



**Wanjiku v Republic (Criminal Appeal 213 of 2017)  
[2023] KEHC 3453 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3453 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL 213 OF 2017**

**CM KARIUKI, J**

**APRIL 26, 2023**

**BETWEEN**

**PAUL WANJAU WANJIKU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was originally charged together with others with two counts of the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#) and an alternative charge of handling stolen goods contrary to Section 322 (1) (2) of the [Penal Code](#).
2. The Appellant was found to have a case to answer in respect to the 1<sup>st</sup> count and the alternative count, the particulars being that on 13.02.2014 at about 11.00pm at Karai Tatu Village, Huhoini Location within Nyandarua County jointly together with another not in court while armed with dangerous and offensive weapons namely pangas, rungus, hammer and maasai sword the robbed Patrick Gichuki and Mary Wangeci Gichuki 3 mobile phones, 1 sheep, 2 blankets and cash kshs. 2,500/- all valued at kshs. 25,000/- and at or immediately before or immediately after the time of such robbery, they wounded the said Patrick Gichuki and Mary Wangeci Gichuki.
3. In the alternative count, the particulars are that on 14.02.2014 at about 3.00pm at Boiman Trading Centre, Huhoini Location within Nyandarua County, otherwise than in the course of stealing, the Appellant together with others dishonestly received or retained three mobile phones knowing or believing them to be stolen goods.
4. The Appellant was tried for the charges and was found guilty of the lesser offence of grievous harm contrary to Section 234 of the [Penal Code](#) and was sentenced to life imprisonment.
5. Having been dissatisfied with the conviction and sentence he filed this appeal. The Appellant cited 3 grounds in his amended grounds of appeal under Section 350(2) (v) of the [C.P.C.](#) that:-



- i. That the learned trial magistrate erred both in law and in fact in accepting prosecution's evidence of identification without considering the fact that PW1 was a single identifying witness. She was attacked at night, there was no clear evidence of the intensity of the light used and PW1 did not give marks of identification to the police or to the person who rescued them. It was an error to rely on such flimsy information.
  - ii. That the learned trial magistrate erred in law and facts by holding that the offence of grievous harm, was proved beyond reasonable doubt but failed to note that the ingredients/elements of the offence of grievous harm contrary to Section 234 of the Penal Code were not proved in evidence.
  - iii. That the learned trial magistrate erred in law and fact by failing to recognize and appreciate the weight of the Appellant's testimony in his defence which could in law be truthful.
  - iv. Appellant's Written Submissions
6. The Appellant stated that the prosecution's case was primarily based on identification evidence by a single identifying witness PW1. That the circumstances that prevailed the identification were difficult. That it was a night and PW1 was being assaulted. She was helpless and scared and thus in such difficult situation she was not able to identify a stranger given the little time she had with him. The Appellant stated that this argument is buttressed by the fact that PW1 couldn't identify the other attackers and PW2 who was together with PW1 could not identify any of the assailants.
  7. In addition, it was contended that PW1 was not a credible witness as she did not lead to the arrest of the Appellant. That she did not record in her first report or initial statement to the police that she recognized or could recognize the attackers.
  8. Reliance was placed on *Kariuki Njiru & 7 Others vs Republic*, *Tekerali s/o Kirongozi and 4 Others* [1952] EACA 259, *Republic v Shaban Bin Donald* [1940] 7 EACA 70
  9. The Appellant reiterated that there was no light at the home of PW1 and PW2. It was at night and the robbers used their own torches and the witness had not torch by herself. The court was not told where the witness was standing and where the source of light was. Reliance was placed on *Loboi Ole Toboke vs Republic*, *Paul Etole and Another vs Republic*, Criminal Appeal No. 274 and 275 of 2009 at Eldoret in *Peter Okee Omukaga & Another vs Republic* (unreported)
  10. It was argued that the elements of the charge of grievous harm was not proved beyond reasonable doubt as against the Appellant. That trial magistrate relied on the evidence of PW1 and PW2 which show there is no circumstantial or direct evidence that connects the Appellant to the offence charged. That PW1 did not know who assaulted her husband.
  11. Lastly, the Appellant also contended that his defence was not considered and that he was framed.
  12. Respondent's Written Submissions
  13. The respondent submitted that the Appellant's conviction was sound and proper as the victim sustained grievous harm; the harm was caused unlawfully and the Appellant caused or participated in causing the grievous harm.
  14. It was stated that PW2 testified that on the material night he was hit on the head with an object appearing like a metal. He was then cut on the face and his lips dropped down. He was later taken to Igwamiti Dispensary where he was dressed and later referred to Nyahururu District Hospital where he was admitted for 2 days.



15. Moreover, the P3 form in respect to PW2 i.e. P. Exhibit 6 indicated that the nature of injuries as grievous harm. The P3 form which indicated that he had a wound on the head and on the left side. Also, another one at the middle of the nose near the eye and his eye was bleeding. Additionally, there was a wound cut at the upper lips near the right cheek. The weapon used was sharp.
16. The respondent asserted that the harm cause was without legal justification and was not as a result of self defence as it was PW1 and PW2 evidence that they were attacked on 13.02.2014 at around 11 pm while sleeping by people who gained access to their bedroom demanding for money and in the process caused grievous injuries to PW2 despite the fact that he had cooperated with them.
17. Lastly, the respondent asserted that the conviction by the trial magistrate is proper and urged the court to confirm the sentence for reasons that the mandatory sentences with respect to offences of grievous harm has not been altered or challenged in any way.

## 18. Analysis and Determination

19. Having considered the evidence adduced before the trial court both for the prosecution and the defence, the grounds of appeal and the submissions for and against the appeal; the issues for determination herein are:-
  - i. Whether the prosecution proved its case against the Appellant beyond reasonable doubt for the offence of grievous harm
  - ii. Whether the Appellant was positively identified as PW2's attacker
  - iii. Whether the Appellant's defence was considered
20. In considering this appeal, I am guided by the principles set out in the case *David Njuguna Wairimu v Republic [2010]* eKLR where the Court of Appeal stated:-
 

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first Appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.
21. For the Appellant to be convicted of the offence of doing grievous harm contrary to Section 231 as read with section 234 of *The Penal Code*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;
22. The victim sustained grievous harm.
23. The harm was caused unlawfully.
24. The accused caused or participated in causing the grievous harm.
25. It is not in dispute that PW2 sustained injuries on his body as per his testimony and the P3 Form produced in evidence by the prosecution i.e. P. Exhibit 6. The victim suffered cut wounds over the mid nostril extending to the eyelid, subconjunctival hemorrhage and cut wound over the moustache extending to the right cheek. The degree of injuries sustained were assessed and categorized as ‘maim’. This evidence was not impeached in cross-examination nor controverted by the defence. The nature



of grievous harm is defined by Section 4 of *The Penal Code* as any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense. Accordingly, I am satisfied that the victim's injuries amounted to grievous harm as defined in the *Penal Code*.

26. Moreover, it is undisputed that the harm was caused unlawfully. According to PW1 and PW2's testimony the victim was harmed in the course of a robbery. On the material night they testified that they were attacked by unknown armed assailants while they were sleeping. PW2 stated that he was hit by a heavy object by people who were demanding money from them. He asserted that he was hit on the head with an object appearing like a metal. He was then cut on the face and his lips also dropped down. It is clear that PW2 was injured without legal justification or excuse. I find that the prosecution proved beyond reasonable doubt that the injury sustained by the victim was caused unlawfully.
27. The issue of identification stands out to me as the main issue for determination in the appeal herein.
28. PW1 testified that on 13/2/2014 at around 11.00pm, she was asleep at home when she saw 3 people next to her bed standing near the wardrobe. They were flashing a torch and she used the same to see them. She stated that the light in her house was off. PW1 asserted that he identified the Appellant. He did not know him before but he came near her bed and sat on it. He was flashing her with the torch. That the suspects abused her that she was a dog and that they wanted money. They were armed with panga, nyundo and knife. She gave them money, Kshs 2,000/=.
29. It was her testimony that her husband had been cut and hit at the head with a hammer very badly and was so injured. That she did not know exactly among the assailants caused the injuries. That she saw the Appellant sitting in the bed when her husband was being cut at the mouth. She begged them not to kill him and they also cut her at the hand.
30. In cross examination, PW1 pointed out that she was able to recognize the accused. That it was at night but they sat and also knelt in her bed and were therefore near her. She stated that he had a torch and was flashing at her while asking for her phone. That the torch was very bright. She confirmed that she did not have a torch. PW1 reiterated that she could identify the Appellant clearly because he sat next to her and he flushed her with her torch.
31. PW2 testified that on 13/2/2014 at around 11.00 pm. He was in his bedroom with his wife, PW1 and their grandchild was also at the house. He was hit by a heavy object and saw some torches lit brightly like a vehicle head lamp. Some of the attackers were inside while others were outside. He could not identify any of them because he was being flashed at by a torch. They demanded for money. He was then hit on the head with an object appearing like a metal and was then cut on the face. He confirmed that he could not identify any one because blood was oozing from his head and covering his face and he was also being flushed with torches.
32. In *R vs Turnbull & Others* (1976) 3 ALL ER 549, the English Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated that:-

“ ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material



discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

33. The Court of Appeal in the case of *Wamunga vs Republic (1989)* KLR 426 stated:

“It is trite law that where the only evidence against a defendant is evidence of 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 conviction.”

34. In *Nzaro vs Republic (1991)* KAR 212 and *Kiarie vs Republic (1984)* KLR 739 the Court of Appeal held that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

35. In *Mungania & 2 others v Republic & 2 others (Criminal Appeal 21 of 2020 & E003 & E068 of 2021 (Consolidated)) [2022]* KEHC 167 (KLR) the court stated that: -

“Evidence from eyewitnesses plays an important role in all contested cases. However, as alluded to earlier, the memory is a fragile and malleable instrument, which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in injustices. Our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. However, the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

.....

Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution. While testing identification evidence of a single witness, great care and caution should be taken to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. Authorities are in agreement that these include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the complainant knew the accused. Such evidence may be reinforced by sufficient collaboration. In absence of collaboration, the court needs to treat it with caution. In evaluating the accuracy of identification testimony, the court should also consider such factors as: -

What were the lighting conditions under which the witness made his/her observation? What was the distance between the witness and the perpetrator? Did the witness have an unobstructed view of the perpetrator? Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator? For what period of time did the witness actually observe the perpetrator? During that time, in what direction were the witness and the perpetrator facing, and where was the witness's



attention directed? Did the witness have a particular reason to look at and remember the perpetrator? Did the perpetrator have distinctive features that a witness would be likely to notice and remember? Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question? What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

36. In the present case, the learned trial magistrate convicted the Appellant on the basis of PW1's evidence that she was able to see the Appellant on the material night. The trial magistrate in his judgement stated that: -

“On the issue of identification of the 2nd defendant by PW1, I find that the evidence of identification to be watertight in terms of quality and quantity. The identifying witness, PW1, confirmed that the 2nd defendant was not known to her before. That the 2nd defendant and his accomplices flashed their torches which were bright. The 2nd defendant sat on her bed and therefore closer to her. I do therefore find no material evidence to make me doubt the identification of the 2nd defendant by PW1. I accordingly find the identification evidence to have sufficiently placed the 2nd defendant at the scene of the attack herein.”

37. Identification of the Appellant in this case is central to his conviction. PW1 testified that although it was at night, the Appellant was sat next to her and she was able to identify him through the light from the torches that the assailants were flashing. I see no reason to doubt the evidence of PW1 where he identified the Appellant as one of the attackers on that night.

38. As was held in *Mungania & 2 others v Republic & 2 others* [supra]

In any event, it is established law that a conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone. The Court of Appeal of Uganda in *Okwang Peter v Uganda* held: -

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error.”

It is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. The law is also clear that there is no particular number of witnesses required for proof of any fact. Further, it has not been shown that the evidence tendered had gaps which required to be filled. I find no reason to make adverse inference in the circumstances of this case.

39. Consequently, from my analysis I find no evidence that the trial magistrate misdirected himself in finding that the Appellant was positively identified by PW1. I find that PW1 was able to identify the Appellant using the light emanating from the torches held by the attackers and particularly the one



held by the Appellant which he flashed at her. I find that there was no error on the trial magistrate's part in convicting the Appellant on the evidence of a single witness i.e. PW1 given that the evidence was clear and satisfactory.

40. Moreover, the Appellant sat next to her on the bed and was therefore in close proximity to her enabling her to see and identify the Appellant. She asserted that the torch was very bright and that when the Appellant sat next to her, he flashed at her and asked her for her phone and that it how she was able to see him. These assailants also attacked and maimed her husband in the course of robbery. Although it was at night, I am satisfied that PW1 was able to identify the Appellant and there was no likelihood of error. I am unable to fault the trial court on this finding of fact. As a result, I find that the Appellant participated in causing the grievous harm occasioned on PW2.
41. It was argued that the Appellant's defence was not considered but the same was full of mere denials and did not controvert the evidence that he was seen at the scene in any way.
42. In the end, I find no merit in this appeal and I hereby dismiss it.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 26<sup>TH</sup> DAY OF APRIL 2023.**

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**CHARLES KARIUKI**

**JUDGE**

