



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Tunoi, O’Kubasu JJ A & Onyango Otieno Ag JA)**

**CRIMINAL APPEAL NO 140 OF 2003**

**DISHON LITWAKA LIMBAMBULA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from a judgment of the High Court at Kakamega,

(Tunoi & Waweru JJ) dated 30 January 2003 in

High Court Criminal Appeal No 33&34 of 2001)

**JUDGMENT**

Dishon Litwaka Limbambula, the appellant herein, was tried and convicted by a senior resident magistrate at Kakamega on a charge of robbery with violence contrary to section (296) (2) of the Penal Code and was sentenced to suffer death as is mandatorily provided for by the law. His first appeal to the High Court of Kenya at Kakamega (Tanui and Waweru, JJ) was heard and dismissed on 27th February, 2003. The appellant now appeals to this court a second time; and that being so, only matters of law can fall for our consideration by dint of the provisions of section 361 of the Criminal Procedure Code.

In his grounds of appeal embraced in a memorandum of appeal and a supplementary memorandum of appeal, the appellant has raised three broad issues, namely:

1. The evidence of identification of the appellant was not sufficient to form a finding that the same was free from any error.
2. Having found that the prosecution case was centred on identifying evidence of a single witness the trial court failed to warn itself on the dangers of relying on the said evidence to enter a finding of guilty.
3. The superior court being the 1st Appellate Court failed to analyze the evidence on lighting at the scene as required of law in that there was no indication as to:
  - (a) How bright or strong was the light from the torches or moon to secure proper identification or recognition.
  - (b) How long the said light was on for proper and sufficient recognition or identification.

According to the particulars of the charge and the evidence in support thereof, the offence was committed at about 1.00 am on 2nd September, 1999. The complainant, Stephen Asiebela Shiambushe, was asleep in his house together with his children. He heard a noise outside his house as if someone was trying to force open the door. He called out to his daughter *Lilian* (PW2) who was sleeping in the sitting room but, apparently, the girl was deeply asleep. Suddenly, a man burst into his bedroom and started looking around with a torch. The complainant got up. The stranger shone a torchlight on him and aimed a *panga* on his head. The complainant shielded his head with his left hand which appears to have been severely cut. He then got hold of the attacker and struggled with him with a view to disarming him but in the process both fell down. The other attackers who were trying to rescue their member directed their torches at the complainant and his attacker. In his testimony before the trial court the complainant testified that because of the many torch lights directed at him, he was able to identify the person who was on the ground with him. He recognized him as the appellant, his first cousin.

Though the complainant lay helpless on the ground the gang mercilessly proceeded to ceaselessly slash him. He appears to have received a total of not less than seven deep cuts all over his body.

The appellant then demanded of the complainant: “*Give us money*”. The complainant directed them to his coat but on searching it the gang found no money in it. The gang became furious and the appellant ordered; “*Finish this man*”, as the complainant had cheated them. The complainant testified that he knew the voice of the appellant well. At that time, torch lights were shone on the appellant’s face and the complainant was able to clearly see it.

As the attack on the complainant was going on, his children, *Lilian* (PW 2) and *Collins* (PW 3) ran out screaming and alerted neighbours, among them the assistant chief *Musonye* (PW 5) and *Musikari* (PW 6). They found the complainant groaning in pain and the entire bedroom was full of blood. He was rushed to *Mukumu Hospital* where he was detained for 11 days before being transferred to the *Kakamega General hospital* for further treatment. He sustained serious cut injuries which have deformed him.

On 4th September, 1991, the complainant gave the names of the appellant and others as the members of the gang.

Another significant and material piece of evidence in this appeal is that on the 1st September, 1999 at about 10.30 am, the appellant had issued threats to *Jackson Ingotse* (PW6), the cousin of the complainant, that as the complainant and his brother *Johan* had conspired to have him (the appellant) arrested over an assault case, the complainant “would recognize who he was” before that case was heard on 16th September, 1999. The robbery, the subject matter before us was committed a day after that threat.

On the basis of the complainant’s evidence, the trial magistrate held thus:

“Although complainant’s testimony boils down to being evidence of a single witness as regards recognition of the culprits, nevertheless, I find it sufficient to form the basis of a conviction. The threat narrated to PW 6 by 1<sup>st</sup> accused strongly coincides with the robbery attack on complainant. And although the 1<sup>st</sup> accused did not specify what he intended to do, it is reasonable to infer that as a result of those threats he organized the gang that seriously injured the body of the complainant.”

The trial magistrate proceeded to find the appellant guilty as charged, convicted him and thereafter sentenced him accordingly.

The superior court on first appeal in a considered judgment upheld the trial magistrate on the issue of recognition and itself stated as follows on the issue:

“Having carefully weighted the evidence on record we agree with the learned trial magistrate that first appellant was adequately and sufficiently seen and recognized by PW 1 with the aid of torch light and by his voice. The threats the first appellant had issued on 1st September, 1999 also corroborated this evidence especially as they were done shortly before the attack.

In the circumstances we must dismiss the appeal of the first appellant Dishon Litwaka Libambula and uphold his conviction and sentence imposed on him.”

After considering all aspects of the case, the superior court came to the conclusion that the appellant’s appeal lacked merit and accordingly dismissed it.

Mr Gichaba for the appellant, submitted before us that the first appellate court should have but did not analyse and evaluate the evidence against the appellant on recognition. Further, he submitted that the trial court did not warn itself that it was dealing with the testimony of a single identifying witness. Such a warning is normally essential and imperative in situations when conditions favouring a correct identification are difficult, for instance at night.

We will deal first with the issue whether the complainant had recognized the appellant’s voice during the attack on him and whether we could safely accept his evidence in this respect and whether the trial court was correct to act upon it.

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, infact, 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. True, as submitted by Mr Gichaba, the only source of light in the complainant’s bedroom were the torches whose intensity was unknown.

But the observation of the appellant was not momentary and the attack lasted for some time. As the complainant and the appellant wrestled they fell down while the several torches in the possession of the gang were directed towards the two for the purposes of hacking the complainant. As they were very close to each other there was every opportunity for the complainant to observe the appellant. We are satisfied, in the circumstances, that the appellant was properly identified by the complainant as one of his attackers.

The two courts below were alive to the fact that they were dealing with the testimony of a single identifying witness. It is trite that such a warning is normally essential and imperative in situations when conditions favouring a correct identification are difficult, especially as in the circumstances appertaining to the robbery before us. It would be prudent, in our view, to do so generally. We are satisfied that this was indeed done here and the record is clear on this.

It was proved that the appellant had issued actual threats to harm the complainant before a certain matter between them in another court was heard. We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person.

See section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.

In the case before us, the two courts below were entitled to hold that interference could be raised that the appellant had a motive to attack the complainant.

We are satisfied that the appellant was properly convicted and we uphold the conviction. His appeal lacks merit. In the result, the appeal is accordingly dismissed. We so order.

Dated and delivered at Nairobi this 28<sup>th</sup> day of November, 2003

**P.K.TUNOI**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**Ag JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**