REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 3 OF 2015

BONIFACE MBEVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Kitui Principal Magistrate's Court Criminal Case No. 926 of 2010** by **Hon. B. M. Kimemia PM on 10/12/14)***

J U D G M E N T

1. **Boniface Mbevi** the Appellant was charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code.** Particulars of the offence being that on the **3rd** day of **December, 2008** at **Kamuti Village Changwithya Location** of **Kitui District** within **Eastern Province,** jointly with others not before court, while armed with offensive weapons namely a **Riffle** and **Machetes** robbed **Samuel Mbevi** of cash **Kshs. 40,000/=,** two Mobile Phone make **Nokia 1100** worth **Kshs. 4,500/=** and **Motorolla C118** worth **Kshs. 3,000/=,** all valued at **Kshs. 47,500/=** the property of **Samuel Mbei** and at or immediately before or immediately after the time of such robbery used personal violence to the said **Samuel Mbevi.**

2. He was tried, convicted and sentenced to **Suffer Death.**

3. Being aggrieved by the conviction by the Lower Court he appealed on grounds that:

- Evidence on record did not support the finding of the trial Court.
- Mandatory provisions of **Section 169(1)** of the **Criminal Procedure Code** were not complied with.
- The learned trial Magistrate relied on facts that were not admissible to convict the Appellant.
- Evidence adduced was adequately rebutted by the defence.
- The burden of proof and innocence of the Appellant was shifted to him.
- The whole of the Prosecution evidence was not considered.
- The learned Magistrate applied her own hypothesis and disregarded the actual evidence tendered, an error that led her to reach a wrong conclusion.
- Failure to dismiss the Prosecution's case and acquit the Appellant was erroneous.

4. Hence the prayer to vary the Lower Court judgment and substitute it with a judgment dismissing the Prosecution's case, quashing and or setting aside the sentence and acquitting the Appellant.

5. Facts as presented by the Prosecution were that, the Accused herein is the Complainant's younger brother. On the **12th** day of **December, 2008** PW1 **Samuel Ngui Mbevi** (Complainant) was asleep in his house at about **1.00 a.m.** with his family when they were attacked by people they recognized as the Appellant, their uncle **Kitavi Nzoka** who was armed with a gun and two (2) others. Their assailants injured him and robbed them of cash **Kshs. 40,000/=** two (2) Mobile Phones. Neighbours answered their call of distress. They took them to **Kitui Police Station** where a report was booked. The Complainant was taken to **Kitui District Hospital** where he was admitted for five (5) days prior to being referred to **Machakos** then ultimately **Kenyatta National Hospital** for three (3) months. The file was compiled and forwarded to the **Attorney General's Office.** A recommendation was made for charging the Appellant. He was re-arrested on the **9th December, 2010** and charged.

6. In his defence the Appellant denied having committed the offence in question. He stated that on the material night he went to the Complainant's home on hearing screams. Their homes are 100 meters apart. He found him already injured. When the village elder called for a taxi he went with the Complainant, his wife and mother-in-law to the police station then to hospital. A day later he was arrested and so was the Complainant's wife. He called their father DW2 **Mbevi Mueke** as a witness who blamed the Complainant's wife for what happened to him. DW3 their mother also blamed the Complainant's wife. They stated that the wife was caught with a man friend and was assaulted

whereafter she vowed to ensure the Appellant was crippled.

7. In his submission Counsel for the Appellant **Mr. Musyoki Kinyua** argued that PW1 and PW2 alleged that the Appellant was one of the people who attacked them but stated that he was not inside the house it was therefore clear that even if he was there he did not participate. That the intensity of moonlight and position of witnesses viza viz where the position of the Appellant that would have enabled them to see him was not put on record. Circumstances that prevailed did not favour frightened people to identify the persons at 1.00 a.m.

Further, he stated that the Appellant answered the Complainant's call of distress and went to assist him. The Complainant did not tell them who his attackers were and even while at the Police Station he did not say who the attackers were. Failure to mention him showed that PW1 and PW2 his wife were not sure of the attackers. There was no evidence that the Appellant was in company of the attackers. That the trial Magistrate erroneously believed that the Accused demanded that the matter be reported to him as it was impossible for a civilian to go round the report desk, stand next to a police officer and demand the report to be made to him. PW2 was arrested for confiscating a cell phone that was dropped by the assailant. The duty of proof was shifted to Accused. There was no evidence of anything having been stolen. There was no proof of existence of money alleged to have been stolen. The Appellant was arrested and bonded to keep peace for 9 months. He was charged after a directive was given by the State Counsel, a year later. Citing the case of **Suleiman Kamau Nyambura vs. Republic Criminal Appeal No. 5 of 2013** he called upon the court to find that evidence adduced was insufficient and proceed to acquit him.

8. The State through Prosecuting Counsel, **Mr. Njogu** opposed the Appeal. He submitted that this was a case of visual and voice identification. The Appellant was well known to the Complainant his blood brother and he saw him with aid of a torch and moonlight. Similarly PW2 and PW3 also recognized him. In the day the Appellant was with PW1 when they went to purchase a motorcycle and having interacted the Appellant knew that the Complainant had **Kshs. 100,000/=.**

Further, he stated that the charge of robbery was proved as the ingredients were established. The Appellant was armed with an axe and he was in company of other people. Injuries were inflicted on the Complainant who was hospitalized.

9. This being the first appellate court, it is duty bound to re-evaluate the evidence and draw independent conclusion bearing in mind the fact that it had no opportunity of hearing or seeing witnesses testify at trial. **(See Okeno vs. Republic (1972) EA 32; Soki vs. Republic (2004) KLR 21; and Kimeu vs. Republic (2003) IKLR 756).**

In this regard issues to be determined will be whether:

- The Appellant was positively identified.
- The case was proved to the required standard.
- Failure to comply with **Section 169(1)** of the **Criminal Procedure Code** was fatal to the Prosecution's case.

10. The Complainant and his family were attacked at night when conditions favouring correct identification may have been questionable as argued by the Appellant. Especially taking into consideration the decision cited of **Simiyu & Another vs. Republic (2005) IKLR 192** where the Court of Appeal stated the following:

> ***"1. 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. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions.***
>
> ***2. In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person to whom the description was given.***
>
> ***3. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity.***
>
> ***4. In the present case, neither of the two courts below demonstrate any caution. Further, there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error."***

In this case the conviction was not only based on visual identification but also voice identification. In the case of **Choge vs. Republic (1985) KLR 1,** the Court of Appeal held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the Appellant's voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it. **(See also Kerani vs. Republic (1985) KLR 290).**

11. In the case of **Vuva Mwachirumbi vs. Republic (2016) eKLR** the Court of Appeal added that:

> ***"In addition to considering the length of time the witness has known the person and circumstances of their acquaintance, one has to consider the words heard by the witness in order to determine whether they were sufficient to enable him correctly recognize his voice."***

12. The Complainant was attacked at about **1.00 a.m.** Witnesses stated that there was moonlight that enabled them to see. In addition the attackers had lit torches and the reflection of the light torches. The light that was emitted enabled the Complainant to see the Appellant his blood brother. When the Complainant (PW1) heard a bang on the door he woke up peeped through the windowpane and saw four (4) people. He identified the Appellant his brother and their uncle (their mother's cousin) **Kitavi.** He heard the Appellant move to the door and call out his child by the name **"Vali".** It was his evidence that he heard the Appellant urging his mates to hasten the process of cutting the window grill. Three of the people entered inside the house but the Appellant remained outside.

13. PW2, **Kavutha Samuel** was woken up by PW1. She peeped and saw the Accused. He heard him call out:

> ***"Vali, uncle."***

This was their son **Daniel.**

Moonlight and the light emanating from the torch enabled her to see and recognize him. She saw four people but only identified the Appellant and **Kitavi.**

14. PW3, **Daniel Munee Samuel** the son of PW1 and PW2 heard the Appellant knocking the door and calling out. He stated that he recognized his voice having known him since childhood. He talked asking another person to leave it and the door was locked from outside. They moved and he called out his brother saying **"Bro Bro".** He peeped through an aperture and saw the Appellant aided by the moonlight and the reflection from the torch. He heard one of them say **"Ngui"** was in the sitting room and the Accused telling them to kill him if he was not answering. Thereafter he heard noises. He heard the voice of **John** his uncle and called him out to open the door.

15. PW4 **John Mukumbi Maingi,** was woken up by screams and **Mumbi** PW1's 15 years old daughter went to his home to seek help. While some 15 meters away he saw a person that he identified as the Appellant. The person stood by the door which was open. He hid behind the tree and heard the person asking in Kikamba language whether they had finished. He was aided by moonlight and the torch the person had. He flashed his torch that aided him to see. He went to the house to find PW1 injured.

16. PW5 **Ben Thomas Isika** who slept at the home of the Appellant stated that he went to the house at **1.00 p.m.** and he did not sleep at home. When they heard screams he went to PW1's house with his aunt **Mbula,** the Appellant's wife and they found the Appellant at the scene.

17. The witnesses, PW1, PW2 and PW3 were people conversant with the voice of the Appellant therefore they could not have been mistaken as to his voice intonation.

18. It was not denied by the Appellant that he was at the scene of the incident but it was argued that he went there on hearing the screams just like other neighbours. The Prosecution endeavoured to counter this allegation.

19. What is intriguing in this case, however, is the fact that the police had the Appellant as a suspect but chose to have him sign a bond to keep peace. **(Vide DExhibit 1).** The Prosecution chose to call an officer who took over investigations from the officer who investigated it, after a recommendation was made by the Senior State Counsel to have the Appellant charged following perusal of statements recorded by witnesses. In his testimony PW5 told the court that he only executed recommendations of the Attorney General. He arrested the Appellant and charged him.

20. According to witnesses when they reached the police station the Appellant seemed to have an upper hand over the whole issue in that he purportedly took charge and directed them to state their complaint at the report office.

21. It was alleged that following the incident PW2 was arrested and placed in cells, an allegation that was refuted by the witness. But this allegation was confirmed by PW5 who said that while at the hospital PW2 was indeed arrested. No explanation was given by the Prosecution why PW2 was arrested and on what terms she was released.

22. PW4 stated that **David Mutinda** did call for means of transport, the taxi that was used to take the Complainant and those who went along to the police station. DW4, **David Mutinda** was not called as a Prosecution witness but he tendered evidence as a defence witness. He went to the scene after PW1 was injured. He called for the taxi and talked to PW1 and PW2 although PW1 could not express himself appropriately. When the police visited the scene at 4.00 a.m. he was present. After they had gone at about 5.00 a.m. a cellphone was heard ringing. It was under a seat and PW1's child took it. He (DW4) recorded the numbers of callers and subsequently he handed over the cellphone to PW2. He recorded a statement but was not called as a Prosecution witness. On cross examination he said that he found PW1 injured and they said they did not know the assailants, children inclusive.

23. In their evidence, witnesses who testified did not tell the court at what point in time they mentioned the name of the Appellant to the police as one of the attackers. Evidence adduced did not disapprove evidence adduced by DW4. The question that remains unanswered is whether the Prosecution witnesses were in doubt as to their assailant at the point of reporting to the police.

Considering the fact that the Appellant was not charged at the outset, the Prosecution had a duty of explaining what transpired and how an opinion was formed to have the Appellant bonded to keep peace. The explanation could have been tendered by the officer who investigated the matter at the outset who was not called as a witness.

24. With regard to the offence of robbery having been committed, what constitutes the offence of robbery with violence was set out in the case of **Johanna Ndungu vs. Republic Criminal Appeal No. 116 of 2005 (Unreported)** where the Court states thus:

"(a) If the offender is armed with any dangerous or offensive weapon or instrument, or,

(b) If he is in the company with one or more other person or persons, or,

(c) If at or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other violence to any person."

In the case of **Oluoch vs. Republic (1985) KLR 549** it was stated that proof of any one of the ingredients of robbery as stipulated in **Section 296(2)** of the **Penal Code** could be a basis for a conviction.

25. In this case the Prosecution established beyond doubt that some of the attackers were armed with an axe, an offensive weapon. They were more than one person, actual violence was used on the person of the Complainant and their property was stolen. This was indeed robbery with violence as envisaged by **Section 296(2)** of the **Penal Code.**

26. It was demonstrated that the Appellant had knowledge of the fact that the Complainant had some money. Their relationship was stated to have been cordial. Although witnesses claimed to have recognized the Appellant, the chain of evidence adduced falls short of proving beyond doubt if the Appellant was one of the attackers. This is due to failure on the part of the Prosecution to state why the Appellant was identified by the Complainant and witnesses at the outset as their attackers and why he was not arrested at the outset. The doubt that was established by events that transpired should have been taken into consideration.

27. From the foregoing convicting the Appellant was unsafe. The Appeal which is meritorious is allowed. The conviction is quashed and sentence imposed set aside.

28. The Appellant shall be released forthwith unless otherwise lawfully held.

29. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **12th** day of **January,** 20**17.**

L. N. MUTENDE

JUDGE