



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)**

**CRIMINAL APPEAL NO. 199 OF 2008**

**BETWEEN**

**COLLINS ODHIAMBO OLUOCH.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at*

*Kisii, (Musinga, Karanja, JJ) dated 31<sup>st</sup> July, 2008*

**in**

**KISII HCCRA NO.92 5 OF 2006)**

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**JUDGMENT OF THE COURT**

**Collins Odhiambo Oluoch**, the appellant, was the 1<sup>st</sup> accused while **Damascus Ombima Alias Rasta** (“Co-accused”) was the 2<sup>nd</sup> accused before the Principal Magistrate's Court at Migori before which court they were, jointly with others not before the court, charged with one count of robbery with violence contrary to Section 296 (2) of the Penal Code. Both the appellant and his co-accused, whose appeal is not before us, were, upon trial, convicted of the said count as charged. The appellant was aggrieved and appealed to the High Court against both conviction and sentence which was imposed upon him. His appeal was dismissed and hence this appeal.

This being a second appeal, only issues of law fall for consideration by reason of the provisions of **Section 361 (1) (a) of the Criminal Procedure Code**. The Supplementary Memorandum of Appeal upon which Mr. Abande, learned counsel for the appellant, relied, raises two legal points namely: failure of the High Court to subject the evidence rendered before the trial court to a fresh and independent evaluation and the issue of identification.

We propose to set out in outline the evidence upon which the trial court relied to found a conviction of the appellant before discussing the two legal points raised. The complainant was **B O O** and testified as PW1 that on the material date 6<sup>th</sup> March, 2005 at 9:00p.m, he was at his home with his family which comprised his wife, **G A** (PW3) (Grace), his children and his brother, **L O** (PW4) (**L**). The family

members were inside his house. G was ironing clothes and L was in the sitting room. The complainant was, at the material time, taking a bath outside the house. As he did so, he saw three people who did not identify themselves but said they wanted to enter his house. The complainant dressed up and entered his house and was ordered by the people to sit down. He said he recognized the voice of the appellant. The people demanded money and one of them hit him with the butt of a gun and he fell down. Another then hit him with a stool on the chest as they demanded money.

On her part, G testified that when she heard people talk outside where her husband was, she opened the door and three people who she did not identify entered. They were armed with a gun and a panga. They then took her to the bedroom and raped her in turns. They took a Nokia mobile phone and Kshs. 6,600/= from her. Although she did not identify any of the people, she stated that during the day before the attack, the appellant's co-accused had visited their home and enquired about the complainant.

L on his part, told the trial court that when the people entered the house, he was in the sitting room. They had a gun, a rungu and a panga and ordered the complainant to sit down as they beat him. They took G to the bedroom and raped her. They also took money from him which he had been given by G. He said he recognized the appellant. The thugs then left after locking the complainant and his family members inside their house.

The evidence of **Luka Ruvisya Magoya (PW2) (Magoya) CPL. Mogesi (PW5) (Cpl Mogesi), Norbet Omondi Aimba (PW8) (Aimba), P.C. Gitari (PW9) (P.C. Gitari) and P.C. Simon Simiyu (PW10) (P.C. Simiyu)** disclosed another robbery which occurred the same night. Magoya was then a bicycle repairer at Uriri. On the material date at 6:00 p.m., one Robert Omondi, took to him a bicycle christened "**Mr. Nice**" for repair. Magoya repaired it and went with it to his home at Ombo. At 7:00 p.m. while at his home, the appellant's co-accused visited him and borrowed the same bicycle but did not return it forcing Magoya to look for him at Uriri the next day, 7<sup>th</sup> March, 2005 without success. Later he received information that the same bicycle was connected to a murder case when he was arrested but was released after recording his statement.

Cpl Mogesi testified that while on duty at Stella AP Camp on the material date at 10:00 p.m., he heard gun shots and cries from Stella trading centre. He woke up his colleagues and proceeded to the centre where they found a woman having been shot dead, and her body was lying on the ground. They called for reinforcements from Migori Police Station and the two teams set off in search of the woman's killers. In the course of their search they found that another robbery which involved the complainant herein had taken place and other police officers were at the scene. According to Cpl. Mogesi, those other police officers intercepted suspects who were riding a bicycle who escaped leaving behind their bicycle, a panga and a torch. The owner of the bicycle was traced and said that he had taken the bicycle for repair. According to Cpl Mogesi, one Damascus later reported, the loss of the same bicycle.

Ayimba acknowledged being the owner of the said bicycle. He further testified that on the material date he took the said bicycle to Magoya for repair but was later, on 7<sup>th</sup> March, 2005 informed that the same had been found at Stella where a person had been killed.

P. C. Gitari was in the team of police officers who went in search of the thugs who had robbed the complainant and those who had killed the woman. He visited the scene and indeed found the body of a woman lying in a pool of blood at Stella. While there he received information of the attack on the complainant herein and the rape of his wife.

His team then proceeded to the new scene and later returned to Stella. They stayed there until 3:00 a.m., when two people approached them pushing a bicycle. When they were challenged they escaped leaving behind their bicycle which was christened "**Mr Nice**."

P. C. Simiyu was one of the Investigating Officers who handled the robbery aspect of the offences. He visited the home of the appellant's co-accused from where nothing was recovered.

On 7<sup>th</sup> March, 2005 at 8:00 p.m., **Augustine Kodiro (PW7)** a Clinical Officer at Migori District

Hospital received the complainant who had lacerated wounds at the back and right side of the head and a swelling of the chest. He assessed the injury as harm and signed the P3 form, which had been issued to the complainant by P.C. Simiyu.

In his defence, the appellant denied the charge and alleged that he was framed. He recounted how on 4<sup>th</sup> March, 2005 he reported the loss of his pool table to Migori Police Station. Some suspects including one **Ismael Hamisi**, were arrested and on 7<sup>th</sup> March, 2005 after their brothers had interceded for them he withdrew his complaint and the suspects were released. He then transferred his pool business from Kakrao to Florida bar.

The following day, 8<sup>th</sup> March, 2005 the appellant said he saw the same Ismael Hamisi and the complainant. Hamisi pointed out the appellant to the complainant and the appellant was arrested.

In his submissions before us Mr. Abande learned counsel for the appellant expressed the view that had the learned Judges of the High Court re-evaluated the evidence, they would have appreciated that the complainant, G and L gave contradictory testimonies regarding the number of people who attacked them, how they were armed and how the attack occurred.

On identification, counsel submitted that the same was not free from the possibility of error because, in his view, the prevailing circumstances were not conducive for a positive identification. Mr. Abande was of that view because the robbery occurred at night and none of the witnesses testified on the intensity of light at the scene. He invoked the decisions of **R -V- Turnbull [1976] 3 ALL LR 549, Shadrack Mbaabu Kinyua -VS- Republic [2013] eKLR and Kaitany -V- Republic [1986]KLR 198.**

On voice identification, Mr. Abande stated that the complainant who had alleged he identified the appellant by voice did not state how long he had heard the appellant's voice prior to the alleged recognition of the same on the material day. Finally, counsel submitted that the testimony of L, who was a minor, was improperly admitted by the trial court without administering a **voire dire** examination.

In answer **Mr. Abele**, learned Assistant Director of Public Prosecutions, expressed the view that the evidence against the appellant was overwhelming as the appellant was both recognized by the complainant and L at the scene which facts were properly accepted by the trial court and by the High Court after due re-evaluation.

In counsel's view while acknowledging that the incident occurred at night, he pointed out that there was sufficient light which enabled L to identify the appellant. Mr. Abele further submitted that there may have been some conflict of evidence which was in his view normal and related to minor aspects of the case.

On the alleged frame up, Mr. Abele expressed the view that the same had no basis given that the person who could have had reason to frame him (Ismael Hassan) did not testify and was not the complainant.

We earlier set out in outline the evidence which was adduced at the trial. The evidence of identification was furnished by the complainant and L. The complainant allegedly recognized the appellant by his voice. Voice identification if properly founded, is as good as visual recognition. However, as it was stated in **Korani -V- Republic [1985] KLR 290** “**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.**”

In the case before us, the complainant, in his evidence in Chief, did not state that he was familiar with the appellant's voice and in cross examination he said that he had known the appellant for two months as “**a pool**” businessman. He did not state that he used to talk to him for those two months. Significantly he added:

**“I cannot tell whether the voice was just similar to yours.”**

In the premises we have come to the conclusion that there were no conditions in existence favouring safe voice identification of the appellant by the complainant and, in any event, the complainant himself said, he could not tell whether the voice he heard was just similar to the appellants. His identification of the appellant by voice was not positive. That leaves the testimony of L who alleged that he recognized the appellant at the scene. We have anxiously considered that testimony and have made the following observations. He was aged 12 years at the time of his testimony. He was therefore a minor. In **Joseph Karanja Mungai -V- Republic [Cr. Appeal No. 157 of 2003] (UR)**, the decision in **Johnson Nyoike Muiruri -V- Republic [1982 -88] 1 KAR 15** was cited with approval. In the latter case the Court stated:-

**“We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.”**

In **Peter Karigi Kuiire [Cr. Appeal 77 of 1982]** we said:-

**“where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion on a voire dire examination, whether the child understands the nature of an oath in which case his sworn evidence may be received. If the Court is not so satisfied, his unsworn evidence may be received if in the opinion of the Court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event the accused person would not be liable to be convicted on such, evidence unless it is corroborated by material evidence in support thereof implicating him. (Section 19 Oaths and Statutory Declarations Act, Cap 20 – the Evidence Act Section 124 – Cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate Court is able to decide whether this important matter was rightly decided and not to be forced to make assumptions.”**

So, there are two aspects when considering whether a child should properly be sworn. First, that the child has sufficient appreciation of the particular nature of the case and second, his realization that taking the oath does involve more than the ordinary duty of telling the truth in the ordinary day to day life.

In the case at hand, the testimony of L was received without administering the voire dire examination at all. The High Court stated as follows regarding that failure:

**“The complainant's brother (PW4) was by definition of law a minor. He ought to have been examined by the trial court on his capability to understand the nature of an oath and duty to speak the truth prior to his evidence being received on oath. This was not done.”**

After making that correct finding, the learned Judges of the High Court continued as follows:-

**“However, no miscarriage of justice was occasioned. A child of 12 years in today's world is very much capable of understanding what it means to take an Oath notwithstanding the legal requirements of examining him in relation thereto. PW4 was very much aware of what went on that material date in that material house. He did inform the Court on Oath what he witnessed. The appellant was given and did take the opportunity to cross – examined (sic) him. He (appellant) cannot now complain that he (PW4) was not examined as required by law.”**

With all due respect to the Learned Judges of the High Court, the appellant was perfectly entitled to challenge the procedure adopted when receiving the evidence of L who was a minor. With respect, we find the attitude of the learned Judges on voire dire examination somewhat preposterous. They came to their conclusion on the evidence of L based on their assumptions that in today's world a child of 12 years is capable of understanding what it means to take an Oath. By a stroke of their pens they threw out of the

window the long established procedure of receiving the evidence of minors. They took the role of the trial magistrate who should have conducted a voire dire examination before receiving L testimony and concluded, without any basis, that L understood what it meant to take an Oath. In our humble view they were not entitled to do so. Consequently the evidence of L, having been improperly received could not form the basis of the appellants conviction.

Besides the improper admission of L' testimony his evidence was also, in our view, discredited. The complainant testified that the appellant did not enter the house, but gave orders from outside. He also stated that the appellant had no weapon. L sharply contradicted the complainant on these two matters. He stated that the appellant entered the house and then stood at the door where he gave orders. According to L the appellant was armed with a rungu, a panga and a torch. That conflict in our view is significant. If the version of L is to be accepted it would mean that the complaint could not have been a witness of truth because he should have been able to see the appellant in his house when he entered with his companions which was L' version. He could also have seen the weapons and the torch that L saw on the appellant.

In the end the evidence of the only two witnesses who purportedly recognized the appellant was unsafe to found his conviction.

Before we conclude this judgment, one other matter has caught our attention which would suggest that both courts below may not have adequately evaluated the evidence which was adduced at the trial. On 14<sup>th</sup> December, 2005 the appellant applied for production of the Occurrence Book (OB) of 4<sup>th</sup> March, to 8<sup>th</sup> March 2005. The learned trial magistrate allowed the application but the record does not show that the said OB was ever produced. Even when the appellant reminded the court, that he had applied to have the OB produced and that his case was just “**fitina**” (malicious), nothing was done about his plea. Neither the learned trial magistrate nor the learned Judges of the High Court mentioned the appellant's plea for production of the OB in their judgments. In the absence of any direction regarding the OB by the two courts below it is not possible to appreciate how the contents of the OB would have impacted on the case put forth by the prosecution.

We take this opportunity to caution courts of first instance and first appellate courts that they should be careful not to be accused of ignoring pleas made by the accused/appellants especially when they are not represented. Indeed in such cases the courts should be in the forefront in championing the unrepresented parties ' fair trial rights.

We have said enough to show that this appeal is for allowing. We accordingly do so. The conviction is quashed and sentence set aside. The appellant shall be henceforth set at liberty unless otherwise lawfully held.

***Dated and Delivered at Kisumu this 14<sup>th</sup> day of February , 2014.***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**