



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.)

CRIMINAL APPEAL NO. 29 OF 2014

BETWEEN

VURA MWACHIRUMBI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Kasango & Muya JJ.)
dated 9th December, 2013*

in

H.C.CR.A. No. 20 of 2012)

JUDGMENT OF THE COURT

On the dead of the night on 15th May, 2010, at 1.30 a.m. to be precise, a violent robbery was visited upon **Masoud Swalehe Kiryauta** (PW 1) and his wife **Fatuma Abdalla** (PW 2). PW 1 while asleep with PW 2 in their house at Kanana Corner, along Lunga Lunga Road, Kwale County, heard a knock on the door and when he enquired who it was, the response was that it was the police. Within no time, the intruders had forced the door to the house open and entered the bedroom. There was light in the bedroom provided by a hurricane lamp. PW 1 noticed three intruders in the bedroom who had powerful torches. They immediately ordered him to give them money. PW 1 and PW 2 too could hear other voices outside. Indeed, they were other thugs breaking into their shop that was in front of their house. When PW 1 hesitated in handing over the money, he was brutally assaulted with pangas, knives, iron bars and axes. One of the thugs suddenly called out a person by the name “**Kimani**” and asked him to “*bring the rifle, this man does not want to give us money*”.

The man called Kimani entered the bedroom and *voila* both PW 1 and PW 2 recognised him as the appellant whose name was “**Vura**”. Both PW 1 and PW 2 had known him for well over 10 years, as a neighbour who occasionally worked for them on casual basis. Indeed, he was a common figure at the shopping centre.

When the appellant entered, similarly armed with a panga and iron bar, he ordered PW 1 and PW 2 to produce money. When PW 1 persisted with his reluctance, he was beaten senseless and cut by the

appellant. Fearing for his life, PW 1 relented and asked PW 2 to hand over the money to the thugs. It is at this juncture that the appellant cut PW 1 on the head and he lost consciousness. PW 2 was able to retrieve Kshs.40,000/- under the bed which she handed over to the appellant. They also took from the house four mobile phones and CD radio. The thugs soon left to join the others who had broken into the shop and stolen therefrom Kshs.150,000/- as well as simcards and cigarettes.

As they all left, PW 2 screamed attracting the attention of their neighbours; **Mwanongo Mndati** (PW 3) a night guard at the shopping centre, **Abdalla Hassan Mtindi** (PW 4), **Bakari Cosmas Tenesi** (PW 5), the assistant chief of the area, **Abdalla Bakari Kipanga** (PW 6) **Hamisi Bakari** (PW 7) and **Bakari Koja Swaleh** (PW 8). They all rushed to the home of PW 1 and PW 2 but found that the thugs had long escaped into the night. Nonetheless, in their hurry to leave the scene of crime, one of the thugs dropped his cap. All these witnesses on recovering the cap at the scene confirmed that it belonged to the appellant.

Some of the aforesaid witnesses helped PW 1 to Msambweni District Hospital where he was admitted and treated for one day. Later, he was examined by **Philip Chebet** (PW 13), a clinical officer then based at the hospital, who assessed the degree of injuries sustained as harm and the probable type of weapon used in the attack as sharp.

In the meantime police at Msambweni Police Station had been alerted of the robbery. Led by **PC Jonah Mutai** (PW 11), they visited the scene on the same night. At the scene, PW 2 told them that she had recognized one of the thugs as Vura, a neighbour and pointed out his house. At about 2.30 a.m., the police raided the house of the appellant and arrested him. He was in the company of another person whom they arrested too. That other person was **Ali Bakari Kasirani** whom they treated as a suspect in the robbery and was later charged alongside the appellant for the offence. Following their arrest and further interrogation they provided information which led to the arrest of one, **Juma Omar Sengeza** who too was subsequently charged alongside the appellant and Ali Bakari Kasirani.

On 27th May, 2010, the trio appeared before the Principal Magistrate's Court at Kwale to answer to a single charge of robbery with violence contrary to **Section 296(2)** of the Penal Code, brief particulars being that the appellant and the other two on 15th May, 2010 at Kanana Corner, Shimoni Shopping Centre in Msambweni Sub County of Kwale County, jointly with others not before court whilst armed with dangerous weapons namely metal bars, robbed Masudi Swalehe Kiryauta cash Kshs.190,000/-, four mobile phones, three packets of simcards and cigarettes all valued at Kshs.221,850/- and at or immediately before or after the time of such robbery used actual violence on the said Masoud Swalehe Kiryauta.

The appellant and co-accused denied the charge and were soon tried. At the conclusion of the trial, the case against the appellant's co-accused was found not proved beyond reasonable doubt for want of accurate identification. They were accordingly acquitted. The appellant was however not so lucky. He was convicted on account of voice recognition. Upon conviction, the appellant was as required, sentenced to death. In due course, he lodged an appeal to the High Court on only two issues, the charge being defective as it was premised on the penalty or punishment section, and voice recognition. The High Court overruled the appellant on both complaints and in a judgment delivered on 19th December, 2013 by **Kasango & Muya, JJ.** dismissed the appeal.

Aggrieved by the dismissal of the appeal by the High Court, the appellant has lodged this second and perhaps last appeal before us. Four grounds are advanced in support of the appeal; that voice recognition evidence relied on to convict the appellant was not free from possibility of error; that the two courts did not consider that there was no connection between his arrest and the offence charged as nothing incriminative was recovered from him; that the prosecution case was not proved beyond reasonable doubt; and lastly, that the courts below failed to consider the appellant's defence.

At the hearing of the appeal, **Mr. Kimani**, learned counsel for the appellant, confined the appeal to the voice recognition ground only and submitted that evidence of voice recognition is anchored on the period the parties have been known to each other and the circumstances of acquaintance. That the evidence of PW 1 was the basis upon which the two courts held that the evidence of voice recognition was credible

and receivable, yet, there was no evidence of the specific words uttered by the appellant that would have formed the basis for the voice recognition by PW1. That though PW 1 heard Kimani demand for money, his tone was not indicated. In the final analysis and on this basis alone, counsel submitted, the case against the appellant was not proved beyond reasonable doubt and therefore the appeal ought to be allowed.

Responding, **Mr. Monda**, learned Assistant Director of Public Prosecutions, submitted that the appellant was not disputing the fact that he and PW 1 had known each other for well over 10 years. He contended that the Judges of the High Court had properly and thoroughly scrutinized the evidence of voice recognition. There was therefore no possibility of error in terms of placing the appellant at the scene of crime. Counsel finally submitted that there were concurrent findings of the two courts on voice recognition which ought to be respected. For those reasons, counsel urged us to dismiss the appeal.

A second appeal to this Court is solely confined to points of law. It is imperative that where a right of appeal is confined to questions of law, an appellate court has loyalty to accept findings of fact of the lower courts and should resist the temptation to treat findings of fact as holdings of law or of mixed law and fact, and further, that the court should not interfere with concurrent findings of fact by the trial and first appellate courts unless on the evidence no reasonable tribunal court could have made such findings. See **M’Riungu v Republic [1983] KLR 455**.

The issue of identification of the appellant by way of voice recognition is obviously an issue of law. The two courts made concurrent findings that the appellant was identified at the scene of crime through voice recognition. This is how the trial court delivered itself:-

“.....in this case it has been proved that the complainant was familiar with accused 1 voice as a neighbour over a long period of time and who always worked for him. The circumstances on the other hand are that accused 1 was entered (sic) alone and straight away ordered to demand for money which he did. There is no doubt that given such circumstances the complainant could easily recognize the voice he was all too familiar with. After exercising due care as required, I find I can safely conclude that accused 1 was identified through his voice. I’m satisfied he was among the group that attacked the complainant’s family....”

As for the High Court, it delivered itself thus on the same issue:-

“11. In this case, PW1 was a neighbour of the appellant and had known him for ten years. His wife PW2 sometimes gave the Appellant casual jobs to do. PW1 said that he knew the Appellant (sic) voice very well. With that evidence it is clear that the Appellant and complainants were familiar with each other and the period that they had in contact with each other on the night in question makes it safe to rely on the voice recognition evidence. The possibility of an error in view of the long period that the complainant knew the Appellant was in our view excluded. See the case of Njeri vs Republic (supra).”

These being concurrent findings, this Court as already stated that it will be slow to interfere with them unless they were based on no evidence at all or on a misapprehension or perversion of the evidence or looking at the evidence as a whole, no reasonable tribunal would have arrived at such findings which is the same thing as saying the judgment is bad in law. We discern no such misapprehension in the concurrent findings of the two courts.

In the case of **Chogo 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. See also **Karani v Republic [1985] KLR 290**.

Both courts believed that the strictures above were met in the circumstances of this case. On the basis of the record before us, we cannot fault the two courts. The appellant has argued that the exact words uttered by him that informed PW 1's recognition of his voice were not captured. We do not think that this complaint is valid. The evidence touching on the issue was tendered by none other than PW 1. He testified that although the person who was called to assist in forcing money out of him was called Kimani, it was actually the appellant who responded to it. Once the appellant walked into the bedroom, he directly addressed or ordered him thus: "*you have to produce money.*" He even ordered PW 1 to lie down. By making the order to lie down, he was also speaking to PW 1. Infact in cross-examination by the appellant, PW 1 was forthright that he knew the appellant's voice very well and recognized it instantly the moment he spoke to him. Further evidence that the appellant spoke in the bedroom is provided by PW 2.

Of course in testing voice recognition, in addition to considering the length of time the witness has known the person and circumstances of their acquaintance, one has to consider the words heard by the witness in order to determine whether they were sufficient to enable him correctly recognize his voice. In this case, the specific words have been noted. The acquaintance between the appellant, PW 1 and PW 2 is not in dispute. The appellant himself conceded that much. They had known each other for a period in excess of 10 years and the appellant used to work for them as a casual labourer and was indeed a neighbour. The conditions obtaining in the bedroom made for easy recognition of the appellant by PW 1 and PW 2.

Given the foregoing and the fact that the words spoken were not few, identification of the appellant by way of voice recognition cannot be doubted. We are thus satisfied just like the two courts below that voice recognition of the appellant was in the circumstances safe. It is on the basis of the foregoing that this appeal must fail. It is dismissed.

Dated and delivered at Mombasa this 27th day of May, 2016.

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR