



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 7 & 8 OF 2012**

*(Appeal from the original conviction and sentence in criminal case No. 879 of 2010 at Malindi by Hon. D.W. Nyambu-PM on 17<sup>th</sup> January 2012)*

**S C S.....1<sup>ST</sup> APPELLANT**

**BRIAN KESI CHARO.....2<sup>ND</sup> APPELANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The two Appellants together with two other people were charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. The Appellants were also charged with the offence of Gang rape contrary to section 10 of the Sexual Offences Act.
2. According to the particulars of the offence, on 17<sup>th</sup> September 2010, the Appellants, armed with dangerous weapons namely, pangas, rungas and other crude weapons robbed P V F of a panasonic camera, a laptop, five mobile phones, binoculars, Kshs.500 and, two bags containing personal effects, all valued at Kshs.283,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said P V F.
3. After the trial, the learned Magistrate convicted the Appellants for the offence of Robbery with violence and sentenced them to suffer death. The learned Magistrate held in abeyance the sentences in respect to counts 2,3,4 and 5.
4. The grounds of appeal are that the trial magistrate erred in failing to see that the charge sheet was fatally defective. The other ground of appeal was that the prosecution witnesses did not give to the police the names and description of the Appellants despite having stated in their evidence that they knew the people who attacked them.
5. Mr. Gicharu, counsel for the Appellants submitted that nothing was recovered from the Appellants and that the prosecution witnesses did not place the Appellants at the scene of crime.
6. Mr. Nyongesa, the learned state counsel stated that the Appellants in this case were not strangers, PW1 knew and recognised her attackers. Counsel submitted that PW1 recognised the voice of the Appellants and that the Appellants were convicted on sound evidence.

7. P V F, a volunteer at Mida Community Eco Camp in Mida, Watamu travelled from England to Kenya on 16<sup>th</sup> September 2010. On 17<sup>th</sup> September 2010, while having dinner with her husband, deceased, together with Mr. Mateso, PW2 and Mr. Suleiman, PW3 at the balcony of their house situated at Eco Camp, she saw four men enter the "banda". The four men went upstairs where they were having

their diner and started hitting them using the sticks and pangas that they were carrying. PW1 informed the trial court that all the four men were wearing similar clothes together with sack cloths which covered their faces.

8. PW1 was hit on the head. The four intruders asked in Kiswahili for money and PW1 responded in Kigiriama that she had no money with her. The cook, PW 2, was pushed downstairs and one of the intruders followed him. As PW1 was holding onto her husband, the robbers pulled her hair and ripped apart her t-shirt. P's husband was pushed downstairs after being slashed. She was left with three men upstairs while the fourth assailant remained downstairs.

9. One of the assailants demanded the nose ring which PW1 was wearing which she handed over to him. They ordered her to remove her trouser which she did then lay on the bench when they demanded that they wanted to have sex with her. The 1<sup>st</sup> Appellant raped her first. She recognised his voice when he told her to say that the sex was nice. PW1 had seen him in the village and she knew him very well. PW1 was then raped by the second assailant who also told her to say that the sex was nice. The third assailant started panicking and told his colleagues to hurry up. When the second finished raping her, the third assailant, whom PW 1 believed was the 2<sup>nd</sup> Appellant, took over. He also told her to say that the sex was nice and that she liked it.

10. It was after they had left that PW1 went downstairs and found PW 2 bleeding. The two walked through the bush towards the village when they met villagers who had appeared to help them. She only learnt about the death of her husband the following day. The barman, PW 1 suffered bruises on the neck, back and the head.

11. PW1 stated that when she went back to the house the following day, she found her two suit cases which contained clothes and other items had been stolen. The suit cases contained the children clothes, books, binoculars, sunglasses, credit cards among other personal effects.

12. Some of her personal effects were recovered on the same day outside the entrance of Eco camp. The witness identified her binoculars which had also been recovered as MFI 3 and her safe as MFI 6. The witness also identified the t-shirt she was wearing on the fateful evening as MFI 7, her pants as MFI 8 and the blood stained trousers as MFI 9.

13. The police later on informed PW1 that they had arrested three people in connection to the robbery. On 21<sup>st</sup> September 2010, a parade consisting of nine people was conducted and PW1 managed to identify the 1<sup>st</sup> Appellant. PW1 also identified the 1<sup>st</sup> Appellant in the dock. The witness also identified the 2<sup>nd</sup> Appellant on the day the parade was mounted and also in the dock.

14. It was the evidence of PW1 that she knew the Appellants whom she thought all along that they were her friends. At the parade she smelt their scent and asked them to repeat the words "it is nice" which they did. These are the same words that all the assailants had told PW1 to say while raping her.

15. In cross-examination, PW1 informed the trial court that she was raped by three men. The whole ordeal took between 30-40 minutes while the rape itself took between 10-15 minutes.

16. PW1 stated that she had informed the police that she recognized the voices of her assailants because they spoke to her. According to the witness, the assailants had told her to say "it is nice and that she likes it". They also asked for money in English, then in Kiswahili and Kigiriama.

17. While enjoying their dinner upstairs, PW1, PW2, PW3 and her late husband had a lantern lamp. However, it was dark downstairs. PW1 stated that she saw four people walking towards the camp while at the balcony. She maintained that she recognized the 1<sup>st</sup> and 2<sup>nd</sup> Appellants' by their voices because the two had worked at the camp before she joined the place and she knew them well. PW1 stated that the 1<sup>st</sup> Appellant was her husband's cousin and he was jealous because her husband had been made the manager of Eco-camp. The Appellants stayed in the village. It was the evidence of PW 1 that she had been involved with the affairs of the camp from inception. The Appellants used to work at the camp although they had left the previous year because they had had

- problems with the proprietor of the camp. According to the evidence of PW 1, the 1<sup>st</sup> Appellant was a cousin to her late husband and was jealous when her late husband was made the manager of Eco Camp. Her late husband had refused to employ the 1<sup>st</sup> Appellant at the Camp.
18. It was the evidence of PW1 that the identification parade was conducted five times and that although she was traumatized and upset at the ordeal, she was not scared.
  19. The barman at Mida Eco camp, PW2, informed the court that him together with PW1, S (PW1's husband) and PW 3 were having drinks after their dinner at 8.00 pm when PW1 heard people approaching them upstairs. According to him, the people who approached them were five in number. Four of them had covered themselves with gunny bags. PW 3 jumped from the balcony to the ground. When P W 2 tried to escape using the stairs one, of the intruders followed him and held him. He then asked PW 2 if he had money on him. He also wanted to know the room that PW 1 was using. After beating up PW 2 and PW1's husband, the assailants collected the suit cases which were in one of the rooms downstairs.
  20. PW2, together with PW1 and PW3 were called at the police station for an identification parade the following day. PW2 did not identify the Appellants at the parade.
  21. Mr. Suleiman Ali Baba, PW3, stated that while they were having drinks upstairs, he saw two men wearing sacks enter the building. The men told them to lie down and it is at that particular point that PW3 jumped to the ground and shouted for help. However, by the time he went back to the camp with the villagers, they found S had been brutally murdered and the assailants escaped. PW 3 stated that he recognized the 1<sup>st</sup> Appellant's voice and he told the police as much. According to the witness, he had known the 1<sup>st</sup> Appellant for 3 years having lived in the same area. It was the evidence of PW3 that the 1<sup>st</sup> Appellant had differed with the late S because he had married PW1. The 1<sup>st</sup> Appellant had previously worked at the camp.
  22. In cross examination, PW3 stated that he was the cook while PW2 was the barman. Alfred, PW 4, was the watchman. PW3 did not see what happened when the thugs were up stairs because he ran for his dear life after seeing two men approaching them. According to the witness, the 1<sup>st</sup> Appellant was a cousin to the deceased and that the two were fighting over the ownership of the camp.
  23. The watchman, PW 4, stated that that he was patrolling the camp at around 8 pm when they were attacked by robbers. He was hit from behind by someone he did not see. He ran and shouted for help.
  24. Alfred Charo Yaa, PW5, was the village elder. He informed the court that on 19<sup>th</sup> September 2010, while at his house, the 1<sup>st</sup> Appellant went and inquired why he (PW 5) was looking for him. PW 5 informed the 1<sup>st</sup> Appellant that it was the Chief who wanted to see him. PW5 then called the Chief who in turn called the police. The police then arrested the 1<sup>st</sup> Appellant.
  25. According to Corporal George Ogolla, PW7, while at the scene of the robbery, he was informed that the suspects of the robbery were the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and another person known as Kahindi who they were unable to arrest. When they visited the house of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants which was one kilometer away, they did not find them in their houses. With the assistance of the chief, they arrested the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> accused persons. They found two binoculars in the house of the 3<sup>rd</sup> accused person and one binocular in the house of the 4<sup>th</sup> accused person which they suspected to have been stolen from PW1. One of the binoculars was marked as MFI 3 while the other two were produced as exhibits number 2 and 3 and returned to PW1.
  26. On 21<sup>st</sup> September 2010, an identification parade was organised in which the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were positively identified. The witness produced in evidence the binoculars as exhibit number 3. He also produced MFI 7, MFI8 and MFI 9 as exhibit numbers 7, 8 and 9.
  27. PW7 finally stated that PW1 recognised the voice of the 1<sup>st</sup> and 2<sup>nd</sup> accused when they spoke to her. Each of the eight people on the parade spoke and their voices were recorded.
  28. Chief Inspector Mathew Bett, PW8, informed the court that he conducted two identification parades which commenced at 3 Pm. He used ten other suspects to conduct the parade. The 1<sup>st</sup> Appellant chose to stand between the 3<sup>rd</sup> and 4<sup>th</sup> persons. PW1 identified the 1<sup>st</sup> appellant by touching him. The parade was re-arranged and the 1<sup>st</sup> Appellant chose to stand between the 7<sup>th</sup> and 8<sup>th</sup> persons. PW2 was not able to identify him. However, PW4, the watchman, identified the

- 1<sup>st</sup> Appellant. The witness produced the signed identification parade form as exhibit number 11.
29. PW8 conducted another identification parade in respect to the 2<sup>nd</sup> Appellant on the same day. The 2<sup>nd</sup> Appellant stood between member number 6 and 7. PW1 then requested that the members of the parade utter words certain words which they did. She identified the 2<sup>nd</sup> Appellant by his voice. The 2<sup>nd</sup> Appellant was also identified positively by PW2. The signed identification parade form was produced as exhibit number 12.
30. PW8 stated that PW1 had reported that she recognized the voices of the Appellants, which fact was relevant to the identification parade.
31. In his defence, the 1<sup>st</sup> Appellant stated that on 17<sup>th</sup> September 2010, when the robbery took place at Eco camp in Watamu, he was in Malindi hospital. His wife had just delivered and she was discharged from the hospital on 17<sup>th</sup> September 2010. The 1<sup>st</sup> Appellant produced the receipts showing the payment he made at the hospital as defence exhibit number 1.
32. The 1<sup>st</sup> Appellant stated that he did not leave his house until 18<sup>th</sup> September 2010 when he went to work. All along, he was assisting his wife who had delivered by way of Cesarean section. Just like everybody else, he heard that Eco camp had been robbed the previous day. The police searched his house in his absence on 18<sup>th</sup> September 2010 at around 11:00 am but did not recover anything. He presented himself to the village elder on 19<sup>th</sup> September 2010 when he was told that the police were looking for him. He was then arrested by the police.
33. The 1<sup>st</sup> Appellant admitted that an identification parade of nine members was conducted at the police station, of all the members, he was the only one with dreadlocks. The 1<sup>st</sup> Appellant stated that although PW1 identified him at the parade by way of his voice, the voice identification tests were never carried out. The 1<sup>st</sup> Appellant denied that he killed his cousin S or raped PW1 as alleged.
34. The 2<sup>nd</sup> Appellant stated that on 17<sup>th</sup> September 2010, he went to his house after his work of making beads at Mida Creek Conservation Group. He had dinner with his family and slept. He was informed about the robbery the following day. He was arrested from his house that evening and an identification parade was conducted on 21<sup>st</sup> September 2010. He was identified by PW1 and PW4. The 2<sup>nd</sup> Appellant stated that although he was asked to speak during the parade, he did not see any recording device.
35. After analysing the evidence, the learned Magistrate was satisfied that the offence of Robbery with violence was disclosed. The learned Magistrate was also satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were among the gang of robbers who attacked Mida Eco Camp. According to the Magistrate, although the 1<sup>st</sup> and 2<sup>nd</sup> Appellants claimed that they were in their respective houses at the time of robbery, they did not call any evidence to prove their alibi.
36. The evidence that was adduced in the lower court was that PW1, PW2, PW3 and the late S were having dinner on the upper floor of the 'banda' at Eco Camp. The upper floor was lit with a lamp while the ground was dark. None of the witnesses saw the faces of the assailants because they were in sacks. When PW3 saw the men approaching them he jumped to the ground floor and ran outside the compound. He never saw or heard what happened to PW 1, PW 2 or to the late S.
37. PW2 tried to escape using the staircase. He however did not manage to escape because one of the assailants pushed him downstairs where he found another assailant waiting. The assailant downstairs was not hooded although he could not see him because of the darkness. He was hit using the iron bar by one of the assailants and robbed Ksh.125 from his pocket. The assailants asked the room that PW1 was using.
38. The only evidence that linked the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to the offence of Robbery with violence and Gang rape was the voice identification by PW1 and PW2. In analysing this evidence the learned Magistrate held as follows:

**“I am however satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> accused were properly identified by their voices. PW1 knew the 1st and 2nd accused persons before. She knew them by names, faces and voices. She therefore recognized their voices. The identification parade was a confirmation. PW7 corporal George Ogolla, who was present at the identification parade confirmed that PW1 identified the suspect by their voices”**

39. The learned Magistrate discounted the evidence of PW4, who was the watchman that he identified the Appellants, and correctly so, because his evidence was that he never saw the attackers. He was hit from behind and he ran away.

40. The conviction of the Appellants rested wholly on the identification of their voices by PW1 and PW2. PW1 identified the 1<sup>st</sup> and 2<sup>nd</sup> Appellants from the parade while PW2 only identified the 1<sup>st</sup> Appellant by his voice.

41. In the case of Julius Waititu Muthuita Vs. R; Criminal Appeal No. 229 of 2005, the Court of Appeal quoted with approval the case of **Mbelle Vs R (1984) KLR 626** in which the court set down guidelines as regards the evidence of voice recognition as follows:

(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 said it.

42. In **Choge Vs R (1985) KLR 1**, the Court of Appeal stated as follows:

**“There can be no doubt that evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances, carry as much weight as visual identification, since it would be identification by recognition rather than at first sight.”**

43. The evidence on record clearly shows that PW 1 knew the Appellants well. PW 1 is one of the people that established Eco camp where the Appellants worked before they were sacked. PW 1 had interacted with the Appellants together with the other villagers to the extent that she could speak Giriama language. Her long stay amongst the community had led her to get married to the 1<sup>st</sup> Appellant’s cousin who was murdered on the night of the robbery. PW 1 was therefore familiar with the Appellant’s voices.

The Appellants spoke when they were attacking PW 1 and her husband. They also asked her to say that the sex was nice when they were raping her. The witness had ample time to identify the voices of the Appellants who were known to her and the conditions obtaining were such that there could be no possibility of error. PW 1 positively identified the Appellant’s voices when the voice identification parade was mounted.

44. We are therefore in agreement with the finding of the Magistrate that PW 1 positively identified the Appellants’ voices and convicted them for the offence of Robbery with violence on that ground. We find no merit in these two appeals and we dismiss them in their entirety.

Dated and Delivered in Malindi this 7<sup>th</sup> day of March, 2014.

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**C. W. MEOLI**

**JUDGE**

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**O. A. ANGOTE**

**JUDGE**