



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL 190 OF 2008

DANIEL KIMONDO MUNDIAAPPELLANT

Versus

REPUBLICRESPONDENT

{Appeal from Original Conviction and sentence in the Principal Magistrate's Court at Nanyuki

in Criminal Case No. 1509 of 2007 dated 28th July 2008 By H.N. Ndungu P.M}

JUDGMENT

Mr. Orinda, learned Senior Principal State Counsel conceded to this appeal and rightly so in our view. The appellant was among nine persons charged in the Senior Principal Magistrate's court at Nanyuki with 2 counts of robbery with violence contrary to section 296(2) of the Penal Code. They pleaded not guilty to the charges and were tried. At the conclusion thereof all except the appellant were acquitted. The appellant was however found guilty of the 1st count, convicted and sentenced to the mandatory death sentence.

The appellant was aggrieved by the conviction and sentence. Hence this appeal. The appeal revolves around issues of identification, contradictions and inconsistencies in the prosecution and failure by court to sufficiently address its mind to the defence of Alibi raised by the appellant.

In brief, the prosecution case in so far as it relates to the appellant was that the complainant **Charles Gatere Mundia** (P.W.1) operates a bar/butchery/shop business at Naromoru. On the night of 1st/2nd July, 2007 at about. 1.00 a.m. he was sleeping in his room behind his shop when he suddenly heard a bang on the front door of the shop. The door gave way and three men sauntered in. He immediately recognized the appellant whom he had known for sometime. The men had torches. The appellant entered his room whilst the other 2 men remained in the shop. The appellant immediately hit him on the left arm with a metal bar and his nail on the 2nd finger came off. He was again hit on the shoulder and he fell down. He was ordered to produce all the money by the appellant. He pointed to his shirt in which there was Kshs. 500/= . He removed that amount and asked him for more money. They went to the shop whereby P.W.1 showed him the cash box where there were coins. He took the coins. The appellant then asked him for his mobile phone. He showed him where it was and he took it. P.W.1 said that the

appellant and his colleagues had powerful torches and they were directing them all over the shop. He had kept Shs. 1,500/= on the shelves and the other 2 men took the said money. The appellant then hit him on the buttocks and led him back to his room where the appellant took an unopened coca cola soda and returned to the shop. His colleagues took 3 packets of super match cigarettes and they then went away. The complainant said that he had been screaming and neighbours came and said they had seen more people outside. The following day he reported the incident to Naromoru police station.

The witness further recalled that on the 2nd day of June 2007 the appellant and another person not before court who had been employed by his neighbour were cutting grass near his shop and loading it on to a handcart. At about 10.00 a.m. they came to the complainants bar and bought one bottle of extra cane and a half (½) head of sheep on which they feasted. In the process they told the complainant that they were happy with his service and promised to bring him more customers. They then carried their handcart and went away. The complainant went on to state that on the date of robbery as the robbers were breaking down the doors, the appellant spoke to him and told him that they had now come as he had earlier on promised and that he should bring money. He told the court that when he reported matter to the police he mentioned the appellant. Through the assistance of the local assistant chief the appellant was arrested by P.W.3. The complainant told the court none of the appellant's co-accused were known to him except the appellant whom he had known for a long time as he used to buy cabbage from him. The appellant was subsequently arraigned in court.

P.W.3 P.C. Odoyo Wolde of Naromoru police station recalled that on 2nd July 2007 at about 3.00p.m he and other officers visited scene of robbery at Aguthi village at the home of one Charles Gatere (P.W.1). They interviewed P.W.1 who told them that among those who had robbed him there was the appellant. He said he had been with him the previous day the whole day and he had promised that he would come back in the evening. He claimed that during the incident he was assaulted and robbed Nokia 2210 and cash shs. 1,900/=. The appellant was traced with the help of the sub chief, arrested and taken to Naromoru police station where he was charged.

Put to their defence the appellant opted to give a sworn defence and called one witness. In his defence he stated that on the night of 1st/2nd July 2007 he was in his house at Aguthi where he slept. The following day he woke up and went to Naromoru to sell vegetables. On 5th July 2007 he woke up and took his donkey cart to pick vegetables and proceeded to Naromoru to sell. As he was offloading the vegetables 2 police officers approached him and asked him to accompany them to the police station. He agreed and went to the police station but was surprised when he was subsequently confronted with this charge he knew nothing about. The appellant told the trial court that complainant **Charles Gatere Mende** is known to him, that he used to see him at Naromoru. He denied robbing him.

His witness was **Anne Wanjiku Kimondo (D.W.1)** She testified that the appellant was her husband. On the material day he was at home with her till the following day when he went to work. On 5th August, 2007 the appellant left in the morning telling her that he was taking vegetables to Naromoru. About 7.30 a.m. police came to her house and asked for the appellant. She told them that he had gone to work. Subsequently she saw him arrested when the police brought him home where they carried out a search in the house but made no recoveries.

At the hearing of this appeal, the state was represented by **Mr. Orinda**, Learned Senior Principal State Counsel whereas the appellant was represented by **Ms Mwai**, learned advocate. As already stated the appeal was conceded to by the state. However the concession was on the grounds that the identification of the appellant at the scene of crime was not watertight and free from possibility of mistake. The prosecution case according to **Mr. Orinda** hinged on the identification of the appellant by a single witness in difficult circumstances. That it should be recalled that the robbery was at night. And 3 people were involved. The complainant was suddenly awoken from his sleep by the robbers only to remember that earlier on he had been told by the appellant that he would be coming back with more customers. The alleged robbers were hooded. Others were however wearing godfather hats. In those circumstances, **Mr. Orinda** thought that positive identification of the appellant would have been difficult.

Ms Mwai associated herself fully with the submissions of **Mr. Orinda**. She however added that there was no light in the bar save for the light from the torches of the robbers. Though the complainant claimed to have recognized the appellant by voice as well there was no evidence that the complainant was familiar with the appellant's voice. That the appellant was arrested a month later. If indeed the complainant had identified the appellants at the scene of crime, he should have led the police team immediately to the arrest of the appellant. The complainant was 70 years or so old. His eye sight might have failed him though he claimed he only used glasses to read. The appellant was a well know figure in the village. Some witnesses who knew him confirmed that he was not among the robbers on that night. On his defence, the learned advocate submitted that the appellant offered an alibi defence. The same was not challenged. The court did not weigh the same at all.

On the issue of identification, the learned advocate cited the following authorities

(1) *Kiilu & Anor v R. (2005) 1 KLR 174,*

(2) *Karanja & Anor v R (2004) 2 KLR 140 and*

(3) *Simiyu & Anor v R (2005) 1KLR 192.*

On voice recognition, **MS Mwai** relied on the case of **Mbelle V R (1984) KLR 626.**

This being a first appeal to us, much as it is conceded to, the law requires of us to re-examine and re-evaluate all the evidence tendered during the trial in deciding the question of whether or not we should uphold the decision of the trial court. In doing so, the law also places upon us the duty to bear in mind the fact that we have neither seen nor heard the witnesses who testified in the trial court and that the trial court had the advantage of assessing their demeanour and, in short, that the trial court, as it were "**had the feel of the case**". That principle is now well settled in our law and if any authority is required to buttress it, we have **Okeno v Republic (1972) E.A. 32.**

The conviction of the appellant turned on the alleged identification nay recognition of the appellant at the scene of crime both visually and by voice by a single witness, the complainant. As stated in the case of *Kiilu & Anor (supra)*, "**...subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that 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 probability of error...**". Further it has been consistently been stated that "**... whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the especial need for caution before convicting the accused in reliance on the correctness of the identification. Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives are sometimes made...**" See *Karanja & Anor (supra)*

In this case, there had been a spade of robberies in the neighbourhood committed by a gang of robbers. Out of all those robberies only the complainant managed to identify and or recognize the appellant among the robbers. The other victims who knew the appellant very well were categorical that the appellant was not among those that had robbed them. The complainant was suddenly awoken from his sleep by a bang on his door. It was 1. a.m. The door gave way and three men walked in to the premises. Whereas two remained in the shop, one, whom the complainant recognized as the appellant entered his bedroom. The bedroom had no lights on. Indeed in his own testimony he stated that the whole of his premises had no lights at all. He went on to state in fact that "**..I was not able to see him**". Now if the premises had no lights, how then was the complainant able to see the appellant sufficiently to be able to recognize him. There is evidence that some of the robbers had hoods covering their faces while others had godfather hats.

If that be the case, it compounded further complainant's difficulties in seeing the robbers subsequently to be able to identify any of them. It was thus not possible for the complainant to have recognized the appellant in the absence of the light and when he was wearing a godfather hat and or had disguised himself. The complainant testified that the robbers had powerful torches which they were shining in the premises randomly which assisted him see the appellant. That might have been the case. However in terms of the case **Maitanyi v Republic (1986)KLR 198** the learned magistrate did not carry out the necessary inquiries. There were no inquiry as to the nature of the alleged torches, brightness and or intensity. There was no inquiry as to the period when the torches remained focused on the appellant as would have enabled him to sufficiently identify the appellant. It was essential that there should have an inquiry as to the nature of the light available which assisted the witness in making recognition, what sort of light, its size and its position vis a vis the appellant would have been relevant. In the absence of such inquiry, the conviction of the appellant on the alleged identification and or recognition would be unsafe.

The complainant was an old man. He was suddenly awoken from his sleep. He uses glasses. There is no evidence that during the robbery, he had his glasses on. He must have been traumatized. Violence was immediately unleashed on him. He was beaten and moved from one room to another. Though he claims that the robbers would turn the torchlight's on to themselves which enabled him to recognize the appellant among them, we doubt that the robbers are in the habit of being so reckless as to turn the torchlight on to themselves knowing very well that they could easily be identified. To buttress this view, we need not go far. It is in evidence that when the robbers broke into the complainant's house, he had a torch, and when he directed it at them, his hand was violently hit and he dropped the torch and indeed one of his nails came off. Further so that they could not easily be identified and or recognized the robbers were hooded and others had godfather hats on. If the robbers had taken such steps to ward off possible identification and or recognition, we doubt that they would have become so careless in the process of robbery as to turn the torchlight on to themselves and thus give themselves away.

The complainant no doubt knew the appellant. The appellant himself concedes that much. He used to buy cabbages from the complainant. Indeed the complainant had known the appellant for well over 5 years. He was an employee of a neighbour. One would have expected that since he had recognized the appellant during the robbery he would immediately lead the police to his arrest. This was however not to be. The appellant was arrested a month or so after the robbery. No explanation has been proffered for this delay in arresting the appellant. There is no evidence that he went underground after the robbery. Indeed on the day of his arrest he was going about his daily chores. The behaviour of the appellant in our view is inconsistent with one who had just committed a heinous crime. Is it possible that the delay in effecting the arrest of the appellant may be attributable to the fact that the complainant might not have been certain about the appellant's participation in the crime? That possibility looms large.

The complainant also claimed to have recognized the appellant by his voice. It has been stated time and again by the court of appeal that in dealing with evidence of identification by voice, 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.

See **Mbelle V Republic (Supra)** and **Choge V Republic (1985)KLR 1**. There can be no doubt therefore 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 than at first sight. In our judgment however, in all the circumstance of this case, it was not safe to say that the complainant was able to identify the appellant and such identification be free from all possibility of error in view of the matters we have already set out regarding the identification and or recognition of the appellant at the scene of crime. There is no evidence that the voice belonged to the appellant. That the complainant was familiar with the appellant's voice. As

already stated the conditions obtaining at the time of the alleged crime made it almost impossible for the complainant to have been able to identify any of the robbers.

All said and done, we think that we are in agreement with **Mr. Orinda** regarding the grounds upon which he conceded the appeal. Accordingly, we allow the appeal, quash the conviction recorded against the appellant, set aside the sentence of death imposed on him and order that he be released from prison forthwith unless held for some other lawful cause. Those shall be our orders on this appeal.

Dated and delivered at Nyeri this 7th day of May 2009.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE