REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 146 OF 2010

ERICK MURIITHI PIUS ALIAS KAMUTUMBA…....APPELLANT

V E R S U S

REPUBLIC…….RESPONDENT

(An appeal against both conviction and sentence by Hon. Peter Gesora Principal Magistrate in Chuka Criminal Case No. 1592 of 2008).

The Appellant was charged jointly with another with one count of robbery with violence contrary to section 2 96(2) of the Penal Code. It was alleged that the two committed the offence on the 12th October 2008 at Chuka Township jointly with others and while armed with dangerous weapon that axes, stones and pangas. They robbed Gilbert Njiru Kinyua Ksh. 8600/- and also wounded him. Both were convicted for the offence and sentenced to death. They both filed their appeals to this court. However the Appellants co-accused passed away before this appeal could be heard.

The Appellant filed his petition with five grounds of appeal. Subsequently the Appellant filed amended grounds on which he relied on for this appeal. They are as follows:

The petition raises the following Amended grounds for Appellant:

1. That the trial magistrate erred in law and facts in convicting me upon an evidence of voice recognition whose factors to support the same were not proved beyond any reasonable doubts.

2.That the trial magistrate erred in law and facts while convicting me without making a finding that the mode of my arrest could not support an evidence of identification by recognition.

3.That the trial magistrate erred in law and facts while convicting me without making an adverse resolution of uncalled vital witness.

4.That the trial magistrate erred in law and facts while convicting me without considering the grudge that existed between me and the complainant (PW1) herein, which grudge I stand to believe was the reason behind my application in the charges herein.

5.That the trial magistrate erred in law in rejecting my dully sworn alibi defence without giving a cogent reason for its rejection and which defence was not shaken by the prosecution.

The prosecution called 8 witnesses. The brief facts of the case are that the complainant PW1 his wife PW4 were attacked in their home by a gang of people and robbed off some cash Ksh.8600/- the thugs also cut PW1on the head and caused him serious injuries. He was unconscious when he was admitted in hospital where he stayed for 12 days. Both the complainant and his wife said that they recognized the voice of the Appellant when he shouted at PW5 ordering here to stop screaming and to keep quiet. The neighbours of PW1 i.e PW2, 3 and 4 also heard the commotion. Nobody entered PW2's house however PW3 and 5 were attacked each in their houses and robbed ksh.3400 and Ksh.4000/- respectively. The Appellant in his defence put forward an alibi. He said that he went to Laare in October, 2007 and that he did not return to Chuka where he was a shoe shiner until his arrest at 10 am on the 12th November 2008. He also said that the complainant did not identify him because he never mentioned his name to the police. He also said that the complainant had a grudge with him because he found the complainant in his house flatting with his wife as a result of which he chased away his wife.

We are the 1st appellate court and are mandated to evaluate and analyze the evidence that was adduced before the lower court and to draw our own conclusion bearing in mind that we neither saw nor heard any of the witnesses and therefore giving due allowance. We are guided by the Court of Appeal case of

Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005 as follows:-

"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of (Okeno vs . Republic [1972] EA 32) will suffice. In this case, the predecessor of this court stated:-

"**The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its won conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."**

We have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation. The Appellant filed written submissions upon which we relied entirely for this appeal. It is the Appellants contention that the learned trial magistrate erred when he relied on the evidence of voice recognition he urged that the evidence of PW1 and 4 that they recognized his voice during this incident was unreliable because they did not tell anyone else not even the police that they had recognized any of the assailants. For the preposition that a witness claiming to have recognized the voice of his attacker must testify so in evidence and during the ID parade must ask the suspect to repeat the same words he quoted the case of **Maghenda v Republic Nairobi Criminal Appeal No. 55 of 1986** however the words he used were not accurate and after we read the entire decision we have identified the section he must have intended to rely on where the court stated;

"The magistrate said that the Appellant was also satisfactorily identified by his voice by John Maina who asked the members of the parade to speak the words "toka inje". After the Appellant spoke these words John Maina touched him on his shoulder. Identification by voice can be a sound and reliable method of identification".

The Appellant urged that the prosecution came to call the person who led police officers to him as a result of which he was arrested for this offence. That person was not called as a witness and neither was his

arresting officer. He relied on the case of **Ng'ang'a vs Republic CA NO. 50 OF 1998** for the preposition that the prosecution may elect not to call a material witness but they do so at their own risk. The Appellant in his submissions urged the court to note that PW7 the investigating officer took the complainant's statement where the complainant implicated him with the robbery one month after the incident. The state was represented by Mr. Motende. Mr. Motende conceded the appeal on the grounds that the language used during plea was indicated as Swahili/English/Kimeru and that as a result it was not clear which language was used by the court. Mr. Motende urged the court to order for a retrial if the court was in agreement in that submission.

We perused the record of the proceeding and have noted that the language used at the plea is indicated as Swahili/English/Kimeru. During the rest of the proceedings the learned trial magistrate did not indicate the language of the court. He also did not indicate that any interpretation was made from any language to any language. All that was indicated throughout the trial was the language each witness used in their testimony. PW1-5 and 8 are indicated to have used the Swahili language. PW6 and 7 testified in the English language.

There is no indication whether the Appellant understood the English and or the Kiswahili language. One of the most important rights to ensure fair trial is the right of an accused person to follow the proceedings in the case against him and where the language used is not understood by him the constitution is very clear that he should be given the services of an interpreter free of charge. Having considered the record of the proceedings we are not satisfied that the Appellant followed the proceedings before the trial court and are therefore not assured that he had a fair trial. The proceedings are therefore defective and as a result we set aside both the conviction and the sentence.

The issue is whether we should order a retrial in this case. Mr. Motende for the State has urged the court to order a retrial on the grounds that the evidence against the Appellant was very strong. Mr. Motende urged that the Appellant was recognized by the complainant. He urged that the complainant knew the Appellant since 1998 and that there was no error in the evidence of voice recognition during the robbery. Mr. Motende submitted that the ingredients of robbery with violence were proved because it was proved that the complainant had been injured at the Robbery and that a P3 form produced in evidence by PW6. He also submitted that the evidence adduced proved that the Appellant and his companions were armed with a panga and a rungu. He urged the court to order a retrial of the case.

The principles to be applied by a court when considering the issue of retrial were set out in the case of **FETHALDI NANJI -VS- REPUBLIC (1966) E A.343**, where the East African court of Appeal said as follows:

"**In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where the conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that a retrial should be ordered. Each case must depend on its peculiar facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause any injustice to the accused person."**

The trial before the lower court was defective as set out in the case we have cited **Fethaldi Nanji, SUPRA**,the principles that should be born in mind by the court in determining whether or not to order a retrial are spelt out in that case. For the purposes of this appeal we think that the issue to determine is whether a conviction is likely to result if the case was ordered to be heard afresh.

We have considered the evidence before this court and find that the Appellant was prohibited on the basis of the evidence of identification that was given by PW1 and 4. These two witnesses said that they heard and recognized the Appellant's voice when he ordered PW4 to stop screaming and keep quite. The actual words heard by these two witnesses were not given to the trial court. It was important that the actual words the two witnesses heard and which they claim enabled them to recognize the voice of the Appellant was recorded. Regarding voice recognition the principles to be applied in receiving such

evidence was set out by the Court of Appeal in the cerebrated case of **Choge vs Republic 1985 KLR 1** where the court held:

"**Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual recognition. In 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 recognized 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 had said it. In the instant case, it was not safe to say that Okumu's identification of the 1st Appellant's voice was free from all possibility or error."**

As we pointed out earlier the actual words spoken by the Appellants were not recorded. We cannot speculate whether they were many words of few words. We would say the more the words the safer the easier it is to recognize the voice. We also noted that the there was heavy rain pounding the area that night. We are not told how the houses where roofed when the incident occurred. However we take judicial notice of the fact that heavy rain bring with it heavy sound. Depending on how heavy the sound was such condition would reduce the complainant's ability to hear and recognize the voice. We are of the opinion that the conditions obtaining at the time the recognition is said to have been made were not save and mistakes in recognition cannot be ruled out.

The Appellant pointed out a very important matter that the first time his name featured is in the statement recorded by PW7 from the complainant one month after the incident. We have considered the evidence before the lower court and agree with the Appellant that the complainant and PW4 did not indicate whether to the police or neighbours that they had recognized any person at the first opportunity they had. It was only after PW7 recorded a statement from the complainant while he was in hospital one month after the incident that he mentioned that he had recognized some people during the robbery.

We have carefully tested the evidence of recognition given by PW1 and 4 and we are not satisfied that it was reliable. We are of the view that if we order a retrial and the self said evidence is adduced before the court it is unlikely to result in a conviction. For the reasons we have given in this judgment we find that it will not serve the interest of justice and that it may result in causing the Appellant to suffer prejudice if we make an order of retrial.

Accordingly we decline to order a retrial in this case. We order rather that the Appellant should be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JULY 2012

LESIIT, J.
JUDGE.

J. A. MAKAU
JUDGE.