



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: CHUNGA, C.J, SHAH & BOSIRE, JJ.A)
CRIMINAL APPEAL NO. 30 OF 2001
BETWEEN
CYPRIANO MURORIAPPELLANT
AND
REPUBLICRESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at
Meru (Mr. Justice Osiemo & Mr. Omwitsa, Commissioner
of Assize) dated 30th July, 1999
in
H.C. CR. APPEAL NO. 71 OF 1994)**

JUDGMENT OF THE COURT

This is a second appeal by Cypriano Murori, the appellant, against his conviction and sentence for the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. The appellant's conviction was based on his identification at night by two witnesses with the aid of torch light. In the appeal, the only point of law raised is the correctness of the appellant's identification.

Vincent Kithinji (PW1), the complainant, and a businessman at Gaitu Market in Meru, was on the night of 18th and 19th April, 1993, asleep with his wife, Susan Nduru (PW2), in their single roomed house, when at 2 a.m they were surprised by a loud bang at the door. The door gave way and immediately thereafter several torches were flashed at the complainant, apparently through the open door. The complainant was not able to know how many people were flashing torches at him. He was however sure they were more than one.

One of those people whom he later identified as the appellant, entered the house and thereupon demanded from the complainant that he produce a radio cassette, gas cooker, key to his motor cycle and all the money he, the complainant, had. It was the complainant's evidence that he was able to recognize the appellant by his voice, which he said he knew well as he and his wife had known him for over three years.

It was the complainant's further evidence that as soon as the appellant entered the house, the complainant hit the appellant who in turn cut the complainant on the right knee and lower part of the left leg using a panga. The complainant returned a second kick which sent the appellant sprawling on his back. According to the complainant the torch the appellant was carrying flashed at the latter's face who was then very close to the former. Following the flashing, the complainant said he was able to recognise the appellant.

The other time the complainant said he was able to recognize the appellant is when the former's wife flashed her torch on the latter's face while he was lying on his back on the floor. The intensity of the torch light was not stated, but it can be inferred from the evidence that it was sufficient to provide ample lighting inside the house and aided the complainant and his wife to clearly observe the appellant's face.

Both the complainant and his wife testified and were cross-examined on it, that although the appellant was allegedly wearing a cap and a hooded green jacket the face was not covered and the two were therefore able to observe the appellant unimpeded for about six seconds.

The appellant's stay in the house was for an estimated period of 15 to 20 minutes, throughout which time, except for the time he fell down, he was struggling with the complainant. The complainant, said he, successfully prevented the appellant and his accomplices from taking any of his property and hence the charge of attempted robbery with violence against the appellant.

The appellant eventually escaped with his companions. Later on the next day, a knife or sword was recovered at the scene, which the complainant said, was the weapon which was used to cut him. It was produced as an exhibit at the trial.

Susan Nduru, the complainant's wife, testified that as the appellant was struggling with her husband, she not only flashed her torch on the appellant's face, but also raised a distress alarm. Some neighbours among them Mureithi, and a watchman known as Zakayo, responded, but after the attackers had escaped. The explanation which was given for their belated response was that the door to their respective rooms had been bolted from outside. Mureithi and Zakayo, are among the people who notified Nicodemus Marangu (PW3), the Assistant Chief of the area, about the attack upon the complainant and mentioned the appellant's name to him as having been named by the complainant and his wife as one of their attackers. PW3 is the one who reported the matter to the police. The appellant is said to have later threatened PW3 with death because of his report to the police.

Mr. Kiara for the appellant submitted that the appellant's aforesaid conduct was consistent with conduct of a person falsely accused of a criminal offence. We, however, think that that may be interpreted as conduct of a bitter man on realizing that he had been found out.

Mureithi M'Mboi, (PW4), who as we stated earlier, was one of the people who responded to Susan's distress call testified that both the complainant and his wife, mentioned the appellant as one of their attackers, and as the person who actually inflicted cut wounds on the complainant.

Julius Mbae (PW5), a senior clinical officer at Meru Hospital, testified at the trial that he medically examined the complainant on 8th April, 1993, and found him with multiple cut wounds which he classified as grievous harm. There is however, a clear conflict in dates in his evidence. If the offence was committed on the night of 18th and 19th April, 1993, it is not possible that he could have examined the complainant before that occurrence. The P3 form he filled, bear the date, 18th February, 1994, as the date it was prepared by the police, and at the bottom it bears two other dates. The first one is under the author's signature and reads as 21st February, 1994. The second date which is below that one reads as 19th April, 1993. Mr. Kiara, submitted before us, that in view of those conflicting dates, medical evidence should be ignored. In his view, if that is done, a case of attempted robbery with violence would not be made out. But that is not the only evidence available to support the aggravated aspect of the charge. The particulars of the charge against the appellant also allege that the appellant was in company of other people not before the court, which is one of the ingredients under section 297(2) of the Penal Code, which reads in pertinent part, thus:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, ... he shall be sentenced to death".

If the evidence of the complainant and his wife is accepted, then it is clear that the appellant was not only in company of one or more persons, but was also armed with a panga, which in our view, and in the circumstances, is a dangerous weapon.

The trial magistrate, Mr. Wamwayi, and the first appellate court have made concurrent finding of fact, that the complainant and his wife were witnesses of truth, and that the circumstances under which they identified the appellant favoured a correct identification. They were entitled to come to that conclusion. The evidence on record justifies that conclusion.

Contrary to submissions by Mr. Kiara, that the torch light the complainant and his wife used to identify the appellant did not provide ample light to facilitate a correct identification, we are of the view and so hold, that considering the size of the complainant's room, his proximity to the appellant at the time of the attack, the fact that both the complainant and his wife had known the appellant for over three years, that the appellant spoke and they were able to recognize him by his voice are aspects which when looked at objectively, leave no doubt that the appellant was positively recognised by the complainant and his wife. The two mentioned his name to the neighbours immediately after the attack, clearly showing that they were not mistaken.

Mr. Kiara, submitted that in absence of any evidence as to the language the appellant used in demanding the complainant's property, then it may not be possible to identify one's voice correctly, as in his view, one's voice changes depending on which language one is communicating. We are unable to agree with him on that and all we can say about it, is that there is no scientific or other proof to support it.

The last point we wish to comment on concerns the fact that in its judgment the superior court proceeded as though it was dealing with a conviction for the offence of robbery with violence contrary to section 296(2) of the Penal Code. It is true, that court did proceed as though it was handling that offence. However, in its conclusion it dismissed an appeal against conviction and sentence for the offence charged.

In the result and for the reasons we have endeavoured to give, this appeal has no merit and is therefore, dismissed in entirety.

Dated and delivered at Nyeri this 17th day of May, 2001.

B. CHUNGA

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CHIEF JUSTICE

A.B. SHAH

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR