



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 37 OF 2011

JOSEPH CHACHA MATINDE APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Kehancha Senior Resident Magistrate's Court (J.R. NDURURI) Criminal Case Number 75 of 2011 dated 15th September 2011)

JUDGMENT

Introduction

1. This is an appeal from the conviction and the death sentence made on 15th September 2011 by the Senior Resident Magistrate's Court at Kehancha, in Criminal Case No. 75 of 2011, where the appellant Joseph Chacha Matinde was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence are that on the night of 10th and 11th February 2011 at Nyamararagere village, Getong'anya sub location in Kuria West District within Nyanza Province, jointly with others not before court, while armed with an offensive weapon namely a firearm, robbed one Mark Rioba Merengo two heads of cattle valued at kshs. 40,000/= and at or immediately after the time of such robbery shot dead the said Mark Rioba Merengo.

The facts of the Case.

2. The prosecution's case is as follows. On the 10th and 11th February 2011 while sleeping with the husband at around 11.00pm to 12.00midnight Esther Magigwa (PW1) heard their dogs bark and they woke up. The husband (now deceased) took his torch and armed himself with a panga and went to check what was happening on the front door. PW1 was left seated on the bed when she heard three gun shot after her husband raised an alarm. She could see torch lights outside, the door was broken into and she started screaming. Two people entered the house and one of them told her "go to sleep, I have had my justice".
3. PW1 recognized the voice as that of the appellant who is a son in law. Since the deceased torch had fallen down and the assailants torches were on, she saw the appellants appearance and the clothes he was wearing a kitenge shirt which had yellow and green flowers. She had seen the appellant wearing it previously on a number of occasions. According to her testimony the appellant was the one holding the gun, she could not recognize the other assailant who was

wearing dark clothes. Before the incident the appellant had lodged a complaint with the area chief that the deceased husband to PW1 had refused to give him back his two head of cattle after they had divorced with their daughter after they had stayed together for three (3) years. It is her testimony that it is because of this that the appellant came to get his revenge.

4. Joseph Magaigwa (PW2) a neighbour to the deceased went to help them after he had heard screams from his neighbours compound. It was around 12.10am. All he did was to take the deceased to hospital after he found him lying down bleeding but unfortunately the deceased passed on along the way to Pastor Machage Memorial hospital. PW2 also testified of having tracked hoofmarks of the stolen cattle which led towards Kombe area which is the appellant's home area.
5. Josiah Masiaga (PW3) the assistant chief Getong'anya sub-location testified of how he received the information that there was a robbery at Nyamararangerera area. The information came from one Hudson Chacha who telephoned him at about 12.30am. PW3 knew the accused who previously had complained that the deceased had refused to return his two cows which he had given as dowry for their daughter who later went back to the deceased homestead after 3 years of marriage. PW3 testified that he organized for AP officers and together they went to the deceased home where they were handed three spent cartridges by PW1 and then they started tracking the hoofmarks of the stolen cattle which led them to near the appellant's home. The appellant having also been identified by PW1 was arrested in his house by PW3 in the presence of PW2 accompanied by administration police officers. PW2 also recognized the 'kitenge' shirt which had reddish and blackish flowers. He was also able to identify the appellant in court. PW3 identified the kitenge shirt the appellant was wearing which he said was white with black and green flowers.
6. John Marwa Koroso (PW4) a neighbour of the deceased also narrated having heard screams from his neighbour at 11.00pm and also gun shots which made them hide. They also assisted in tracking the hoofmarks of the cattle that had been stolen.
7. APC Hitler Amuka (PW5) confirmed that PW3 went to their camp at about 3.00am during the material night and informed them of the robbery and that some suspects had been identified. They accompanied PW3 and together with three other colleagues went to the appellant's home and arrested the appellant.
8. PC Samuel Kimetoo (PW6) also confirmed that he received a telephone call from PW3 who informed him about this case and that a suspect had been arrested and was at Masaba D.O's office where they rearrested the appellant. He interrogated PW1 on what transpired, went to the home of the deceased, saw where the deceased had been shot as well as where the cattle boma was. He was given the spent cartridges, saw three bullet holes on the door to the deceased's home and was told how PW1 recognized the accused person and saw him holding a gun. He drew a sketch plan of the deceased's home and sent one PC Moses Okwach to Pastor Machage Memorial Hospital where a post mortem was performed on the body of the deceased and a report issued. He prepared an exhibit memo form, escorting the three spent cartridges to the Government ballistic examiner in Nairobi who examined them to be components of 7.62 x 39mm caliber ammunition and thereafter preferred the charge against the accused. He produced the post mortem report (P.Exb. 2), sketch plan (P.exb 3), exhibit memo form (Pexh 4) and a report from the government ballistic examiner (Pexb 5).
9. When put on his defence, the appellant gave a sworn testimony and called one witness, his first wife Mary Motatiro (DW2). In his testimony he stated that he spent the entire night of 10th and 11th February 2011 in his house with DW2 and was woken up and arrested by police officers at about 5.00 to 6.00am. He wore the said 'kitenge' shirt that morning when police officer told him that he was under arrest and should dress up. DW2 on her part told the court that she was with the appellant all through the entire night on 10th and 11th February 2011 in their home. After evaluating the evidence the trial court convicted and sentenced the appellant as afore stated.

Grounds of Appeal

10. In the present appeal filed on 23rd September 2011 the appellant has set out the following grounds:-

1. He pleaded not guilty to the offence of robbery with violence contrary to section 296(2) of the Penal Code.
2. He was not allowed by trial court to defend himself to his satisfaction.
3. The first witness said she did not know him and it was the first time to see him yet he relied on information from the chief through phone.
4. After hearing the screams second witness went to the complainant's house and followed the footsteps of the stolen cattle which was not on the direction of his home.
5. Third witness went to the scene and also followed the footsteps of the stolen cattle towards his house they did not trace them and he also said that he found him sleeping in the house with his wife.
6. He had a grudge with the complainant since he divorced his daughter of which she suspected him of doing the offence.
7. Complainant had no concrete ground to prove appellant did the offence since there was no evidences to show before the honourable court.

He therefore prays that the honourable court intervene, quash the conviction and sentence.

Submissions

11. At the hearing on the 13th March 2013 the appellant tendered written submissions which he relied on in toto. In summary the written submissions stated that PW1 did not show the distance where the attackers were from where she was to enable her identify them. He insists that the grudge of the cattle is what makes him to be a suspect. The trial magistrate also relied on identification without considering the grudge. Complainant did not raise alarm using the appellants name and in her first statement she did not give the colour of the shirt. The appellant further submitted that PW1 also did not give the time taken for the robbery to be effected to enable her recognize and identify the accused person positively; that she did not also give the intensity of the torch light; and that his defence was overlooked by the trial court as he was arrested in his house as per the evidence of the arresting officer and there were no cattle recovered. He submitted also that there were contradiction between PW1 and PW2 testimony over the description of the colours of the kitenge that whereas PW1 said it was yellow and green PW2 said it could be reddish with blackish flowers not as stated by PW1, PW3, PW4 and PW5.

12. Mr. Majale learned counsel for the respondent opposed the appeal. He submitted that the charge was supported by facts; that PW1 recognized appellant's voice positively because the appellant was married to her daughter for 3 years though they were now separated; and that it was this divorce that drove appellant to attack the deceased and not the 2 head of cattle as appellant had been constantly demanding a refund of his dowry which was 2 heads of cattle. That is why appellant after shooting the deceased dead said "*go to sleep, I have had my justice*". Counsel submitted that PW1 also stated that appellant was dressed in a kitenge shirt on that night, a shirt he had won many times before during his visits to the deceased's home and that she was able to recognize the appellant's shirt with the help of torch light which the deceased had switched on. The appellant also had a torch which had been switched on.

13. Counsel further submitted that appellant alleged a frame up by PW1 and deceased after separation with their daughter, but the Appellant had made threats on deceased's life which the deceased had reported. He submitted that it was appellant who had bad blood towards the deceased and his family and that is why he attacked and robbed them on the material night. Counsel contended that PW6 corroborated PW1's testimony on the kitenge shirt he wore when he was arrested and the shirt was produced as an exhibit.

14. The appellant's alibi defence, counsel submitted, was contradictory to that of his witness DW2, further that the evidence of PW3 is to the effect that he had received complaints from the appellant to the effect that deceased had refused to return the cattle after the deceased's daughter had left him (the appellant) was part of a course of events in this case clearly showing that appellant was determined to recover the cattle from his father in law and because the efforts had failed appellant opted to attack and rob the deceased through violent means. He urges court to review evidence on record thoroughly and to uphold conviction. Appellant in reply still insisted that this case was a frame up because he was asking for his property and he denies that he was in the home of the deceased on the material night.

Re-evaluation of Evidence

15. As a first appellate court, it is our duty to evaluate afresh the evidence that was tendered before the trial court and arrive at an independent determination bearing in mind that we did not see or hear the witnesses who testified before the court. See ***Muthoko and Anor. vs. Republic*** (2008) KLR 297. Having carefully analyzed the evidence and given due consideration to the grounds of appeal and submissions thereof it is not disputed that a robbery did take place and all ingredients of the robbery with violence proved, See ***Ganzi vs. Republic*** (2005) 1 KLR 52. What is in issue is whether at the time of the commission of the offence the complainant was able to identify the appellant and his co-accused.

16. The only source of light in and around the house by which the eye-witness PW1 could identify the attackers during the incident which occurred about midnight were the two torches, one carried by her deceased husband which fell on the floor when he was shot and the one carried by one of the attackers whom she recognized. There is no evidence on how big the torches were or how bright they were, the distance from the person identified. It is noteworthy that torch light does not give a general panoramic view of the surroundings but only a focused beam and in absence of evidence as to where the torches were spot-lit, it is not safe to accept identification in such circumstances. The conditions therefore for the alleged recognition were difficult, and in accordance with authority what was needed was other evidence tending to point to the guilt of the accused to support a finding that the identification or recognition was free from possibility of error. See ***Karanja & Another –vs- Republic*** (2004) KLR 140.

17. We have analyzed the evidence presented by the prosecution and alibi defence of the accused as required by the authority of ***Njagi & Anor vs. R*** (1988) KLR 258 which held that a trial court must weigh up an alibi defence before reaching a decision as to whether the recognition of the accused who raised the alibi was proper, [see also ***Karanja –vs- Republic*** (1983) KLR 501)]. We find that:

- a. The accused's alibi is unsupported by independent evidence and the testimony of DW2 the (accused's wife) that she was with the accused husband at home when at 5.00 am he was awoken and taken away by police officers, does not relate to the time earlier than 5.00am; it is absolutely silent on the time before accused's arrest; it does not disclose when the accused came home; and he could have come home after midnight after taking part in the robbery incident which happened according to PW1 between 11.00pm – 12.00 midnight. PW2 and PW3 were notified of the events that had taken place at PW1's home at 12.10am and 12.30am, respectively.
- b. The difficulties in identification of the accused by means of his Kitenge shirt through the torch light is compensated and strengthened by the voice recognition of the accused by the PW1 his mother in law for 3 years according to PW1 (and 1 year according to the accused himself).
- c. The recognition evidence of PW1 is supported by the fact that she told the neighbours who responded to the gunshots and the assistant chief PW3 that she had recognized the accused during the attack by his voice when he told her to stop crying and by the Kitenge shirt in which she had seen him several times before. This information led the assistant chief PW3 and his Administrative Police Officer including PW5 in arresting the appellant at his home in the morning following the midnight attack.
- d. There is no stark colour contrast in the description of the accused's Kitenge shirt as one with yellow and green flowers as stated by PW1; reddish and blackish flowers, according to PW2 and

- white, black and green flowers by PW3. It was the PW1 recognition of the accused by this shirt that was crucial, and the accused was indeed arrested while wearing it without denying that it was his and that he had worn it several times previously as stated by PW1.
- e. On its own, the fact that the accused had severally failed to recover from the deceased, and had therefore sought the intervention of the assistant chief PW3 to recover, his two heads of cattle paid to the deceased as dowry for his daughter's hand in marriage which had failed, and he may consequently have been ill motivated to violently recover them, is in accordance with section 9 (3) of the Penal code immaterial as regards his criminal responsibility.
 - f. However, taken together with the recognition evidence of PW1, the evidence that the accused had put up a spirited fight to recover the dowry he had paid to the deceased after the failure of his marriage to the deceased's daughter, culminating in the complaint at the area chief's office, served to strengthen the evidence of identification and recognition of the accused as one of the attackers, making it free from possibility of error.

Findings

18. Having appropriately warned ourselves of the dangers inherent in identification or recognition evidence, we find that the deficiencies of the visual identification were in this case remedied by the complementary voice recognition of the accused supported by the first opportunity reports on this recognition to the neighbours and the assistant chief leading to the arrest of the accused a few hours after the attack. We find that it was safe to rely on the recognition evidence of PW1 and that the accused's involvement in the robbery the subject of these proceedings was proved beyond reasonable doubt.
19. The trial court relied on the Court of Appeal decision in *Karanja & Another -vs- Republic*, supra, on identification in difficult circumstances and must be taken to have warned itself of the inherent dangers. The Court however held that PW1 was able to identify his assailants using the torch light and that she also recognized what the appellant was wearing i.e "the kitenge" shirt and his voice which she heard clearly. In its judgment and after carefully considering the circumstances under which PW1 allegedly recognized the accused person the court concluded that even though the same were difficult it was satisfied that they were sufficient to enable PW1 positively recognize the accused person. In its judgment the words "go to sleep I have had my justice" are strong pointer that the accused person had a motive to attack the deceased. Without saying so, the learned magistrate's ruling is to the effect, correctly in our view, that the evidence of identification by means of the Kitenge shirt was supported by other evidence of recognition of the accused by his voice. He said:

"I have carefully considered the circumstances under which PW1 allegedly recognized the accused person. Even if they were difficult conditions, I am satisfied that they were sufficient to enable PW1 to positively recognize the accused person. She was able to recognize his voice. As he was able to see him from the light of the two torches. The fact that there is no evidence as to intensity of the light of the two torches notwithstanding, PW1 saw the shirt that the accused person was wearing and which she had seen him wearing before. Upon his arrest in his home, the accused person was still wearing the same shirt. Furthermore, the accused person already had a dispute with the deceased over the two head of cattle that he had given him as dowry. The words 'Go to sleep, I have had my justice' are strong pointer that the accused had a motive to attack the deceased. On the other hand, the accused person's testimony, though sworn is mere denial. The evidence of DW2 who is his wife cannot be relied on as independent, as any wife would be expected to support her husband in a case like this."

20. We find that the trial court fully weighed the evidence presented by the prosecution and the accused and do agree with its findings on identification evidence through the recognition of the accused by PW1 by use both of the accused's voice and the Kitenge shirt which he wore during the incident.

21. We, therefore, find no reason to quash the conviction of the accused or to interfere with the sentence imposed by the trial court. The Senior Resident Magistrate's Court judgment of 15th September 2011 is therefore upheld and the appellant's appeal herein dated 23rd September 2011 is dismissed.

Dated, Signed and Delivered in open court at Kisii this 9th day of May 2013.

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RUTH N. SITATI

JUDGE

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... for the Appellant

.....for the Respondent

..... Court Clerk

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RUTH N. SITATI

JUDGE

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EDWARD M. MURIITHI

JUDGE