



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)**

**CRIMINAL APPEAL NO. 204 OF 2013 (R)**

**BETWEEN**

**WYCLIFFE MUSIDA KENYANI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Eldoret (Ochieng, J.) dated 28<sup>th</sup> November, 2013*

**in**

**HCCRA. NO. 191 OF 2010)**

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**JUDGMENT OF THE COURT**

1. On 1<sup>st</sup> December 2010 Wycliffe Musalia Kenyani, the appellant, was convicted by the Magistrate's court at Eldoret for the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. The particulars of the offence were that on 8<sup>th</sup> August 2010 at Shauri Estate in Uasin Gishu District within the then Rift Valley Province, jointly with others not before the court, while armed with dangerous or offensive weapons, namely pangas, the appellant robbed Monica Wanjiku Maina of numerous household items all valued at Kshs. 40,000.00 and immediately before or immediately after the time of the robbery threatened to use actual violence on Monica Wanjiku Maina.

2. His appeal to the High Court on the grounds that the offence was not proved; that the ingredients of the offence had not been established; that the evidence of the complainant was not corroborated; that the sentence imposed was too harsh; that the prosecution evidence was fraught with contradictions and inconsistencies and that the conditions of identification were not favourable was dismissed in a judgment delivered on 28<sup>th</sup> November 2013.

3. In this second appeal to this Court, learned counsel for the appellant, Mr. Angu Kitigin, referred us to the grounds of appeal and submitted that the conditions under which the appellant was allegedly

identified as the perpetrator of the offence were not conducive for positive identification. Counsel argued that the complainant's assertion that she identified the appellant by voice should be treated with caution as she had known the appellant for only two weeks and she must have been terrified by the incident and there is doubt that the voice was that of the appellant as she could have been mistaken.

4. Regarding the testimony of the other witnesses who claimed to have identified the appellant, counsel argued that that evidence was not sufficient; that the witnesses did not say what distinguishing features they used to identify the appellant; and that the glass through which the witnesses claimed to have seen the appellant was not described; that considering that the complainant's premises were not broken into it is possible anybody could have gained access to her premises.

5. Conceding the appeal, Mr. Zachary Omwega, learned Assistant Deputy Public Prosecutor, submitted that the complainant did not state the words uttered by the appellant so as to enable her identify his voice; that the intensity of light when the incident took place is not shown and that although the appellant was arrested the same night the incident occurred, nothing was recovered from his house. In those circumstances, counsel argued, the appellant should be given the benefit of doubt.

6. We have considered the appeal and submissions by counsel. Section 361(1) of Criminal Procedure Code restricts second appeals to matters of law. [See **M'Riungu v R [1983] KLR 455**]. Furthermore, we cannot, on a second appeal, interfere with the concurrent findings of fact by the lower courts unless such findings are not based on evidence, or are based on a misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. In **Karingo vs. Republic [1982] KLR 213** the Court stated:

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja vs. Republic (1950) 17 EACA 146)”***

7. Applying that standard to the matter at hand, the central question that we have to determine in this appeal is whether, based on the evidence of identification, the conviction of the appellant was safe.

8. The prosecution case was that Monica Wanjiku Maina, (PW1) the complainant, Consolata Njeri (PW2) and Weldon Chepkwony, (PW3), were all residents in the same estate development in Shauri Yako Estate in Uasin Gishu District where the appellant was the caretaker. The appellant was also one of the construction workers during the construction of that development. He described himself as “*the supervisor or foreman during the construction.*” He was undoubtedly well known at that development as both PW 2 and PW 3 said that he had acquired the name “*Power saw*” with which he was referred.

9. According to PW1, PW 2 and the appellant, the three of them were at PW1's house within the development in the evening of 8<sup>th</sup> August 2010 up until 11pm. Earlier that day, PW 1 had brought household goods into the house including a TV, DVD player, et al, and had enlisted the help of the appellant to fix the TV set in the house. According to PW 1, she went to bed that evening after PW 2 and the appellant left her house. At about 3.00 am she was woken up by strangers who had already gained entry into her house. She screamed. The assailants had torches and they demanded money and mobile phones from her. Two of the assailants were in her bedroom. The third, who she identified by voice to be the appellant, remained in the sitting room. The assailants took away her TV, DVD, cooker, mattress, TV trolley, mobile phone and an electric iron box. The assailants were armed with pangas and they threatened her to keep quiet lest they kill her. Later she alerted her neighbours of what had happened.

10. The same night at about 3.00 a.m, PW 2 was in her house when she heard someone screaming. She also heard footsteps and the sound of something falling down. She peeped through her window and saw “*power saw*” carrying a mattress and TV trolley. She heard the appellant telling his companions not to alert the neighbours as they moved. She called the landlord and alerted him of the incident. She also switched on the security lights. The police later arrived and picked up the appellant.

11. On 8<sup>th</sup> August 2010 at about 3.00 a.m, PW 3 was also asleep in his house within the development when he heard the main gate being opened. He then heard footsteps. On peeping through his window he saw three people including the appellant to whom he also referred as “*power saw*”. He was carrying items. PW3 had apparently seen him earlier in the day at the house of PW1. He assumed the appellant was assisting PW1 move. He later heard screams and got outside only to learn that PW 1 had been robbed. PW 3 was no stranger to the appellant. He knew him as the caretaker. He had on one occasion sent him to get paraffin and was certain he is the person he saw that night. According to him there was moonlight.

12. APC Gibson Njagi was attached to Huruma AP post. He received a complaint from PW1 regarding the theft of her household goods by the appellant. He proceeded to Shauri Yako estate and arrested the appellant. He did not recover any goods from the appellant’s house. The appellant was subsequently handed over to Baharini Police Post where Sergeant Charles Onyango Kagal, PW5, investigated the matter and charged the appellant with the offence.

13. In his defence, the appellant stated that PW1 requested his assistance at about 7.30 pm on 8<sup>th</sup> August 2010 to fix some nails in her house. They were joined there by PW2. He later left PW1’s house and went to sleep. His employer the landlord at the development and other members of the public who claimed he had participated in the robbery woke him up. The police then locked him up at Baharini Police Station before being charged with the offence.

14. With that evidence, the trial court was satisfied that PW 1 had identified the appellant “*whose voice she recognized to belong to the accused.*” He was also satisfied that two of PW1’s “*fellow tenants managed to see the accused...carrying a mattress and T.V while his companions carried other items.*” The learned trial magistrate concluded that:

***“The complainant and her witnesses appeared quite consistent, truthful and cogent in their evidence and were not even shaken on cross examination by the accused. They had known and interacted with the accused and were therefore quit [sic] familiar with his voice which they recognized and did not mistake the same for somebody else. Furthermore there was enough light provided by security light and moonlight and they were able to recognize the accused herein.”***

15. The High Court reviewed and re-evaluated the evidence before concluding that “*we are satisfied that the conditions of identification in this case were favourable.*”

16. There are therefore concurrent findings by the lower court regarding the identification of the appellant and the conditions under which that identification was made. As this Court stated in **Adan Muraguri Mungara vs. R [2010] eKLR**, we must:

***“Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”***

17. We do not have a basis for interfering with the decisions of the lower courts. PW1 was with the appellant in her house for a considerable period in the evening preceding the incident. She had sought his help to fix things in her house. She knew him before that as the caretaker and was certainly familiar with his voice. She was categorical he was the one who remained in the sitting room as his accomplices entered her bedroom. The voice recognition of the appellant was not the only form of identification the lower courts relied upon. There was corroboration from PW 2 and PW 3 who were PW1’s fellow tenants in the development. Both PW 2 and PW 3 were confident that they saw the appellant carrying PW1’s household items when they were woken up by screams. The appellant was not a stranger to them. They had previously interacted with him as the caretaker at the development. He is a person they knew well. In addition to the security lights there was moonlight that aided them in spotting the appellant.

18. We are satisfied that the circumstances in which the appellant was identified were favourable for positive identification and we do not have any basis for interfering with the decision of the lower courts. For those reasons we hereby dismiss the appeal.

**Dated at Eldoret this 5<sup>TH</sup> day of FEBRUARY, 2016**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**