



**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: O'KUBASU, WAKI & ONYANGO OTIENO, J.J.A)**

CRIMINAL APPEAL NO. 50 OF 2007

BETWEEN

ALI MLAKO MWEROAPPELLANT

AND

REPUBLICRESPONDENT

*(An appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Sergon, J.) dated
30th April, 2007*

in

H.C.C.R.A. NO. 311 OF 2000)

JUDGMENT OF THE COURT

ALI MLAKO MWERO, (Mwero) the appellant before us, was convicted by Mombasa Senior Resident Magistrate, L. Achode on 25th July, 2000 for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. It had been alleged in the charge sheet laid before that court in CM. Cr. Case No. 2175/99, that:

“On the night of 21st and 22nd April, 1999 at about 4.00 a.m. at Mwalughanje Gate – Kinango Location in Kwale District within Coast Province, jointly with others not before court; being armed with dangerous weapons namely pangas robbed MESALIM CHARO cash Kshs. 20,450/=, one wrist watch, one radio make sonny all valued at Kshs.25,450/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said MESALIM CHARO.

Upon the conviction he was sentenced to *“suffer death in accordance with the law.”*

Mwero was dissatisfied with that decision and he filed an appeal to the superior court, H. C. Cr. A. No. 311 of 2000. It is apparent from the record before us that there was some confusion which arose from a mix up of two different case files involving the same appellant. The appellant had been jointly charged with another person with a similar offence in CM. Cr. C. No. 2176/99 and they were both convicted. They filed two separate appeals to the superior court; 362 of 2000 and 366 of 2000 which were consolidated and heard together by Etyang J and a retrial was ordered on 28th September, 2004. The confusion led to the absurdity that instead of conducting the retrial in respect of CM. Cr. Case No. 2176/99, the Chief Magistrate’s Court commenced the retrial of CM. Cr. Case No. 2175/99 (registered as 3260/2004) even when the appeal relating to that case was going on before the superior court! Three of the same prosecution witnesses who had testified in the original case were heard again before one P.N. Ngigi (SRM) between October, 2004 and March, 2005 before the trial magistrate was interdicted and an order was made for another magistrate to take over. The confusion was discovered in November, 2005 and a

nolle prosequi was filed in respect of that re-trial. The appeal thus proceeded on the basis of the original proceedings before the trial magistrate, L. Achode. That did not stop the appellant from applying to the superior court, which granted him the request, that the proceedings in CM. Cr. Case No. 2176/00 and the nullified proceedings in Cr. C. 3260/04 be made available to the court at the hearing of the appeal as he intended to raise issues of contradictory evidence in relation to the evidence tendered by prosecution witnesses. The superior court (Sergon and Maraga, JJ.) concluded the hearing of the appeal and delivered its judgment on 30th April, 2007, upholding the trial court and dismissing the appeal, thus provoking the appeal before us. Both the appellant and State Counsel confirm that the death sentence has since been commuted by the President to life imprisonment.

The appeal is the second and final one. As such only issues of law may be raised. Learned counsel Mr. S.O. Oguk was instructed to appear for the appellant and he abandoned the original memorandum of appeal filed by the appellant in person. He also abandoned supplementary grounds of appeal filed by him on 24th June, 2008 and chose to argue two grounds of appeal filed on 4th December, 2008 with leave of the court. The grounds are as follows: -

“1. *The learned Judge of the Superior Court erred in law and fact by making a finding that the appellant had been identified and/or recognized at the scene of crime by appearance and by voice whereas there was no evidence in support thereof sufficient to sustain a conviction.*

2. *The learned Judges of the superior court and the learned trial magistrate erred in law and fact by failing to adequately consider the alibi defence of the appellant and by failing to hold that the same was not satisfactorily displaced by the prosecution.*”

We shall revert to those grounds and the submissions made thereon, presently. What was the evidence tendered and before the trial court and the concurrent findings of fact made by the two courts below?

Mesalim Charo (PW1) (**Mesalim**) was a Ranger/Revenue Clerk employed by the Kenya Wildlife Service and was stationed at the Mwalunganje Gate of the elephant sanctuary in Kinango, Kwale District. On 24th April, 1999, she collected some Shs.19,200 from tourists who had visited the park through that gate and at 6.30 p.m. she placed the money in a safe and locked her park office to retire to her residence. Her residence was about 50 meters away. It was a Swahili type house with two other rooms occupied by two other workmates; **Juma Madamu** (PW2) (**Juma**) and **Mwaguzo Guzo Mwaguzo** (PW3) (**Guzo**). Mesalim had a young child in the house and so she kept her oil lamp alight even after she went to sleep that night. At about 4 a.m. she heard shouting from her next door neighbor, Guzo, saying that he had been locked in from outside. She also heard the furthest neighbor, Juma saying the same. She got up from her bed and then heard the sound of pangas being run along the wall outside her room. Suddenly, her door was kicked in and two young men burst into the room, one holding two pangas, the other holding one. They wore nylon sacks which were fashioned as garments with holes for the head and arms. One of them had a piece of blanket wrapped on his head. Mesalim nevertheless recognized them immediately but could not call them out for fear of being killed. The two were the appellant herein and one Charles Maganga who is still at large.

The two intruders demanded money from Mesalim under threats and she showed them a drawer from which Maganga took Shs.1000/= . They demanded the keys to her office and they took them from another drawer. They went out and locked her in. After a short while they returned and told her they did not find the money. They dragged her out threatening to kill her if she did not show them where the money was.

It was a moonlit night and when they reached the office they put on lights for her to get the money. They had ransacked the office and the office safe but eventually she found the money, threw it at their feet and ran back towards her house. They followed her and went into her house where they took her radio. As they left, Mesalim pushed back the door to her room to close it, but it was pushed back by Maganga who went in and took Mesalim’s wristwatch and wall clock and left. She remained in her room and did not go out until 6.30 a.m. when she opened for Juma and Guzo who were calling her out through their windows. They reported to Kwale Police Station and both Mesalim and Juma gave out the names of the

two robbers as Mwero and Maganga.

Mesalim was able to recognize the two because she had grown up with them since birth and they were all school mates. In her own words: -

“When they came in I identified all two of them because of the light and because they are people so well known to me that I would have identified them anywhere. I grew up with them. We all went to Ngonzini primary School. This one in court (Accused identified) is called Ali Mlako. This Ali also worked at the same park with me for a year before he left.

I did not call their names that night because I feared they would kill me.”

Examined further she stated: -

“We could see each other face to face in my room because of the burning oil lamp and we could still see each other outside because there was moonlight and already knew who they were.”

Juma was normally stationed at Kitanze gate of the same park, but on 21st April, 1999 he was at Mwaluganje gate where he had gone for some ball games and chose to spend the night there. He recognized the voices of the two assailants after he was locked in from outside; in his own words: -

“At about 4.00 a.m. I heard voices outside. I heard the officer in the next room calling out to me to open the door for him. When I tried my door I found it locked from outside. Then I heard voices from Mesalim’s room. The voices were loud and were demanding for money from Mesalim. I recognized the voices as belonging to Ali Mlako and Maganga Charles. I recognized them because originally I worked at Mwaluganje gate which faces their houses and we used to play football with them every evening. We were all very well known to each other. I heard them all leave but some 20 minutes later I heard them return.”

On cross-examination by Mwero, he was firm in his assertion, thus: -

“I heard two voices speaking with Mesalim and they were demanding for cash. The house had a ceiling board before but it has aged and fallen away mostly in my room, and I could hear you. I had known you for some three years before the attack. You and I knew each other so well that we could identify each other even by voice. You did not know I was there. We used to walk together, play football together and generally hung out together.”

In contrast, Guzo who occupied the room between Mesalim and Juma only heard doors being knocked and on asking who it was there was no answer. On checking his door he found he was locked in from outside. He heard a bang on Mesalim’s door which broke and Mesalim started screaming before suddenly keeping quiet. He did not hear the voices of the intruders or see any of them.

The robbery was reported to **Pc. Joseph Kibet** of Kwale Police Station and the names of the two robbers were given out by Mesalim and Juma. Pc. Kibet and another officer visited the scene and confirmed the robbery and the attendant damage to property. With the assistance of members of the public they set out to look for the two assailants at their homes but they were nowhere to be found. The following day information was received about their hideout which the police invaded but only found a radio, a nylon sack garment, a torn blanket and a panga. Further information was received about a house which Mwero frequented and they headed there. But before they reached the house Mwero saw them and fled. Pc. Kibet fired shots in the air but Mwero ran through a group of some women and disappeared into the bush. It was not until 3rd July, 1999, that Pc. Kibet received information that Mwero had been arrested by Lunga Lunga Police for another offence and was in custody there. **Pc. Richard Matoke** (PW5) of Lunga Lunga Police had arrested the appellant on 15th June, 1999 for the offence of breaking into a shop and stealing therefrom. Arrangements were made for the re-arrest of Mwero in connection with the robbery committed at Mwaluganje. On 11th July, 1999 Mwero recorded a statement under inquiry before IP David Nzauka (PW6) in which he admitted committing the offence with one Charles Maganga and escaping from the area after sharing the loot, until his arrest for another offence. Mesalim was called to the police station and she identified the radio as her own and also the nylon sack garment and the torn blanket as the attire

worn by her assailants. Mwero was thereupon charged with the offence stated earlier in this judgment.

In his defence Mwero denied ever being anywhere near Mwaluganje on the night of 21st April, 1999 asserting that he left Kwale on 21st February, 1999 and went to his home in Lunga Lunga where he worked as a casual labourer in masonry works. When he could not get further casual jobs at the end of April, he was employed as a watchman but on 15th June, 1999 he was attacked by robbers at his place of work. His employer however suspected him for the robbery and he had him arrested and charged for the offence. Before that case was heard he was taken to Kwale Police Station where an allegation was made about a robbery at Mwaluganje and he was beaten up and a statement recorded from him by **IP Nzauka**. He also saw Juma at the station and confirmed that he knew Juma. He also knew Mesalim as they had worked together at the park before. Nevertheless he contended that the two had falsely implicated him in the offence because of an earlier incident at work when some batteries got lost and they had him arrested. Subsequently, the batteries were found with Mesalim's uncle and Mwero complained to the chief who ordered that he should be paid Shs.5000/= for the false accusation. Mesalim paid the money but vowed to finish him thereafter. Finally Mwero denied any association with the exhibits recovered by the police contending that they were recovered long before the offence at Mwaluganje was committed as confirmed by other witnesses who had testified in other criminal cases facing him.

After fully analyzing the entire evidence, both courts below were in no doubt that Mwero was identified at the scene by Mesalim, through recognition and rejected his *alibi* defence. On identification the superior court stated as follows: -

“It is not denied that the appellant is a person well known to Mesalim Charo (PW1) and Juma Madamu (PW2). The evidence of PW1 indicates that Ali Mlako Mwero, the appellant herein had attended with PW1 Gonzini Primary School and that they both grew up together. PW1 and the appellant also worked together at Mwalughanje Wildlife Park. PW1 said that her oil lamp was on when her door was forcefully opened and hence she managed to see the appellant and his accomplice called Charles Maganga. She said they were armed with pangas. The duo took her to Mwalughanje's Wildlife Park offices where electric light was put on and that is when she clearly saw the duo. PW1 saw the appellant restraining Charles Maganga from cutting her with the panga which was in his possession. PW1 said she mentioned to the police the names of the appellant and that of Charles Maganga as the people who robbed her on the nights of 21st and 22nd April, 1999. This assertion is corroborated by the evidence of Pc. Joseph Kibet (PW4) who said that PW1 gave him the names of her attackers when she booked the report of the robbery at Kwale Police Station. The appellant in fact admitted having worked with PW1. His complaint is that PW1 had a grudge against him which arose out of a theft report she made to their employer against him. We have carefully considered these arguments and the evidence and we think PW2's identification is that of recognition. We are satisfied that the appellant was properly identified by the complainant with the help of light emanating from her oil lamp at her room and that of electricity put on at the offices of Mwalughanje Wildlife Park offices. The identification in our view is positive, unmistakable and free from error. We are unable to agree with the appellant that PW1 had a grudge against him.”

In rejecting the *alibi* defence, the court stated thus: -

“We reject his *alibi* defence because the same is displaced by the evidence of PW1 and PW2. Juma Madamu (PW2) said he managed to recognize the voices of the appellant and his accomplice when they demanded to be given money in the adjacent room of PW1. PW2 said that the appellant and Charles Maganga were people whom he worked with at Mwalughanje wildlife Park gate and that they used to play football together every evening hence there was no way he could have mistaken their voices. PW2 had known the assailants for a period of three years before the date of the incident. We are satisfied that the evidence of PW2 corroborated the testimony of PW1 which in effect placed the appellant at the scene of crime. We think the trial magistrate came to the correct conclusion in dismissing the appellant's defence and in holding that the appellant was positively identified.”

It is those self same two issues which the appellant has revisited in this appeal before us. On the first ground, Mr. Oguk submitted that the conditions favouring positive identification at the scene were non-existent since the only source of light relied on by Mesalim was an oil lamp. It was also conceded by Mesalim that she was terrified on hearing the sound of pangas and seeing them brandished at her. Furthermore; in her own evidence, the robbers were masked and there was no clear evidence, as wrongly found by the two courts below, that there was electricity in the park offices. That is because during the abortive retrial in Cr. Case 3260/99, Mesalim had said that there was no power. Considering that there was nothing recovered in possession of the appellant, he submitted, Mesalim remains as the sole witness on visual identification and her evidence was not sustainable. The only other evidence on identification was that of Juma which, in Mr. Oguk's submission, was not cogent. That is because Juma pretended to have heard the voices of the robbers which Guzo could not hear despite his proximity to Mesalim's room. He cited the case of **Cleophas Otieno Wamunga v Republic Cr. Ap. No. 20/1989** (ur) where the principles upon which visual identification by recognition were re-emphasised. The court in that case stated:

“The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J., in the known case of R. V. Turnbull (1976) 3 ALL E.R. 549 at page..... where he said:

‘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.’

This need for caution was also reiterated by the Court of Appeal for Eastern Africa in case of Abdallah Bin Wendo v. R. 20 E.A.C.A 166 at page 168 thus:

‘Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.’”

Mr. Oguk submitted that the evidence of Mesalim was not subjected to careful consideration by the two courts below in line with those principles. He also cited the case of **Dishon Litwaka Libambula v Republic Cr. A. No. 140/2003** (ur) where the circumstances under which voice identification is admissible were discussed. The court in that case stated:

“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. See CHOGE v. REPUBLIC 1985 KLR. 1. In the instant case, it was not in dispute that the appellant was the complainant's first cousin. They were, in fact, very close. It was therefore safe to say that the complainant's identification of the appellant's voice was free from any possibility of error.”

Once again Mr Oguk submitted that it was not possible for Juma to have recognized the appellant through his voice as he was far removed in distance from Mesalim's room. He pleaded with us to allow the appeal on this ground.

We have considered that ground of appeal and we think, with respect, that it is lacking in merit.

The identification of the appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Mr. Oguk, that in either case, the

evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken. So may a number of them; see Roria v R [1967] EA 583. There is nevertheless some measure of reassurance when the case rests on recognition as stated in the case of Ajononi & another v Republic [1980] KLR 59, thus:

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).”

We had earlier in this judgment reviewed the evidence recorded in respect of this robbery in some detail. In addition to examining the statements of facts recorded from the witnesses, it must be remembered that the credibility of those witnesses was central to acceptance of their evidence and on that credibility the trial court, which saw and heard them, would be the best judge. Mesalim clearly stated that she was aided by three sources of light in her identification of the appellant; an oil lamp in her room, moonlight outside and electricity at the park office. She also took a considerable period of time with her assailants. We do not accept as contended by Mr. Oguk that the assailants were masked. The finding made by the two courts below was that they had made a poor attempt at disguise which Mesalim saw through and recognized them. The material they used in their disguise was recovered shortly thereafter together with a stolen radio and Mesalim identified those items thus connecting the appellant with the offence. It is our view that there was credible evidence from Mesalim that she recognized the appellant at the scene of the robbery and we find no reason to interfere with the concurrent findings of the two courts below. We also think there was credible evidence from Juma that he recognized the voice of the appellant. The criticism that Juma was too far to hear any voices is not borne out by the record. All three witnesses who were at the scene state clearly that they could speak from their rooms and were heard by the other occupants. Even Guzo, who stated that he did not hear the voices was the first to call out Juma to open for him, before Juma told him he was also locked in. They could talk to each other and did so. Mesalim confirmed she could also hear both of them from their rooms. We do not therefore take the appellant’s criticism seriously, especially when Juma testified that the ceiling in his room had fallen away in decay. We agree with learned State Counsel Mr. Ondari, that the evidence of recognition by Juma fortified that of Mesalim and thus made the identification of the appellant more reassuring. There was also further supporting evidence from Pc. Kibet that the appellant ran away from the police as they approached his residence, which conduct betrayed his guilt. In all the circumstances, the evidence tendered on identification was properly evaluated and we find no reason to interfere with it. We reject that ground of appeal.

Having so found on the issue of identification, it follows as pointed out by Mr. Ondari, that the appellant’s *alibi* defence cannot stand. On that issue Mr. Oguk argued that the appellant testified on oath in stating that he was not at the scene although he had no burden of proof of his *alibi*. He stated that he was in Tanzania at the time and was arrested several months after the alleged offence. Furthermore the items associated with him and the robbery were recovered in respect of other robberies which had nothing to do with him.

It is indeed the law that an accused person assumes no burden of proof in a criminal case whether his defence amounts to an *alibi* or not. As stated in Saidi v Republic [1963] EA 6:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

Neither the trial court nor the superior court, both of which examined the *alibi* defence found anything in it to raise reasonable doubts on the prosecution evidence that the appellant was at the scene of the robbery

and not in Tanzania on 21st April, 1999. On our own evaluation of the evidence we come to the same conclusion.

In the result this appeal has no merits and we order that it be and is hereby dismissed in its entirety.

Dated and delivered at Mombasa this 4th day of March, 2011.

E.O. O’KUBASU

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR