



**Republic/Prosecution v Simiyu & 3 others (Criminal Appeal
E078 of 2021) [2023] KEHC 3843 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E078 OF 2021**

REA OUGO, J

APRIL 27, 2023

BETWEEN

REPUBLIC/PROSECUTION APPELLANT

AND

JOSEPH SIMIYU 1ST RESPONDENT

MIKE MUKHWANA 2ND RESPONDENT

DEDAN SIKUKU 3RD RESPONDENT

GASPA WANYONYI 4TH RESPONDENT

*(Appeal from the judgment dated 28th June 2021 of Ho. N. Barasa,
Principal Magistrate – Webuye Law Courts in C/F Number 199 of 2019)*

JUDGMENT

1. The appellant had preferred the charge of attempted robbery with violence contrary to section 297 (2) of the Penal Code against the respondents. The particulars of the offence were that Joseph Wafula, Mike Mukhwana, Dedan Sikuku and Gaspa Wanyoyi on the night of April 4, 2019 at Nandika village, Sirende location in Webuye West sub-county within Bungoma county jointly while armed with offensive weapons namely, Pangas, attempted to rob off Josphine Nanjala of her 5 pigs valued at Kshs 100,000/- and immediately before the time of such attempted robbery wounded the said Josephine Nanjala. They were arraigned in court on April 16, 2019 and a plea of not guilty entered. During the pendency of the case, the 1st respondent died and the case was withdrawn against him pursuant to section 87 (a) of the *Criminal Procedure Code*.
2. The prosecution called 5 witnesses in support of its case and the respondents gave their respective defences. At the end of the hearing, the trial magistrate found that the respondents were not sufficiently identified as the people who attacked the complainant and therefore acquitted them.



3. The appellant dissatisfied with the finding of the trial magistrate filed a Petition of Appeal before this court on the following grounds:
 1. That the trial magistrate erred in law and in fact by not taking into consideration and attaching the necessary weight to the evidence of the complainant and her witnesses.
 2. That the trial magistrate erred in law and in fact in holding that the complainant did not make proper identification of the respondent during the commission of the offence, whereas she had lighted a solar lamp hence being able to positively recognize her attackers during the offence.
 3. That the trial magistrate erred in law and in fact in holding that the complainant did not positively make identification whereas there was recognition because she sufficiently recalled the respondents from the date of the offence because they were well known locals in her neighbourhood.
 4. That the trial magistrate erred in putting emphasis on the defence case, not considering a prima facie case had been established by the prosecution.
 5. That the learned trial magistrate erred in failing to satisfactorily analyze and evaluate the evidence in court hence arriving at a wrong conclusion.
4. This being a first appellate court, I am duty bound to re-evaluate, re-assess and determine afresh the evidence tendered before the lower court before arriving at an independent determination without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. (See *Okeno and another vs Republic* (1972) EA 32).
5. The appellant has challenged the trial court's finding on identification. The two witnesses who saw what transpired were Josephine Nafula Wanjala (Pw1) and Lydia Nyongesa (Pw2). Pw1 testified that on the material day at around 2:00 a.m. she heard footsteps outside and her pigs oinking sound. She had a lamp from the one-acre fund and went outside and saw that the pigs were out yet she had locked them in. She was attacked by 4 people whom she had seen earlier as they had visited her farm. They attacked her by cutting her with a panga. She had cuts in her head, eyes, nose, right hand and chest. She fell down and lost consciousness. She testified that she had always seen the respondents. On cross examination, she testified that the lamp helped to clearly see, the 2nd respondent was from her village while the 2nd and 4th respondents from the neighbouring village. She testified on re-examination that the accused persons wore clothes which they normally wear.
6. Pw2 testified that when she heard the noise from the pigs she woke up and found her mother carrying a lamp and followed her from behind. She identified the respondents who attacked her mother, stating that they were boys she used to see in the village. The appellants would pass by their home and they wore clothes they used to wear. The prosecution evidence on identification is by recognition. In *Wamunga versus Republic* [1989] KLR 424 the Court of Appeal stated thus:

It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.
7. Madan J.A for the Court in *Anjononi and Others vs The Republic* [1980] KLR stated:

“.....This, however, was 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 Vs. The Republic* (unreported.)”

8. The incident took place at night. Evidence of identification/recognition at night must be absolutely watertight to justify conviction (see *Nzaro vs Republic* (1991) KAR 212 and *Kiarie vs Republic* (1984) KLR 739). According to Pw1 and Pw2 the appellants were from the neighbouring village and had passed by the complainant’s farm. They positively identified them by the clothes which they wore as they testified that they adorned clothes which they usually wear. They were able to do so from the light from the lamp that went off once Pw1 was attacked. The trial magistrate found that the identification by the prosecution witness was scanty, she held that:

“...Pw2 identified them that night by way of clothing they had as they wore clothes they are always seen in. It is clear that both Pw1 and Pw2 who are key witnesses so far as identification of the suspects are concerned, neither identified any of them by name and neither did they specify the description of the clothing they each wore that night for the court to ascertain from a third party whether it is indeed true that the three dressed in the same manner always and can be easily spotted by the clothing.”

9. Both Pw1 and Pw2 testified that they knew the respondents based on the clothes that they wore, yet there was no description of the said clothes. The prosecution also failed to provide evidence of the clothes seized from the respondents that matched the description given by Pw1 and Pw2. I agree with the trial magistrate that the prosecution ought to have given further evidence either by the witnesses stating the names of the assailants or description of what they had worn. If Pw1 and Pw2’s recognition was pegged on the recognition of the assailants based on their clothing, then it was crucial that they give a proper and detailed description of the assailants. In the case of *Simiyu & Another V. R* (2005) 1 KLR 193 the Court of Appeal expressed itself on this point as follows:

“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused and then by the person or persons to whom the description was given. The omission on part of complainant’s to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identify.”

10. The prosecution witnesses having failed to describe the clothing or give the names of the assailants whom they testified were well known to them, I find no reason to interfere with the finding of the trial court. The prosecution evidence on identification was not to the required standard. Having come to the conclusion that the evidence on identification was scanty there is no need to deal with the other grounds of appeal. The petition of appeal dated July 8, 2021 is hereby dismissed.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 27TH DAY OF APRIL 2023.

R.E. OUGO

JUDGE

In the presence of:

M/s Omondi for the Appellant

2nd, 3rd & 4th Respondents- Present



