



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 20 OF 2012

(From Original Conviction and Sentence in Criminal Case No. 859 of 2010 of the Principal

Magistrate's Court at Kwale – E. K. Usui Macharia, PM)

VURA MWACHIRUMBIAPPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

1. On the night of 15th May 2010 PW1 and PW2 who were husband and wife suffered a most horrific and violent robbery. Thereafter the Appellant was arrested with two others and he was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. By the judgment of the trial Court of 3rd February 2012 the Appellant was convicted as charged and was sentenced to suffer death. He has appealed against his conviction and sentence. The other two persons that were arrested and charged together with the Appellant were acquitted by the trial Court.
2. There are two issues that the Appellant raised in his appeal. The first is that the evidence of voice recognition was not proved according to the Criminal standards. The second was that the charge that the Appellant faced was defective.
3. In the frequently cited case of **OKENO VS REPUBLIC [1972]EA** the Court of Appeal set out the duties of first Appellate Court as follows-

“.... to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial Court should be upheld ...”

4. Masudi Swalehe Kiryauta PW1 on 15th May 2010 at 1.30am while asleep with his wife Fatuma (PW2) heard a knock at the door. The people that were knocking identified themselves as police

officers. The door was forcibly broken. Those people entered into his bedroom. He noted that there were five people. He had a hurricane lamp which was on. The intruders had powerful torches. He could hear others that were outside breaking into his shop which was near his house. The intruders demanded money from him. Since he did not hand over money to them one of them called out a person by the name 'Kimani'. The one calling to Kimani said '**bring the rifle, this man does not want to give us money.**' The man that was being addressed as Kimani entered the bedroom PW1 noted that it was the Appellant he stated-

"I then saw it was Vura first accused (appellant) a person I know very well as he is a neighbour in the area. He held a panga and iron bars. He said I had to produce money."

5. PW1 proceeded to describe how the Appellant hurt him on the head as a consequence he asked his wife to hand over the money to them. The Appellant cut him again and he lost consciousness. He said that the thieves stole Kshs. 150,000/- from the shop and they also stole Kshs. 40,000/- amongst other things. He said that he informed the police who went to the hospital to see him the same night that he knew the Appellant and had known him for ten years. He said '**I knew his voice very well when he said I had to give him money. I saw him through their torches.**'
6. Fatuma Abdalla the wife of PW1 collaborated PW1's evidence of that night. In respect of the Appellant she stated-

"I saw the person they were calling Kimani was Vura (Appellant) who does casual work for us. I know him well. ... I even remember his clothes a blue T-shirt and shorts. He had his usual black shoes and his usual cap."

This witness stated that she was able to see the appellant because the intruders had very bright torches.

7. PW3 upto 8 all confirmed to have had screams coming from the home of PW1 and they all responded. They confirmed that a cap belonging to the Appellant was recovered from PW1's compound although there was no clear evidence of exactly who found the cap. It was therefore of little evidential value.
8. The Appellant gave a sworn statement in his defence. He stated that on the material night he was sleeping in his house when he was ordered to open the door. Those that entered came in with panga and a cap. They then arrested him. He denied the charge and also denied that the cap was recovered at the scene.
9. We wish to begin by considering the Appellant's submission that the charge he faced was defective. The Appellant submitted that the defect was due to the charge being under Section 296(2) which he argued was a penalty Section which section does not disclose the offence of robbery with violence. A quick answer to that submission is that the issue of whether a charge of robbery with violence charged under Section 296(2) is defective was recently subjected to a five judge Court of Appeal decision. This was the case **JOSEPH NJUGUNA MWAURA & 2 OTHERS –VS- REPUBLIC (2013)eKLR**. The Court of Appeal in that case referred to its previous decisions which had found that the charge of robbery with violence was not defective when a charge was laid under Section 296(2). The Court of Appeal in that case proceeded to hold as follows-

***“We agree that this is the correct proposition of the law. Indeed, as pointed out in JOSEPH ONYANGO OWUOR & CLIFF OCHIENG ODUOR V R (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is Section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under Section 296(2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.*”**

The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex charge.”

That holding in our view puts to rest the Appellant’s submission on the charge.

10. The Appellant submitted further that voice recognition was not proved

by the prosecution. The issue of voice recognition was the subject of a Court of Appeal decision in the case **CHOGE -VS- REPUBLIC (1985)KLR**. The Court of Appeal considered the admissibility of voice identification in that case and held-

“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 that 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”.

The Court in the case **NJERI -VS- REPUBLIC [1981] KLR 156** responded to submissions that voice identification was less satisfactory by stating-

“Mr. Otieno has submitted that identification by voice is less satisfactory than visual identification. In our view it can be equally safe and free from error, more so if the identification takes place at night. We agree with the two lower courts that in the particular circumstances of this case, the appellant and the complainant being familiar with each other for many years, the possibility of error was excluded.”

11. In this case, PW1 was a neighbour of the Appellant and had known him for ten years. His wife PW2 sometimes gave the Appellant casual jobs to do. PW1 said that he knew the Appellant voice very well. With that evidence it is clear that the Appellant and complainants were familiar with each other and the period that they had in contact with each other on the night in question makes it safe to rely on the voice recognition evidence. The possibility of an error in view of the long period that the complainant knew the Appellant was in our view excluded see the case of **NJERI -VS- REPUBLIC** (supra).

12. Having analyzed the trial Court's evidence we have come to the conclusion that the prosecution did prove beyond reasonable doubt that the Appellant was in the gang that broke into PW1's home and robbed him. We are of the view that the Appellant's defence does not displace that

evidence. Accordingly we dismiss the Appellant's appeal.

Dated and delivered at Mombasa this 19th day of December, 2013.

MARY KASANGO

M. MUYA

JUDGE

JUDGE



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