but slept in an adjacent house to that of **PW1**. **PW3** was **Brenda Nanjala** who slept with **PW1** in the same house whereas **Martin Shikuku Okumu** and **Lawrence Wanjala Chesoni** who were neighbours to **PW1** testified as **PW4** and **PW5** respectively. **PW6** was a Clinician in-charge of Matunda Sub-District Hospital who produced a P3 Form for **PW1** and the investigating officer **No. 41443 PC Joseph Koror** attached at Matunda Police Station testified as **PW7**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.
5. Upon closure of the prosecution's case the Appellant was placed on his defence and he gave an unsworn defence. The Appellant was subsequently found guilty, convicted and accordingly sentenced to suffer death.
6. Being aggrieved by the conviction and sentence, the Appellant lodged the appeal subject of this judgment where he wholly challenged the judgment.
7. The appeal was heard by way of written submissions and the Appellant who appeared in person filed comprehensive submissions and relied on several decisions in calling for the appeal to be allowed. He also filed amended grounds of appeal where in essence he expounded on the initial grounds of appeal and challenged his identification as the attacker, variances between the charge sheet and the evidence, that he was not informed of his right to Counsel pursuant to **Article 50(1)(g)** of the **Constitution**, that the medical evidence was wanting, that the investigations were shoddy and the charge was not proved and lastly that the death sentence meted on him was unconstitutional. He prayed that he be set at liberty.
8. The State opposed the appeal and urged the Court to be guided by the evidence on record which went along to prove the charge. It was submitted that the Appellant was adequately identified as the attacker and that the charged was sufficiently proved. On **Article 50(1)(g)** of the **Constitution** Counsel submitted that the right was progressive and was to be fully realized within 4 years hence there was no infringement as alleged. Counsel prayed that the appeal be dismissed.
9. As this is the appellant's first appeal, the role of this Court is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence

tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In discharging the above duty, this Court will consider the appeal as follows: -

a. On the issue of identification:

11. The identification of the assailants was by both visual and voice identification. PW1 testified on two occasions. Although the trial began *de novo* PW1's initial evidence remained part of the evidential record of the court and it served to *inter alia* ascertain the credibility of PW1 especially if there was a significant variance in the evidence. In this case the twin evidence of PW1 was not distinctively different. According to PW1 she had woken up at around 01:30 am and fed her twins and as she was about to go back to sleep she heard a loud bang of the front wooden door to her house. She sat by the bedside in her room. The front door opened and some people entered. She saw a big torch light at the sitting room which was then switched off. She then heard some of the people walking towards her bed room and she screamed as well as PW3 who was sleeping in one of the other rooms. PW1 heard one of the people commanding the others to cut PW3 and she readily recognized the voice as that of the Appellant who was her neighbour's son and had lived with and whom she ordinarily interacted with for three years.

12. As the two entered her room one of the attackers who had a panga was at the front followed closely by the other who had the lit torch. Amid the torch light PW1 confronted the attackers and grabbed the panga. A struggle ensued and PW1 managed to disarm the Appellant and threw the panga down. She was however cut on the toes and fingers in the struggle as the torch light was also switched off. PW1 struggled with the Appellant whom she held firmly as she continued raising alarm. The Appellant urged his companion to attack PW1 to free himself and again PW1 heard the voice of the assailant that close. The companion hit PW1 on the face, head and hand and PW1 lost energy and left the assailants loose. The attackers then left with PW1's two phones, hurricane lamp and a radio. PW1 gave the name of the Appellant to the police as one of the assailants.

13. Although PW3 did not see the assailants she nevertheless heard the voice of the Appellant which she also readily recognized as the Appellant's as it had not changed since the time the Appellant worked in the neighbourhood where PW3 used to hear him, talk to and even conversed with. PW3 also gave the name of the Appellant as one of the assailants to the police.

14. PW2 also had an encounter with the attackers. As he was returning into his house from answering a call of nature outside his house which was adjacent that of PW1 and as he was closing the door from inside, he was confronted by some people who forced the door open and gained entry. They tied him and laid him on the floor as some carried a big stone towards the house of PW1 which was about 20 metres away. PW2 then heard PW1 screaming from her house and one of the attackers who was left to guard him escaped. Shortly afterwards one of the attackers returned to PW2 and told him what had happened inside PW1's house. It is that attacker who injured PW2 on the head and hand.

15. PW2 recognized the one who tied him as the Appellant using the torch light as it was shone around. The attacker also came so near PW2 and PW2 recalled him as the Appellant who used to work at one of their neighbour's home.

16. It is the foregone evidence which the trial court analyzed and found that the visual identification was wanting but the voice identification was without any error. The State did not cross-appeal on the issue. The way a trial court is to handle evidence on voice identification is now well settled. Extreme care is peremptory to ensure that the following conditions are met, which conditions were discussed by the Court of Appeal in **Malindi Criminal Appeal No. 27 of 2016 Safari Yaa Baya vs. Republic (2017) eKLR** as follows, that: -

(a) It was the accused person's voice;

(b) The witness was familiar with it and recognized it;

(c) 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 said it.

17. The Court of Appeal had also previously held in **Karani vs. R (1985) KLR 290** and **Choge vs. R (1985) KLR 1** that just few words like 'break her legs' sufficed. In this case there is no doubt that the Appellant and PW1, PW2 and PW3 were neighbours and knew each other well. The Appellant so confirmed in his defence where he went forth to raise the issue of PW1 having framed him up after he disciplined PW1's children after he found them fighting with his children at a borehole. PW1 narrated how the ordeal took place and stated that she heard the Appellant order one of the attackers to cut PW3 who was also screaming in another room in the house. PW1 stated that he held and struggled with the Appellant and having so held him tightly, the Appellant called his companion to hit PW1 so as to free him. The exact words however allegedly used by the Appellant were not given. It is always imperative that the exact words used must be given and the court must be satisfied that the said words were uttered by the accused. PW1 stated that when she heard the attackers walk towards her room she screamed and so continued throughout the ordeal until she was rescued. PW3 was woken up by the screams of PW1 and also screamed. There is no doubt that both PW1 and PW3 were traumatized and screamed as much to attract the attention of their neighbours. The circumstances then made voice identification doubtful especially if PW1 really heard the alleged words the Appellant said about PW3 and if PW3 really heard the words in the midst of that commotion.

18. I therefore come to the finding, on the re-evaluation of the voice recognition evidence, that the prevailing circumstances at the scene did not favour any positive voice recognition and that the said evidence was weak and could not be the basis of a conviction. Having so found, a consideration of the other grounds of appeal will not add any value to this appeal.

19. Consequently, the appeal is allowed, the conviction quashed and the death sentence set-aside. The Appellant shall be set at liberty unless otherwise lawfully held.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at ELDORET this 1st day of November, 2018.

H. A. OMONDI

JUDGE