



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEALS NOS 108 & 110 OF 2014**

**GABRIEL MUMO KITUKU.....1<sup>ST</sup> APPELLANT**

**STEPHEN MWANGANGI KIVUTHI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the ruling and orders of Hon. L. N. Mugambi SPM in Criminal Case No. 420 of 2013 delivered on 6<sup>th</sup> June 2014 at the Senior Principal Magistrate's Court at Kangundo)**

**JUDGMENT**

The 1<sup>st</sup> and 2<sup>nd</sup> Appellants were the 5<sup>th</sup> and 4<sup>th</sup> Accused persons in the trial Court, and they were charged with two counts of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence in count I were that on the 26<sup>th</sup> day of August 2013 at Mukalwa Market in Matungulu District within Machakos County, jointly being armed with dangerous weapon namely pangas, rungas and spears, robbed Raphael Ngwii cash Ksh. 50,000/=, assorted airtime valued at Kshs. 5,700/= and cigarettes valued at Kshs. 50,000/= all valued at Kshs. 157,000/=, and immediately before the time of such robbery wounded the said Raphael Ngwii.

The particulars in count II were that on the 26<sup>th</sup> day of August 2013 at Mukalwa Market in Matungulu District within Machakos County jointly being armed with dangerous weapon namely pangas, rungas and axes robbed Raphael Ngwii cash Ksh. 50,000/=, and immediately before the time of such robbery wounded the said Raphael Ngwii.

The Appellants were arraigned in court on 2<sup>nd</sup> September 2013 where they pleaded not guilty to the charges. They were tried, convicted on both counts of robbery with violence, and sentenced to death for count I, with the death sentence for the count II being suspended.

The prosecution called seven witnesses. Veronica Syombua (PW1) and Raphael Kimeu (PW2) were man and wife who were the victims of the robbery and testified as to the happenings of the night of 25<sup>th</sup> August 2013 when their shops were robbed and they were injured. Emmanuel Musyoki (PW3) was the clinical officer at Kangundo District Hospital who produced a P3 form for PW1, while Dominic Mbindyo (PW6), also a clinical officer at Kangundo District Hospital, produced the P3 form for PW2.

Catherine Mwikali (PW4), the senior sub –chief in Tala, testified that on 26.8.13 received a phone call to

assist PW1 who had been attacked by thieves, and that she sent a colleague to investigate and visited the shop that was robbed the next day. PC Kipsang from Tala Police Post (PW7) received a report of a robbery and visited the scene of the robbery, while APC Daniel Ongamba (PW5) was the arresting officer in the case.

The 1<sup>st</sup> Appellant gave sworn testimony and did not call any witnesses. He stated that he had been framed with the charges and had been arrested for harvesting sand. Further, that on the 26<sup>th</sup> August 2013 he was at home with his wife and children. The 2<sup>nd</sup> Appellant also gave a sworn testimony stating that the PW2 had a grudge against him over a land dispute, and that on 26<sup>th</sup> August 2013 he had gone to church then went home to sleep and after three days he was arrested.

The Appellants are aggrieved by the judgment of the trial magistrate and preferred this appeal. The grounds of appeal as set out in their Memorandum of Appeal dated 17<sup>th</sup> June 2014 are that: there was no proper identification of the Appellants; there were inconsistencies in the evidence of PW1 and PW2; the prosecution case was not proved beyond reasonable doubt; the evidence of voice recognition by PW2 was not corroborated; an identification parade was not conducted; the evidence of PW2 on the alleged alias names of the Appellants was not corroborated; and that the evidence of the prosecution was contradictory and inconsistent.

K'oceyo & Company Advocates, the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, filed submissions dated 1<sup>st</sup> December 2015 wherein it was argued that the trial court was wrong in finding that PW2 was alert, having been asleep past midnight. It was also submitted that the voice identification of the 1<sup>st</sup> Appellant was not evaluated by the court *viz a viz* the last time PW2 had a conversation with him in order to infer familiarity.

Reference was made to the decision in **Shadrack Mbaabu Kinyua vs Republic, CA No. 163 of 2011** and in **James Chege Wanja & Another vs Republic, CA No. 323 of 2011**. It was further argued that where a trial court relies on voice identification, the particular words uttered or spoken have to be taken into account. Reliance in that regard was placed on the case of **John Chege Gicheru vs Republic, CA No. 638 of 2010** for the position that the trial court did not identify any specific words nor attribute the same to the 1<sup>st</sup> Appellant.

In addition it was submitted that that the trial court wrongly relied on the evidence of PW2 to find that the purported nickname "mumo-diblo" belonged to the 1<sup>st</sup> Appellant and no one else testified on the same. Further, that the said nickname was also not indicated in the charge sheet as an alias name. As regards the 2<sup>nd</sup> Appellant it was submitted that PW2 had stated that he had recognized him as his cousin, however the circumstances of the evidence did not point at a contact between PW2 and the 2<sup>nd</sup> Appellant which resulted to the visual identification. It was noted that in **John Chege Gicheru vs Republic, CA No. 638 of 2010** the Court of Appeal quashed a conviction based on visual identification at 3am in the night, where the trial court failed to evaluate and investigate the intensity of the light and position of the parties in relation to the light relied upon in identification.

Maureen Wambogo, the learned prosecution counsel, opposed the appeal and filed submissions dated 8<sup>th</sup> February 2016. It was argued therein that there was proper identification of the Appellants since PW2 testified that although the attackers used a torch most of the times, at one point during the robbery they put on the electricity lights and one of the robbers he was able to identify was the 1<sup>st</sup> Appellant. PW2 was emphatic that the 1<sup>st</sup> Appellant was the one who cut him, and stated that even if he had been wearing a mask he was able to identify him through his voice.

As regards familiarity with the 1<sup>st</sup> Appellant's voice, PW2 testified that he had known the 1<sup>st</sup> Appellant since childhood, they grew together, schooled together and he was a customer at his shop. In addition that the robbers kept conversing as the robbery was going on and he was able to ascertain his identity as his nickname "mumo-diblo" was called out severally.

As regards the 2<sup>nd</sup> Appellant, it was submitted that PW2 had seen him on the scene and had heard him being called by his nickname. Additionally, that PW2 and the 2<sup>nd</sup> Appellant were cousins and had also grown up together as age mates. It was also stated that PW2 had reiterated this fact by relaying the information to PW7 after he had been taken out of the theatre. It was thus submitted that the prosecution had proven their case beyond reasonable doubt and that evidence of voice identification was receivable and admissible in this case.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see Okeno v Republic [1973] EA 32).

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise two issues. These are firstly, whether there was positive identification of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants; and secondly, whether the 1<sup>st</sup> and 2<sup>nd</sup> Appellants' convictions for the offences of robbery with violence was based on consistent and sufficient evidence.

On the issue raised of the positive identification of the Appellants, the evidence of PW1 and PW2 is the one that is material as they are the only witnesses who were present during the robbery incident. I note that PW1 did not testify as to having seen 1<sup>st</sup> Appellant who was the 5<sup>th</sup> Accused in the trial Court during the robbery incident, or having identified him. Likewise for the 2<sup>nd</sup> Appellant, PW1 was not sure whether she saw him on the night of the robbery and stated that one of the robbers had a metal bar, and she thought it was the 2<sup>nd</sup> Appellant.

The Court also notes that the evidence of identification by PW2 is the only evidence that put the 1<sup>st</sup> and 2<sup>nd</sup> Appellant at the scene of the crimes alleged to have been committed. PW2 in this respect testified that he was able to visually identify the 1<sup>st</sup> and 2<sup>nd</sup> Appellants who were known to him because the electricity lights were later turned on during the robbery, and through the use of their nicknames being "man-man" and "mumo-diblo" which everyone in the locality knew. These nicknames were called out by the assailants as the robbery went on. During cross-examination he stated that the 1<sup>st</sup> Appellant is the one who called out Sila's (the 1<sup>st</sup> Accused) and "man-man's" names. He could not tell who called "mumo-diblo's" name.

On the visual identification of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, I am guided by the guidelines in the case of Mwaura v Republic [1987] KLR 645, in which the Court of Appeal held, *inter alia*, that:

**"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

In addition as PW2 was the only witness who identified the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, I am also alive to the holding as to what constitutes favourable conditions for a correct identification by a sole testifying witness in Maitanyi vs Republic, (1986) KLR 196 as follows:

**"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

In the present appeal, the offence that the Appellant is convicted of took place during the night. PW1 and PW2 testified that the assailants were initially using torches, and later put on the electricity lights for

about 15 minutes. However, PW2 testified that some of the intruders were wearing masks, and during cross-examination he stated that the 1<sup>st</sup> Appellant was wearing a mask, but that he was able to identify him through his eyes. The accounts of the robbery by PW2 also indicates that he and PW1 at one time hid under a bar while the robbery was going on. Finally, PW2 also indicated that he lost consciousness at some point during the robbery. I find that all these circumstances are inimical to a positive identification by PW2 without any corroborating evidence, and no such corroboration was provided on the identification of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants by the only other witness who was present, namely PW1.

On voice recognition, the Court of Appeal in *Karani v Republic* [1985] KLR 290 and in *Mbelle v. R* [1984] KLR 626 held that *identification by voice nearly always amounts to identification by recognition*. The said Court laid down the guidelines when a court is dealing with evidence of identification by voice, and stated that the court should ensure that –

- (a) The voice was that of the Accused.
- (b) The witness was familiar with the voice and recognized it.
- (c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.”

In this appeal, PW2 testified that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were known to him as they were his customers. However, PW2 did not give details of his previous interactions with the Appellants, and particularly if the Appellants had ever talked to him before the incident, how many times and the last such interaction. The fact that the PW1 was familiar with the Appellants and used to see them in his shop is only reliable evidence when it comes to visual identification. For voice recognition to be established, the prosecution needed to prove that the Appellants in addition to being customers, had also been talking and interacting with PW2 before the incident, which was not done. In the absence of such evidence, the Court cannot definitely find that the voice heard by PW2 calling out Sila and man-man’s names was that of the 1<sup>st</sup> Appellant, or that PW2 was familiar with the said voice.

In addition, this Court is of the view that the conditions obtaining at the time were not favourable to safe and positive identification, as PW 2 was undergoing a traumatic event, and from his evidence it is not clear whether and/or when any conversation with the 1<sup>st</sup> Appellants took place. The conditions obtaining were such that there could be possibility of error. I am therefore of the view that that the evidence of identification by voice was not reliable.

These finding are sufficient in my opinion to dispose of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants’ appeals. I would like however to make a comment on the issue of whether there was sufficient evidence to convict the 1<sup>st</sup> and 2<sup>nd</sup> Appellants for the offences of robbery with violence. This is on the requirement in the offence of robbery with violence of evidence of the items that were stolen, as robbery is an integral part of the offence. In the present appeal no evidence was brought of the existence of, and ownership of the stolen items by the complainant, or of their possession after the said robbery by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. It cannot therefore be found that there was in fact a robbery.

I therefore allow the 1<sup>st</sup> and 2<sup>nd</sup> Appellants appeals for the foregoing reasons, and quash their conviction for the offences of robbery with violence contrary to Section 296(2) of the Penal Code for both counts 1 and II. I also set aside the sentences of death imposed upon them for the said convictions, and order that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 6<sup>TH</sup> JUNE 2016.**

**P. NYAMWEYA**

**JUDGE**