IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: NAMBUYE, KIAGE& SICHALE, JJ.A.)

CRIMINAL APPEAL NO 130 OF 2014

BETWEEN

NJIRU BENSON……..……1ST APPELLANT

ELIAS NKONGE ……..2ND APPELLANT

AND

REPUBLIC ……. RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Meru (Lesiit & Kasango, JJ) dated 29th October, 2010

in

H.C.CR.A No 80 & 81 of 2008 (CONSOLIDATED)

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JUDGMENT OF THE COURT

The main theme which runs through this second appeal is that of identification both visual and voice. **Njiru Benson** (hereinafter the 1st appellant) and **Elias Nkonge** (hereinafter the 2nd appellant), were charged, tried and convicted for robbery with violence contrary to **Section 296 (2)** of the **Penal Code** by the Principal Magistrate at Chuka in that on the 25th day of May, 2002 at Ndunguri Market, Ndunguri Sub-Location, Ganga Location of Meru South District within the then Eastern Province, jointly with others not before Court, while armed with offensive weapons namely; Pangas, Axes and Rungus, they robbed **Obed Ndubi** of Ksh 71, 000 (cash), 50 packets of Sportsman's cigarettes, 2 dozens of Eveready batteries valued at Ksh 4, 400, a total of Ksh 75, 400.

They pleaded not guilty to the charge before the trial court, paving way for a trial in which the prosecution called seven witnesses. It was the prosecution's case that on 24th May, 2002 between 7 p.m. and 7.30p.m., the complainant, Obed Ndubi (Obed) was in his daughter's shop wherein he had been overseeing operations with the aid of an attendant called **Mbaya.** At 8.30 p.m. Obed's daughter **Lysibeth**

Gateria (Lysibeth), arrived at the shop with a view to conducting an account of the day's sales. The same amounted to the sum of Ksh 21, 000.Lysibeth took the said money and an additional amount, and handed it to her father with instructions that the same be taken to Nairobi the following day. Obed in turn put the money in a drawer at the shop before Lysibeth left. Moments later he retired for the night.

At about 1a.m. Obed went outside to answer a call of nature within the compound. Upon his return, he heard movement outside and decided to move towards the shop, from where he called the night guard to no avail. Obed then heard a stranger's voice instructing him as follows:-

"Mzee fungua wacha juita (sic) watchman. Tupee ile pesa Lysibeth alikuwachia".

(Old man open, don't call the watchman. Give us the money Lysibeth left with you)

Sensing danger, Obed moved to the enclosed verandah and started screaming for help. He called one **Kinyua**, who was Lysibeth's driver, albeit without success.

In the meantime, the robbers broke a window in their quest to gain access to the shop, an exercise which lasted for 30 minutes before they entered the premises.

The robbers first port of call was the till, where they found coins of various denominations. Disappointed with their findings, they broke an inner wooden door within the shop in a bid to reach Obed, who fled into Lysibeth's room and locked it. The gang knocked Lysibeth's door until Obed heard one of them say ***"tumepata" (we have found)***. They fled from the scene thereafter.

By this time Lysibeth's driver (Kinyua) had arrived at the shop accompanied by Lysibeth, IP Omondi (IP Omondi) and a crowd of curious onlookers. Kinyua informed Obed that they were outside the shop, whereupon he opened and informed the group that the robbers had stolen money from the shop. Lysibeth entered the shop to assess the loss. Later, she informed her father that the robbers had also made away with cigarettes and batteries.

PW 2, Lysibeth corroborated the testimony given by Obed in all material aspects, while PW 3, PC Nathan Kivava (PC Kivava) gave an account of the steps the Police took to investigate the crime which had been committed. The testimonies of PW 4, Japhet Kinyua Nkonge (Japhet), PW 5, Roford Nkonge (Roford), and PW 6 Andersom Miriti Njeru (Andersom) who were eyewitnesses to the events of the material date are that their sleep was interrupted on the morning of 25th May, 2002 by screams from Ndunguri Market. Thereafter, the trio left for the market separately to find out what was amiss. Upon arrival, they found a crowd milling around Lysibeth's shop which was under attack by a gang of robbers. Obed was the one who had been screaming for help.

Other notable aspects which were brought out by the testimony of the above mentioned witnesses were that:-

i. ***There was moonlight on the night in question;***

ii. ***There were several robbers who had attacked Obed;***

iii. ***The robbers were armed with weapons such as axes, iron bars and clubs;***

iv. ***The identities of some of the robbers, and in particular that of the 1st and 2nd appellants herein were established through visual and voice recognition;***

v. ***As they and members of the public approached the crime scene, the robbers pelted them with stones to keep them at bay, with a view to facilitating their escape, forcing them to take refuge in a maize plantation.***

PW 7, Loyford Mbae Munyua (Loyford) confirmed the occurrence of the robbery on the material date;

that there was more than one robber involved; that the robbers pelted him with stones when he raised the alarm, forcing him to flee into a maize plantation; and that there was moonlight on the morning of the robbery. Loyford did not manage to identify any of the robbers.

When placed on their defence, the appellants gave sworn statements, denied the charge and termed it a fabrication. The trial court convicted the appellants and sentenced them to death as provided in law. Aggrieved by the decision of the trial Court, the appellants lodged an appeal at the High Court, which affirmed their conviction and sentence giving rise to the present appeal which is the 1st appellant's only, as the 2nd appellant's abated under **Rule 69 (1) (a)** of the **Court of Appeal Rules** following his death in custody.

The 1st appellant has faulted the decisions of the two courts below on the grounds that,

- ***The two Courts below failed to direct their minds to the conditions which were prevailing at the crime scene, thereby arriving at an erroneous finding that he was one of the robbers.***
- ***The two courts below erred in law by relying on evidence of voice identification yet the same did not meet the required standards.***
- ***The first appellate court did not discharge its mandate of subjecting the evidence to a fresh and exhaustive examination thereby arriving at a wrong finding.***
- ***The two courts below erred in law by convicting the 1st appellant based on a defective charge sheet.***
- ***The two courts below failed to resolve the discrepancies in the prosecution's case in favour of the 1st appellant thereby arriving at the wrong finding.***

The appellant was represented by Ms Nelima, learned counsel, while the State was represented by Mr Mugo, learned State Counsel. The gist of the appellant's submissions was that the first appellate court did not re-evaluate the evidence as it ought to have done, instead it relied wholly on both visual and voice identification as the basis of convicting the 1st appellant.

Ms Nelima submitted that the two courts below did not abide by the conditions set by this Court in ***Mbelle v Republic*** ***[1984] KLR 626***. According to learned Counsel, there were more than eight robbers at the crime scene on the material date, and all of them were speaking simultaneously. In the circumstances, learned Counsel posed the question as to how the 1st appellant's voice was settled on as belonging to one of the robbers who attacked Obed. Counsel pointed that both courts below had not established the words which were uttered by the 1st appellant during the robbery, and the learned State Counsel before the first appellate court had conceded the appeal on the basis of questionable voice identification.

On visual identification counsel drew the Court's attention to the guidelines set out in ***Nzaro v Republic*** ***[1991] KLR 70*** and ***RV Turnbull*** ***[1977] QB 224***. It was submitted that the two courts below did not inquire into the intensity of the moonlight on the night of the robbery, the moon's position vis a vis the 1st appellant and the distance between Obed's rescuers and the shop which had been broken into. Counsel posited the possibility of mistaken identification noting that the first appellate court conceded that the same had occurred under difficult circumstances. She submitted that there were lots of discrepancies and contradictions in the evidence led by the prosecution, with the Investigating Officer relying on an informer as the basis for arresting the 1st appellant coupled with the testimony of Loyford which was not helpful at all as he did not identify any of the robbers.

Counsel next faulted the Identification Parade which was carried out by the Police, questioning why the exercise was carried out, yet Obed's assailants had been allegedly recognized. Moreover, the absence of an initial report to the police, according to learned counsel, vitiated the identity parade. In conclusion, Ms

Nelima submitted that identification parade officer was not called to testify.

The State conceded to the appeal, with Mr Mugo, learned Prosecuting Counsel submitting that the prosecution had not proved its case to the required standard. He submitted that Japhet, Roford and Andersom testified that they hid in a maize plantation on the night of the robbery, in circumstances which were difficult and not free from the possibility of error. He drew the Court's attention to the failure of the two courts below to interrogate the intensity of the moonlight which was shining on the night of the robbery. He also submitted that whereas some of the prosecution witnesses had testified that they recognized the 1st appellant's voice, no evidence was led to demonstrate how familiar they were with it.

This is a second appeal. By dint of **Section 361** of the **Criminal Procedure Code**, this Court dwells on matters of law only. The State has conceded to the appeal on the grounds set out hereinabove. The respondent's opposition of an appeal does not, of course, lead to a dismissal of the appeal. Nor does the respondent's concession of an appeal lead to its automatic success. See ***Norman Ambich Miero & Another Vs Republic- Nyeri Criminal Appeal No 279 of 2005*.** This Court therefore has a duty to examine this appeal on its merits.

In ***Johanna Ndung'u Vs Republic- Criminal Appeal No 116 of 2005 (unreported)***, the offence of robbery with violence contrary to Section 296 (2) of the Penal Code-Cap 63 was said to be proved;

a. ***If the offender is armed with any dangerous or offensive weapon or instrument, or ;***

b. ***If he is in the company with one or more other person or persons, or;***

c. ***If at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.***

Proof of any one of the ingredients is enough to sustain a conviction. See ***Oluoch Vs Republic [1985] KLR 549***.

Testimony tendered before the trial court by the prosecution indicates that the robbers in question were armed with dangerous or offensive weapons namely: axes and clubs, and that there was more than one robber. This evidence withstood the rigours of cross-examination to the very end. Be that as it may, who robbed Obed?

In ***Wamunga v Republic [1989] KLR 424*** this Court held that:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".***

The English case of ***RV Turnbull [1977] QB 224*** is also useful in this regard;

> ***"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgement when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution […..]***
>
> ***When in the judgement of the trial judge, the quality of the identifying evidence is poor, as***

> ***for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification". (At page 552-553)***

Whether the quality of identification evidence remained good to the close of the prosecution case, and the conditions under which identification occurred remain pertinent to this appeal and the brief answer is that the quality of that evidence and the conditions under which it was obtained were unsatisfactory.

In ***Maitanyi Vs Republic [1986] KLR 198*** this Court held as follows:-

> ***"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made …… If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description".***

The said holding accords with the submission of the appellant's counsel on the failure of both courts below to ascertain the intensity of the moonlight on the material night. Had the courts probed this aspect further, they would have been in a position to determine whether Obed or his rescuers in this instance would have been in a position to positively identify the robbers. Whereas Obed's rescuers said they could see and hear the robbers in action from the safety of the maize plantation, no precise descriptions of the robber's facial or bodily features were forthcoming.

This holding also resonates with the appellant's submission on the conspicuous absence of the initial report to the police, and the failure of the officer who conducted the identification parade to testify at the trial.

Voice identification also featured prominently before both courts below. This type of identification has received judicial consideration on several occasions, In ***Libambula v Republic [2003] KLR 683*** this Court held that:

> ***"Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, 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." (***Our emphasis). See also ***Choge v Republic [1985] KLR 1***.

Whereas Japhet, Roford and Andersom testified that they managed to recognize the voice of the 1st appellant at Lysibeth's shop, it is instructive that the trio admitted in their evidence that there were several other persons who were speaking at more or less the same time the 1st appellant spoke. Andersom is on record as having testified as follows under examination-in-chief:-

> ***"There were also other voices which were of threatening in nature and one other person who spoke was accused 2 herein".***

And that;

> ***"Kutokea saa hii ni kuaribu maisha yako and oowa (sic) langu hao".***

The conditions at the time the voices were being heard were marked with fear and confusion with screams rending the air, stones being hurled and the rescuers taking cover in a maize plantation. Hardly any conditions conducive to the positive and safe identification of a voice existed at the time. Accordingly,

the 1st appellant cannot be said to have been positively identified by voice and the question of identification was not therefore settled beyond reasonable doubt. See ***Wanjohi & 2 Others v Republic [1989] KLR 415***.

On whether we should depart from the concurrent findings of fact by the courts below, we recall ***Daniel Kabiru Thiong'o vs Republic-Nyeri Criminal Appeal No 131 of 2002 (unreported)*** where this Court stated that:-

> ***"An invitation to this court to depart from the concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so".***

Having established that the 1st appellant was not positively identified, a compelling reason exists to warrant a departure from a finding of fact by the two courts below and we think, with all due respect, that the first appellate court did not satisfactorily execute its mandate of re-evaluation of the evidence tendered at the trial.

In the result, the 1st appellant's conviction was not safe. It is accordingly quashed and the sentence set aside. He shall be set free forthwith, unless otherwise lawfully held.

Dated and delivered at Meru this 17th day of December, 2015

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR