



REPUBLIC OF KENYA



**Muturwa alias Gitahi & another v Republic (Criminal Appeal 47 & 50 of 2018  
(Consolidated)) [2023] KEHC 1509 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1509 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL 47 & 50 OF 2018 (CONSOLIDATED)**

**J WAKIAGA, J**

**FEBRUARY 22, 2023**

**BETWEEN**

**JAMES MWANGI MUTURWA ALIAS GITAHU ..... 1<sup>ST</sup> APPELLANT**

**WILLIAM KINYUA MUGURO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(eing an appeal against both conviction and sentence from original Senior Principal Magistrate Court at Kigumo SPMCC NO 1825 of 2016 Hon. A. Mwangi on 14th June 2018)*

**JUDGMENT**

1. The accused persons were charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code* on count 1 and being in possession of cannabis sativa contrary to section 3(1) as read with section 2(a) of the *Narcotic drugs and Psychotropic Substances Control Act* No 4 of 1994, to which they both pleaded not guilty.
2. They were tried convicted and sentenced to twenty (20) years imprisonment on count one and being aggrieved by the said conviction and sentence, they each filed their respective appeals, which appeals were consolidated by the court on March 14, 2022 for purposes of trial and determination.
3. Directions were given that the appeal be heard by way of written submissions which were duly filed.
4. The 1<sup>st</sup> appellant filed an amended ground of appeal and written submissions wherein it was contended that the trial court erred when it failed to consider that the identification of the appellant was not done to the required standard and failed to consider his defence.
5. In support thereof, he submitted that an identification by one witness under conditions which did not favour identification was not safe for the court to convict as was stated in *Maitanyi v Republic* [1986]



eKLR and that the court was under a duty to warn itself on the dangers of relying on the evidence of PW1 as there was no adequate light to enable identification.

6. It was contended that the prosecution case was not proved beyond reasonable doubt as the same was uncorroborated.
7. On behalf of the 2<sup>nd</sup> appellant, he filed an amended grounds of appeal and written submissions, wherein it was contended that the evidence on record was contradictory and the conditions were not suitable for positive identification, to sustain a conviction and that the sentence of twenty years was harsh and stiff. The appellant's defence was not taken into account.
8. It was submitted that the condition was not suitable for positive identifications as the evidence on record was that the complainant only used a spot light, without ascertaining the intensity of the light, to aid in the identification of the appellant who was not known to her, yet PW2 stated that she gave his name, which she did not do at the time of the initial report.

It was submitted that the identification of the appellant was by way of recognition, yet the evidence in support was not clear.

9. The state through Ms Otieno submitted that the appellants were armed with a panga and rungu and inflicted injuries upon the complainant as per the P3 Form. They were two in number and therefore the ingredient of the offence was proved. The appellants were identified through the aid of torches and these complainants recognised the 1<sup>st</sup> appellant as a neighbour and a watchman and the 2<sup>nd</sup> appellant whom she had met before, so the identification was safe and free from error.
10. This being a first appeal, the court is under a duty to re-evaluate the evidence tendered before the trial court and come with its own determination thereon, while giving allowance to the fact that it did not have the advantage of seeing and hearing witnesses as was stated in *Okeno v Republic* [1972] EA.
11. The issue for the court's determination are whether the appellants were positively identified, their defence taken into account and whether the sentence was excessive.
12. On the issue of identification, PW1 John Murigi stated that he was asleep at 2.30 am when his house was broken into by two people whom was able to identify through the use of his phone and their torches. He knew the 1<sup>st</sup> appellant through his voice as he was a neighbour and a watchman near his home. He was able to see the 1<sup>st</sup> appellant as he was reading his pin number and knew him as Gitahi. He was able to recognise his voice when he asked him to lie down.
13. It was his evidence that the 2<sup>nd</sup> appellant was known to him, having arrested him with his friend's goat at Mukuyu market and he was able to recognise him through the aid of the spot light they were having and that he spent adequate time with him when they were demanding money.
14. This evidence was corroborated by PW2 CI Mohammed Godana who stated that the complainant gave the names of the appellant at the time of the first report and that he personally knew the 2<sup>nd</sup> appellant whom he had arrested over the theft of the goat.
15. I am therefore satisfied that the appellants were positively identified by recognition and their identification was free from error and that the trial court cannot be faulted as in convicting the appellant he stated that

“The sole identification evidence of PW1 may be sufficient into base a conviction against the accused persons subject to the court warning itself of the dangers of a possibility of mistaken



identity and after carefully considering the circumstances surrounding the identification evidence. This is per the holding in *Killu and another v Republic* [2005]1 KLR 174.....”.

16. On the appellants’ defence trial court considered the same and dismissed the *alibi* defence put forward by the 2<sup>nd</sup> appellant and stated that the way he was arrested corroborated the evidence of the complainant and therefore find no fault with the trial court finding on fact and therefore dismiss the appeal on conviction.
17. On sentence, the same remains at the discretion of the trial court which the appellant court cannot interfere with unless it is proved that the same was excessive and based on wrong principles. In sentencing the appellants, the court stated that the Court of Appeal had since held that death penalty under section 296(2) of the *Penal Code* is not a mandatory sentence and that courts have discretion. He stated further that the accused were armed with crude weapons hence the offence was aggravated calling for a harsh sentence.
18. It therefore follows that the sentence was lawful and cannot be termed harsh when the law provides for a death sentence. The mere fact that this court may have reached a different determination on sentence had it been the trial court in not a ground for it to interfere with the court’s exercise of discretion
19. At the end of the day I find no merit on the appeal herein which I hereby dismiss, both on conviction and sentence and affirm the trial court finding on both. And it is ordered.
20. The appellants have right of appeal.

**DATED SIGNED AND DELIVERED AT MURANGA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2023**

**J. WAKIAGA**

**JUDGE**

**In the presence of**

Court Assistant - Carol Mutahi

