



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 115 OF 2011

BETWEEN

KENNETH JOSPHAT BAMU.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Meru (Lesiit & Kasango, JJ.) dated 19th May, 2011

in

H.C.CR. A. NO. 29 OF 2010)

JUDGMENT OF THE COURT

1. This appeal raises one legal issue of whether the appellant was positively identified as one of the perpetrators of a robbery that occurred on the wee hours of 8th day of June, 2009, at Mutindwa Village, Maara District. At the material time, Ronald Munene (PW1) and his wife Hilda Mukwanjeru Kaburu, (PW2), were sleeping and at about 2.00 a.m., they were woken by the sound of dogs barking. Both went to the door to check. They realized they were surrounded by a group of robbers who were armed with pangas. The thugs forced their way into the house by breaking the door. They also smashed the security lights.

2. While inside the house, the thugs assaulted PW1 and threatened to chop his head off and rape PW 2. PW1 was forced to lie on the floor, while PW 2 sat on the bed pleading with the thugs to spare the life of PW1 as he had a family to raise. The thugs ransacked the house and when they came across PW1's police jacket; they demanded to be given his firearm. PW2 continued to plead with the thugs to take her husband's motor vehicle. The thugs took her purse, removed two mobile phones a Nokia and a Samsung and Ksh.3,350/= . They also took off with PW1's special torch which he said he bought in Yugoslavia while serving in the peace keeping Mission Force. They also took PW1's briefcase, which they smashed against a tree; it made a loud sound like a bullet which made them scamper away. None of the stolen items was recovered.

3. PW2 screamed and their father and sister who were in the neighboring compound responded. They also called the police and Sergeant Andrew Cirigi (PW4), visited the scene on that night. PW1 sustained

some injuries and was treated at Embu Provincial General Hospital by Dr. Margret Ngari (PW5), she produced the P3 form that classified the injuries as harm. The evidence of how the complainants were able to identify the appellant is scanty. They merely mentioned in their evidence that they recognized the appellant among the group of the robbers. PW1 said he recognized the voice of one of the assailants called “Bamo”, and PW2 said she recognized the appellant during the robbery. We shall revert to this aspect later in this judgment.

4. The appellant was arrested by an Inspector of Police, George Otieno, the Deputy Divisional Commanding Investigations Officer, Meru, PW6 following the report by the two complainants that they had identified one of the assailants by voice and they gave his name as “Bamo”.

5. The appellant was charged before the Senior Resident Magistrate's Court at Chuka, with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence stated that on the 8th day of June, 2009, at Mutindwa Village, Murigi Sub-location, Kianjagi Location in Maara District within Eastern Province, jointly with others not before court, being armed with dangerous weapons namely: matchets, knives and clubs, robbed Ronald Kaburu Munene of one Nokia 6300, one Samsung E 250, one Nokia 1200 and one American torch all valued at Ksh. 24,000/= and at the time of the robbery used actual violence on the said Ronald Kaburu Munene.

6. The appellant denied the offence. The prosecution adduced evidence from a total of six witnesses. After the close of the prosecution's case, the appellant was found to have a case to answer, he was put on his defence and he gave a sworn statement of defence. He denied the offence and stated that on the material day he had gone to a place called Keria to slaughter goats for his hotel. He alleged that he was arrested by a police Sergeant based at Chogoria while he was going about his normal businesses. He conceded that he knew both complainants but they had a disagreement when he had employed their son in his hotel as a casual.

7. After evaluating the evidence, the learned trial magistrate convicted the appellant and sentenced him to death. The appellant appealed before the High Court, however, he was unsuccessful. The learned Judges of the High Court, **Lesiit** and **Kasango, JJ.** concurred with the findings by the trial court, that the two complainants identified the appellant during the robbery. The learned Judges also re evaluated the defence raised by the appellant of *alibi* which was overlooked by the trial magistrate but they also rejected it as lacking in credibility in the face of what they referred to as;-

“the very credible and corroborative evidence of PW1 and PW2.

We find that the defence cannot be upheld”.

The appeal was dismissed and the conviction and sentence against the appellant were upheld.

8. It is against that decision the appellant has appealed before us. He raised 5 grounds of appeal in his homegrown memorandum of appeal which was adopted by his counsel to wit:

1. *That the appeal Judges erred in both law and facts in not finding that the alleged voice identification and recognition wasn't free from possibility of error.*
2. *That the appeal Judges erred in both law and facts in not observing that the report made to the police was not made with my names.*
3. *That the appeal Judges erred in both law and facts in not finding that the prosecution tendered invariably and contradicting evidence.*
4. *That the appeal Judges erred in both law and facts in not noting that the Prosecution failed to summon vital witnesses mentioned during the trial for a just decision to be reached.*
5. *That the appeal Judges erred in both law and facts in law and facts in not finding that the trial*

magistrate disregarded the sworn defence without sufficient reasons.

9. In his address to us, Mr. Ng'ang'a, learned counsel for the appellant submitted that the learned Judges of the High Court failed in their duty to re-evaluate the entire evidence on appeal before them and to arrive at their own independent determination. Instead they merely agreed with the reasoning and findings of the learned trial magistrate. The evidence of identification by the two complainants was not tested; there was no identification parade or voice evaluation. The appellant was apprehended on 22nd June, 2009, and the offence was committed on 8th June, 2009, a period of about two weeks. This was strange as the complainants alleged they knew the appellant who was from the same area. No explanation was given for this delay.

10. The two complainants did not give the description of their attackers to the police, especially PW4 who responded immediately and even visited the scene the same night. If the complainants had identified the appellant, it defeats logic that the police did not pursue his arrest immediately. Even the evidence of the Investigating Officer merely states that PW1 identified the attacker by voice and PW2 said she recognized the appellant but the actual description of his features were not given. Finally, the defence by the appellant was not given any consideration by the learned trial magistrate.

11. On the other hand, Mr. Kaigai, the learned Assistant Deputy Public Prosecutor, supported the appeal maintaining that the evidence of both PW1 and PW2 was clear that the appellant was commanding a group of robbers who attacked them at their home. However, he conceded that it is not clear from the evidence when the description of the appellant was given, a problem he attributed to the way the witnesses were guided when giving their evidence before the trial court.

12. We have no doubt in our minds that the conviction of the appellant was based on evidence of identification by recognition. The law is now well settled that much as recognition is much safer than identification of a stranger, the court must look at the evidence carefully because, even an honest witness may be mistaken as cases of mistaken identity even of close relatives do occur. There is still need for a court of law to be extra careful when dealing with this evidence and must analyze it to rule out a possibility of mistaken identity. See the case of ***R -vs- Turnbull & Others [1976] 3 ALLER 549***. In that case, the learned Judges stated on page 552 as follows:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

13. In the case of ***Anjononi & Others v Republic (1980) KLR 59***, this court stated that recognition of an assailant is more reliable, and more assuring than identification of a stranger, because it depends upon personal knowledge of the assailant, in some form or other, it must still be appreciated that the court's duty to examine with extra care evidence of identification is not lessened mainly because the evidence was on recognition and not identification of a stranger.

14. In this case, the attack happened at night, the assailants smashed the lights outside and there was total darkness outside. There was no evidence that the lights were switched on in the house during the robbery. This is what PW1 said regarding the identification of the appellant:

“I later talked to the Divisional Investigating Officer Meru South, who commenced investigations. He later reported to me that he had arrested one suspect who is accused herein. Accused is known to me as we hail from the same village. I was not present when he was arrested. He lives on the opposite valley a kilometer away. In the process of the attack, I was able to identify accused's voice when he commanded my wife to give out money or she be shot by the waria.”

This is what PW2 said:

“During the incident, I saw accused herein who was large. He wore a purple jacket (sic) and

there was his torch which he lit and was on. He was close to me when demanding for the money for about 30 minutes. Earlier in the day we had met.”

15. The two courts below did not evaluate the circumstances under which this identification was done. PW4 a police officer visited the scene almost immediately after the robbery, we agree with counsel for the appellant that perhaps the evidence of identification was pieced up later otherwise if the complainants were sure the appellant was their attacker, we do not see why efforts were not put in place to pursue and arrest him immediately. Moreover, the report that was made to the police is scanty, it is not clear how the complainants recorded the report, whether it was through telephone or they visited the police station. Be that as it may, what is of concern to us is that there was no detailed description of the appellant, by way of his physical features and even his correct names, PW6 said the complaints identified the voice of one of the robbers as “Bamo”. This is what PW4 a police officer who visited the scene immediately after the robbery had to say in his evidence:

“The CID Officer from Meru South Division came to look for accused herein who had been named as a suspect. I assisted (sic) them by arresting accused herein. He was at Splendor Bar Chogoria. I relied on the description given to arrest him.”

16. In our view this was very scanty evidence, and both courts below had a duty to evaluate this evidence of identification so as to rule out a possibility of a mistaken identity. If the complainants were sure they had recognized the appellant as one of the perpetrators, they ought to have recorded a detailed description of the appellant to the police. We do not see why this was difficult if indeed they had recognized him. Even the Investigating Officer does not seem to have received a proper description of the appellant because this is what he said in his evidence;-

“In the process they identified the voice of one of the robbers whom they named as Bamo”.

17. The next issue is regarding the voice recognition which is basically identification by recognition of the voice, see the case of Karani v Republic [1985] KLR 290. This court held at page 293:

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases 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.”

As we have stated, the circumstances under which this identification occurred were difficult. The source of the light that illuminated the scene was by the assailant’s own torch. No evidence was adduced regarding the intensity of the light emitting from the torch and none of the stolen items was recovered from the appellant. The description of the appellant who was allegedly known to the complainants was not instantaneously given and recorded by the police, such as the name and other descriptions. Lastly, according to the charge sheet, the arrest took place on 22nd June, 2009, which raises further concerns as to what caused the delay if the assailant was known from the time of the attack and the police responded immediately.

18. We think we have said enough to show that the two courts below did not seem to have analyzed in depth the evidence of recognition. Had they done so, they would have concluded as we have, that the evidence against the appellant did not meet the required standard to sustain a safe conviction. Accordingly, the appeal is allowed, conviction is quashed and the sentence is set aside.

Unless otherwise lawfully held, the appellant should be set at liberty forthwith.

Dated and delivered at Nyeri this 4th day of July, 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR