REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 81 OF 2011'B'

(From the original conviction and sentence in criminal case no. 4 of 2011 of the Chief Magistrate's Court at Malindi before Hon. L. W. Gitari – CM)

CHANGAWA MWERI NGOKA ….....…..…….…… APPELLANT

VERSUS

REPUBLIC.....….....….....……..RESPONDENT

JUDGMENT

1. The appellant, Changawa Mweri Ngoka was charged before the Chief Magistrate's Court Malindi with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the charge are that on the 30th day of December, 2010 at Chakama, Malindi District within Kilifi County jointly with others not before court while armed with dangerous weapons namely pangas, knives and rungus robbed Mohammed Ali cash Kshs, 500,000/-, a pair of shoes, a mobile phone make Nokia and spare battery of mobile phone all valued at Kshs. 506,000/- and immediately before the time of such robbery wounded the said Mohammed Ali.

2. Following a full trial he was convicted and sentenced to death. Aggrieved by the decision of the Lower Court he now appeals to this court against both conviction and sentence. He raised eleven grounds of appeal, majority of which attack the adequacy of the prosecution evidence. The final complaint was that his defence did not receive proper consideration by the court. His appeal was one of those heard during the Judiciary Service Week and the appellant was the beneficiary of *probono* services through Mr. Mayaka advocate. Mr. Mayaka argued grounds 6, 7, 10 and 11 of the grounds of appeal.

3. In sequence, grounds 6 7, 10 and 11 take issue with the failure by police to conduct an identification parade, contradictions in prosecution evidence, alleged possession and identification of stolen phone battery and the dismissal of the appellants sworn defence. Mr. Mayaka in his submissions faulted the identification evidence for two reasons. That there was insufficient light at the scene of attack and that no identification parade was conducted.

4. With regard to the latter point, he relied on the case of **Charles Eloba Rekemo v R (Cr. Appl. No. 16 of 2003)**. He submitted that the evidence on the recovery of the phone battery and identification thereof was contradictory and wanting. Finally, he argued that the Lower Court did not give due consideration to the appellant's sworn defence. He also urged the court to review the death sentence in view of the "emerging jurisprudence" on mandatory death sentences for capital offences.

5. Responding, Mr. Musyoki for the State restated the evidence of key prosecution witness asserting that it was consistent. He argued that the witnesses spent sufficient time with the appellant prior to the robbery and therefore had opportunity to identify him thus obviating the need for an identification parade. Further, that the complainant identified the money and battery recovered from the appellant whose bid to flee, thwarted by police was an indication of guilty knowledge.

6. This being a first appeal, the court is mandated to review the evidence of the trial afresh and to draw its own conclusions. In so doing, the court will bear in mind that the Lower Court had the advantage of seeing and hearing the witnesses testify. See (**Okeno v R 1972 EA(1972) EA32**). Secondly, the appellate court must be weary of interfering with a finding of the Lower Court based on the credibility of a witness unless "it is clear that no reasonable tribunal could make such a finding, on that the finding is clearly wrong" (see **R v Oyier [1985] KLR 353**).

7. The evidence led by the prosecution in the trial was as follows.

The complainant, Mohamed Ali (PW2) is a cattle trader. On 29th December, 2010, together with a fellow trader Mohamed Njure Kalume aka Guracha (PW3) he traveled from Malindi to Chakama area in search of cattle to buy. PW2 had on him a sum of shs. 600,000/- in cash earlier given to him by his business partner Abdullahi Abbas Sheikh (PW4) for the purpose. PW1 and PW2 spent the night at the home of the appellant with whom the former was acquainted.

8. On the next day the appellant, PW2 and a third person described as Kai or Kaye went out in search of cattle. However, upon returning in the evening PW2 and PW3 decided not to spend the night at the home of the appellant having become apprehensive of their safety. By that time PW2 had given part of the purchase money – Shs. 100,000/- to PW3 for safe keeping. At the request of PW2, the appellant called for a motor bike to take the duo away. They left at about 7.00pm.

9. A short distance from the homestead, the motor cycle owner declared that the same was short of fuel and stopped. He asked his passengers to disembark. The two passengers complied and started walking as the motor cycle drove back towards the home of the appellant. Soon they were confronted by a group of men riding on a motorcycle. The lights were switched off. The men were armed with crude weapons including metal bars, machetes and sticks and descended on PW2 and PW3 screaming "shika, ua" (arrest and kill). The appellant was allegedly in the said gang.

10. They beat the two men but PW3 managed to escape and hide. PW2 was robbed of all the money, Shs. 500,000/- together with his own shs. 2,000/-, a mobile phone make Nokia, a spare battery and shoes. Although PW3, like PW2 sustained injuries during the hour long ordeal, he did not lose anything to the robbers. He returned the shs. 100,000/- to PW4 on the next day. Police were notified of the robbery on the same night by PW3 and commenced investigations.

11. Pc Kariuki Njeru (PW5) visited Chakama in search of the appellant. On seeing police, the appellant fled, dropping shs. 7,000/-. He was caught and disarmed as he had a knife. Upon being searched, the appellant was found in possession of two mobile phones and a phone battery which PW2 claimed to be the one he had lost in the robbery.

12. The appellant elected to give a sworn statement in his defence. It was a long statement. He said that on 26th December, 2010 he was approached by Kaya (Kai) who was accompanied by one Joshua and Ngala. They claimed to have been sent by one Mohamed to collect some luggage from a place called Mbukubi in the Tsavo. They sought his assistance to get there. He agreed.

On arrival at the destination, the trio met one Bashir and confirmed to Mohamed (possibly PW2) that "the luggage was secure". That evening the appellant returned to Chakama with his acquaintances and accommodated them for three nights during which communication with Mohamed continued.

13. Eventually Mohamed (PW2) did come to Chakama with six other persons including PW3 and discussed with his "agents" the cost of the luggage and payment. It was subsequently arranged that the exchange of the "luggage" and payment would happen on 30th December, 2010 at the appellant's home, but it did not happen as there was no money. Nonetheless the "luggage" was given to PW2 who left for Malindi to "sell" it. On the next day, the 31st, the owner of the goods came in search of PW2 and PW3 and not finding them complained that they had stolen from him. At 11.30am police came to his home accompanied by PW2 and PW3 – his guests of the previous three days. It was said they had been robbed of money and a mobile phone. Following a search in his house some Shs. 7000/- was recovered therefrom. He claimed that it was his money.

13. It is our considered view that this appeal turns on the question of identification of the appellant at the scene of robbery, and the alleged recovery and identification of PW2's stolen phone battery (Exh.3), and to some extent the sum of shs. 7,000/- (Exh.4).

14. Regarding the first issue, there was no dispute that the robbery occurred at night by the roadside after PW2 and PW3 had disembarked from the motorcycle. At the trial both PW2 and PW3 asserted that they were able to identify the appellant among the robbers. PW2 stated in his evidence in chief that:

> **"I saw him (appellant) and it was not dark. The accused said they kill me if I would cause them trouble. I saw him and heard his voice."**

15. During cross-examination PW2 confirmed that the attack occurred at 7.30pm. PW2 did not identify the nature or proximity of any lighting at the scene to enable identification. Neither did he elaborate upon the special features that distinguished the appellant's voice among the din of five attackers who ascended on them suddenly amid threatening chants. In the case of **Choge v R (1985) KLR** the Court of Appeal considered the question of identification of accused persons by voice and stated:

> ***"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. Receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognised it and that 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."***

In **Karani v R (1985) KLR 290** the Court of Appeal held that:

> ***"...identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favoring safe identification."***

The decisions were recently cited by the Court of Appeal sitting in Nyeri in **Joseph Muchangi Nyaga & Anor v R [2013] eKLR.**

16. The circumstances of attack in the latter case were similar to the present case; it was at night, a gang of several men descended upon the complainants' home and assaulted him using crude weapons during the robbery. The complainants claimed to have recognized the appellant by voice and appearance. In its determination the Court of Appeal observed regarding the said identification

"....there were between 9 and 10 intruders who entered the house. The judgment of the High Court does not contain the exact words spoken by the 1st appellant which words led the complainant to recognise his voice. It is also not clear in what language the words were spoken. Failure to subject the voice identification to test and analysis casts some doubt as to the veracity. In addition, the fear and shock as stated by PW1 make the prevailing conditions at the scene, of crime unfavourable for safe voice identification... the honourable judges erred in giving undue weigh to the testimony on voice recognition."

17. For his part PW3 said in his examination in chief that the appellant "was with the people (robbers) and they had not commenced their faces. Under cross-examination he elaborated:

"It was about 7.30pm when we were attacked. It was not dark. There was no moon. It was dark. I heard you say "ua, ua" (kill, kill) and you had not covered your face. I heard you talk and you were the first one to hit me in the left shoulder with an iron bar. I had just left you (your home) and I saw you and you talked, there was no way I could have failed to recognise you."

18. Clearly the witnesses testimony on the actual words spoken by the appellant differ even though the circumstances obtained are roughly described in similar vein. Secondly, there were several voices according to PW2 and PW3. The appellant's voice was not singled out by the witnesses. In her judgment, the learned Chief Magistrate did not separately consider voice identification but believed that visual identification was possible as it was not very dark, as stated by PW2 (mistakenly referred to as PW1 in the judgment) and that PW2 and PW3 "could not mistakenly identify the accused as they had been with him the whole day and only parted with him a short while before they were robbed." She believed the two had no reason to "frame" the appellant.

19. With respect, the Lower Court failed to examine the circumstances of the robbery in detail and especially the fact that it was dark and that the attack was carried out by several persons. The mere fact that the victims had spent time with the appellant cannot justify the alleged identification under darkness, where the source of light, or its intensity is not described.

20. In **Joseph Muchangi** the Court of Appeal stated:

"Evidence of visual identification should always be approached with great care and caution (see Waithaka Chege v R [1979] KLR 271). Greater care should be exercised where the conditions for a favorable identification are poor. (Gikonyo Karume & Another v R [1980] KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (see Abdalla Bin Wendo & Another v R (1953) 20 EACA 166; Wamunga v R [1989] KLR 42; and Maitanyi v R [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him..."

21. In our considered view the trial court did not properly evaluate the identification evidence (visual and voice). It was not enough to believe the testimony of PW2 and PW3. The trial court, with respect failed to analyse the evidence of the robbery incident with particularity. In our evaluation of the evidence of the trial, the circumstances prevailing at the scene of robbery were not conducive to positive visual or voice identification of the appellant that can be said to be free from the possibility of error.

22. Regarding the recovery and identification of PW2's stolen phone battery and cash shs. 7,000/- PW4 and PW5 merely stated that the battery was "recovered" from the accused during the search but the money was dropped by the fleeing suspect. PW2 who was present during the arrest of the

appellant did not seemingly witness the said recovery. PW2 said police told him of the recovery. He was shown the phone battery but not the money. According to PW3 who was present during the arrest the appellant threw away some money and the phone battery while fleeing. The recovery evidence is riddled with contradictions. It is therefore doubtful (see **Charles Eloba Rekemo [2005] eKLR**).

23. The onus always lies with the prosecution to tender consistent and credible evidence to justify the invocation of the doctrine of recent possession by the court. Thus in **Arum v R [2006] 2EA 10** the Court of Appeal stated:

> ***"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is, there must be positive proof, first; that the property was found with the suspect. Secondly, that the property is positively identified as the property of the complainant; thirdly, that the property was stolen from the complainant."***

In the present case, even the identification of the phone battery by PW2 was most casual. He said he marked the battery by biting it, causing a dent. A phone battery being a common place item, there was need for better identification, say by way of purchase documents or special marks beyond a mere dent.

24. From the evidence tendered, there is no telling whether indeed any money at all or the phone were found with the appellant, or even that these items were part of the property taken from the complainants during the robbery. Claims by the appellant that the money was recovered from his house are dubious too, as they were never canvassed with any witnesses during the trial. This is also true of the long winded testimony he gave in his defence as the trial court correctly observed. The defence had the ring of an elaborate tale and was properly dismissed. Even so the prosecution evidence upon which the conviction was founded is doubtful in our opinion and the conviction unsafe. We do therefore quash the conviction and set aside the death sentence imposed by the Lower Court. We direct that the appellant be set at liberty forthwith unless otherwise lawfully held.

Delivered and signed at Malindi this 7th day of March, 2014.

C. W. Meoli **O. Angote**

JUDGE **JUDGE**