**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORASM: OKWENGU, WARSAME & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO. 25 OF 2019**

**BETWEEN**

**GEORGE MWAURA KINYITA.........................................................APPELLANT**

**VERSUS**

**REPUBLIC........................................................................................RESPONDENT**

***(Being an Appeal from the Judgment of the High Court of Kenya***

***at Kiambu (Nagillah, J.) dated 4th October, 2017***

***in***

***HCCRA No. 9 of 2017***

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**JUDGMENT OF THE COURT**

**1.** George Mwaura Kinyita (the appellant) has preferred this second appeal challenging his conviction and sentence for the offence of robbery with violence. Our role as the second appellate court was succinctly set out in ***Karani vs. R [2010] 1 KLR 73*** wherein this Court expressed itself as follows:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."***

**2.** The facts giving rise to the appeal are that on 13th July, 2013 at Gatei Village in Gatundu South sub-county around 9.00 p.m., **SMK (PW2)** was closing his family's shop to go and pick his mother when he was accosted by two individuals with faces covered with black clothes. PW2 however recognized one of the robbers by his voice and walking style as **George Mwaura Kinyita**, the appellant herein. PW2 stated that they tied him up with one of the robbers staying outside assaulting him with a knife or *panga* while the appellant entered the house. The appellant returned and told his accomplice they had to leave. PW2, injured on his legs and hands, then raised the alarm after which his grandfather (PW3) with neighbours came to his rescue. PW3 then called CW (PW1) who is the mother of PW2. She entered the house and found that money (Kshs.70,000/=) had been stolen from a metal box in the home.

**3.** The matter was reported to the police. Later the appellant was arrested in Juja by members of the public and taken to Gatundu Police Station. PW4, a doctor, filled the P3 form for PW2 stating he had marks on his elbow and leg approximately 10 days old that were caused by a rope. The injuries were classified as harm. Corporal Ekiru from CID Gatundu (PW5) states that he went to the scene and established that Kshs.70,000/= had been stolen from a metal box. He states that during the incident, the appellant ran away and disappeared only to be found and arrested in Juja by members of the public. The money was never recovered.

**4.** The appellant was later charged before the Senior Resident Magistrate's Court with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars of the charge read as follows:

> ***"On the 13th day of July, 2013 at gatei village in Gatundu South District within Kiambu County, jointly with other not before court being armed with dangerous weapons namely pangas robbed Samuel Mwaura Kariuki kshs.70,000/= and immediately before the time of such robbery used actual violence to the said Samuel Mwaura Kariuki."***

**5.** The appellant denied the charge and trial proceeded with the prosecution calling evidence of 5 witnesses from which the learned trial magistrate (Kinyanjui Ag. SRM) found that a *prima facie* case had been established and put the appellant on his defence. The appellant asserted that he knows nothing about the robbery. He stated that he is a mason from Gatei Village who works in Juja. On 23rd July, 2013 he worked till 10.00 a.m. when two officers came to arrest him and took him to Juja Police Station and thereafter to Gatundu Police Station. He explained that he had a grudge with PW2's parents i.e. PW1 and her husband who the appellant said is his uncle. The grudge he said concerns land and their portions border each other.

**6.** Dismissing the appellant's defence that this was a set up due to a dispute over land, the trial magistrate cited the failure by the appellant to call a single witness to show that there existed a land problem in the family. She found that the prosecution had proved its case to the required standard and convicted the appellant as charged under **section 215 of the Criminal procedure Code**. In mitigation, the appellant had nothing to say; the magistrate noting that the appellant was not remorseful stated that nevertheless the offence charged carries a mandatory sentence and condemned him to death.

**7**. The appellant unsuccessfully mounted an appeal against the conviction and sentence before the High Court. In a Judgment delivered on 4th October, 2017 **(Ngugi, J.)** upheld the findings of the trial court and dismissed the appeal; hence this second appeal, which is predicated on the appellant's amended Memorandum of Appeal. The grounds therein are:

> ***"A. THAT the learned superior court judge erred in law by admitting voice identification evidence of a minor of seventeen (17) years without corroborating it with other evidence;***
>
> ***B. THAT the learned superior court judge erred in law by admitting the evidence of the victim (PW1) who was a minor aged seventeen (17) years without conducting a voire dire to establish if he knew the importance of telling the truth as he was the only eyewitness;***
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> ***C. THAT the first appellate court erred in law by not examining and reevaluating the evidence afresh in order to come up with an independent finding in the following ways:***
>
> > ***1. Failing to re-evaluate the inconsistencies and contradictions of prosecutions witnesses which may have resulted in a different finding;***
> >
> > ***2. Failing to find that the prosecution's case did not meet the threshold of proof required in criminal litigation;***
> >
> > ***3. Failing to find that the prosecution did not prove any ingredients in the offense of robbery with violence.***
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> ***D. THAT the learned judge erred when he rejected the Appellant's sworn evidence which clearly pointed out that the case was planted against him; especially by the existence of grudges in connection with family land;***
>
> ***E. THAT the first appellate court erred in law by upholding conviction and sentence without observing that the entire prosecution case was impeachable under section 163 of the Evidence Act, thus unworthy of being relied upon;***
>
> ***F. THAT the first appellate court failed to appreciate the provision of Article 50 of the Constitution.***
>
> ***G. THAT the high court judge erred in failing to hold that the burden and standard of proof by the prosecution was not discharged thus the prosecution case was not proved beyond reasonable doubt as provided for under law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice." [sic]***

**8**. This appeal was canvassed through written submissions and oral highlights made during the plenary hearing. Fully cognizant of our jurisdiction as a second appellate court, the questions for our determination in this appeal are twofold:

> **(a) Whether the first appellate Judge erred in admitting the evidence of a minor of (17) years without corroborating evidence, conducting an age assessment or undertaking a *voire dire*;**
>
> **(b) Whether the first appellate court failed in its duty to reanalyze the evidence and misdirected itself and if so, the consequences thereof.**

**9**. Ms. Nafula, learned counsel for the appellant, explained that the complainant (PW2) was a minor of seventeen (17) years and the only person at the alleged scene of the crime. As such, she argued that he ought to have been taken for an age assessment and that there had been no trial within a trial to determine if at all the complainant, a minor, understood the importance of telling the truth.

**10**. PW2 testified on 5th February, 2014 and indicated he was 17 years old. **Section 125 (1) of the Evidence Act** provides that:

> ***"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions***

***put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause."***

**11.** In ***Kibageny v R [1959] EA 92,*** the predecessor of this Court took the expression "child of tender years" to mean any child of an age or apparent age of less than fourteen years. **Section 2** of the **Children's Act No. 8 of 2001** defines 'child of tender years' to mean a child under the age of ten years. The age of majority, namely 18 years, is not the age used to determine the competence of a person to testify. Guided by the law and the provisions of the aforementioned Act, we are satisfied that PW2 was a competent witness and was not a child of tender years to require a *voire dire* examination in order to give evidence.

**12.** Ms. Nafula faulted the trial court for accepting the recognition evidence produced by the prosecution and the first appellate court for failing to re-evaluate and re-analyse the evidence of PW2. She stated that the appellant was convicted solely on the basis of the claim by PW2 that he recognized the appellant by his voice and walking style. She pointed out that nothing specific of the style of walking is recorded anywhere in the proceedings. Further, there was no interrogation as to the distance covered during the walk or whether the assailants walked in front or behind the victim. She added that there was no evidence on record that the witnesses, when they first reported the incident to the police or when they recorded their statements, gave the name and description of the physical features of the appellant and no evidence was led by the prosecution on this point.

**13.** In regard to the voice recognition evidence, Counsel submitted that there was no cogent evidence that the appellant spoke to PW2 at length or at all for the voice identification to register. Ms. Nafula cited the case of ***Paul Kimanthi Sungu vs. Republic [2005] KLR*** that highlighted the need for a court to warn itself of the special need for caution before convicting an accused in reliance on the correctness of identification thus the likelihood of mistaken identity. She also cited ***Toroke vs. Republic CA No. 204 of 1987*** where this Court held that it was possible for a witness to believe that they had been attacked by someone they knew yet be mistaken. Counsel further relied on the case of ***Safari Yaa Baya vs. Republic [2017] eKLR*** and ***Wamunga vs. Republic (1989) KLR 424*** where, in the latter case, this Court held that:

> ***"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility or effort before it can safely make it the basis of a conviction."***

**14**. Counsel further submitted that the actual words allegedly spoken by the appellant, the language in which they were spoken, and the number of times these words were repeated was unknown and the prosecution had adduced no evidence on the same. Ms. Nafula submitted that identification evidence was not independently verifiable as it solely depends on the credibility of the witnesses. She pointed to inconsistencies in the evidence of the prosecution witnesses including on the name of the alleged attacker in the initial reports, the presence of a weapon, and the time lapse in the reporting of the incident to the police to impeach the accuracy of the evidence, the credibility of the witnesses, and thereby the reliance on the identification of the appellant as one of the alleged attackers.

**15**. Mr. Muriuki for the state opposed the appeal but did not submit written submissions. Conceding that the first appellate court had not undertaken an in depth analysis of whether the evidence tendered on voice identification was sufficient to convict the appellant, he asserted that the evidence of identification by voice was sufficient to support the conviction of the appellant. He further pointed out that PW1 placed the appellant at the scene of the crime, and that PW2, the victim of attack, knew the appellant well, as they were neighbours and related.

**16**. This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In ***Stephen M'Riungi, & 3 Others vs. Republic [1983] eKLR*** it was pointed out that:

> ***"… where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."***

**17.** There are concurrent findings of the learned Magistrate and the superior court to the effect that the evidence of PW2, the victim of the attack and the only substantive witness, identifying the appellant by walking style and by his voice was adequate to support a conviction. In ***Mbelle vs. Republic (1984) KLR 626*** this Court held:

> ***"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."***

**18**. Further, this Court in ***Vura Mwachi Rumbi vs. Republic [2016] eKLR*** stated:

> ***"In the case of Choge v R [1985] KLR 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant's voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it..."***

In ***Karani vs. Republic [1985] KLR 290*** this Court 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 favouring safe identification."***

**19.** Therefore, where the prosecution relies on identification the court needs to satisfy itself on the circumstances of that identification. We believe that neither the trial court nor the first appellate court was sensitive to the need to adequately satisfy themselves on the recognition evidence. In ***Peter Kifue Kiilu & Another vs. Republic [2005] eKLR***, this court citing ***Abdalla bin Wendo and Another vs. Republic [1953], 20 EACA.166*** stated:

> ***"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 the 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".***

**20.** In the case of ***Kariuki Njiru & 7 Others vs. Republic, Criminal Appeal No. 6 of 2001, (UR)*** this Court stated:

> ***"The law on identification is well settled. …the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free***
>
> ***from the possibility of error. The surrounding circumstances must be considered… Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.***
>
> ***This Court, in Mohamed Elibite Hibuy & Another vs. Republic Criminal Appeal No. 22 of 1996 (unreported) held that:***
>
> ***"If (sic) is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone particularly to the police at the first opportunity. Both the investigation officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omissions of evidence of this nature at investigation stage or at the time of prosecution in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."***

**21.** It is apparent that the initial report did not give the name and description of the alleged attacker. The name of the attacker was only given when PW1 and PW2 recorded statements with the police on 17th July, 2013, four days after reporting the incident. There are contradictions and discrepancies in regard to the presence of a weapon at the scene in the testimony of PW2. On 24th July, 2013 the prosecution stated*: "We have recovered some of the amount and we are just about to recover more"* yet on 9th June, 2014 PW5, the investigating officer stated that *"The money was not recovered."* PW2 testified that *"They tied my legs and hands…[t]he other one was left assaulting me with either a panga or a knife…on my hand and leg."* On the other hand, PW4, a medical doctor, stated that *"…the injuries were caused by ropes."* The above listed matters go to the credibility of the prosecution witnesses, the accuracy and veracity of their evidence and, possibly, had the trial court considered the same, may very well have arrived at a different conclusion in regard to the probability of error in the identification evidence of PW2.

**22**. It is the prosecution case that the appellant was arrested in Juja town by members of the public and taken to Gatundu Police Station. It is not clear to us why the appellant was arrested, who pointed him out to the members of the public and how was the arrest connected to his identification. In our view that is also another issue that should have created doubts in the minds of the trial court. This is another loose end which was not explained by the prosecution.

**23.** It is clear that the basis of the appellant's conviction was voice recognition by a minor and the law as we understand it is that voice recognition is the weakest kind of evidence to sustain a conviction. The prevailing circumstances at the scene, did not in our humble view, at all favour positive and proper voice recognition. Again, we must state that where the only evidence against an appellant is that of voice recognition, the trial court is required to examine such evidence with care and circumspection, in that it must be satisfied that the prevailing circumstances were favourable and free from possibility of error, before such evidence can be a basis of a conviction. The failure of the trial court and 1st appellate court to undertake that exercise, goes to the root of the conviction. Clearly and addressing our mind to such a fundamental aspect of the conviction, we have no doubt that the conviction was unsafe and cannot be sustained by this Court.

**24.** There is nothing in the record to show that the superior court actually evaluated the evidence as is required of the 1st appellate court. To our minds, the superior court undertook only a perfunctory scrutiny of the evidence and dismissed the appeal. Had it evaluated the evidence related to the identification by a single witness as well as the apparent inconsistences and contradictions in the prosecution's evidence, it may have come to a different conclusion from that arrived at by the trial court.

**25.** The first appellate court did not carry out such duty and this Court Cannot know what conclusion the superior court would have reached had it done so. We are of the opinion that if the Magistrate's court and the superior court had their attention drawn to the matters we have stated above their conclusion may have been different. As a whole, we are satisfied that the prosecution's case was not cogent and credible, in that the prosecution failed to prove the case beyond any reasonable doubt. The prosecution case raised more questions than answers in respect of the mode, nature and circumstances of identification. We think the appellant is entitled to the benefit of doubt created by the inconsistencies in the identification; we find it unsafe to sustain the conviction.

**C**onsequently, we allow the appeal, quash conviction and set aside the death sentence. The appellant is at liberty unless lawfully held.

***Dated and Delivered at Nairobi this 23rd day of October, 2020.***

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

**....................................**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**....................................**

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

***DEPUTY REGISTRAR***