



**Makau & another v Republic (Criminal Appeal E038 & E039 of 2021 (Consolidated)) [2023] KEHC 19654 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19654 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E038 & E039 OF 2021 (CONSOLIDATED)**

**GMA DULU, J**

**JUNE 30, 2023**

**BETWEEN**

**NICODEMUS NDUNDA MAKAU ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH MUSYOKA ALIAS MREFU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Voi Magistrate's Criminal Case No. 890 of 2018 delivered on 14th September 2021 by Hon. D. Wangeci (PM) in Voi Law Courts)*

**JUDGMENT**

1. The two appellants herein were charged in the magistrate's court with robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of offence were that on October 9, 2018 at Ndii area along Mombasa Nairobi highway in Voi sub-county within Taita Taveta county jointly with others not before court robbed Benson Kago Mwai of motor vehicle registration number KCK 076R Mercedes Benz axor lorry trailer registration number ZD 4063 loaded with assorted electronic appliances valued at Kshs 13,486,026/= the property of One 2 One Logistics Company Limited and his mobile phone Tecno touch screen, Nokia touch screen and kabambe valued at Kshs 27,499/= the property of Benson Kago Mwai all valued at Kshs 13,513,525/= and during such robbery injured Benson Kago Mwai.
2. They both denied the charge. After a full trial, they were each convicted of the offence and sentenced to life imprisonment.
3. Dissatisfied with the conviction and sentence, the appellants have filed two appeals which were consolidated and their grounds of appeal can be summarized as follows:-



For Nicodemus Ndunda Makau filed through counsel Joseph Mwangeli and company there are three grounds of appeal, that is:-

1. The learned trial magistrate erred in law and fact by convicting the appellant on the basis of evidence that was contradictory and inconsistent.
  2. The learned magistrate erred in law and fact by relying on the evidence of identification that was not conducted in a manner set out in the law and in which the appellant was not informed of his right.
  3. The learned magistrate erred in law and fact by wholly relying and believing the testimony of the prosecution witnesses while not wholly considering the evidence rendered by the appellant in his defence.
4. On his part, Joseph Musyoka filed three (3) grounds of appeal, that:-
1. The learned trial magistrate erred in law and fact by convicting him in reliance on the identification evidence of the complainant (PW1) which occurred in unfavourable circumstances.
  2. The learned magistrate erred by convicting him in reliance on the single identification evidence of the complainant (PW1) who after the offence was unable to give a description of his attackers to the police when making the first report.
  3. The learned magistrate erred by considering the Id parade evidence which was unlawful.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by each of the two appellants as well as the submissions filed by the Director of Public Prosecutions.
6. This being a first appellate court, I am bound by the legal principle that I have a duty to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* (1972) EA 32.
7. The grounds of appeal in both appeals are on the adequacy of the evidence of identification and by a single witness. The nature of the offence under section 296(2) of the [Penal Code](#) is not contested on appeal.
8. For the sake of clarity, section 296(1) and 296(2) of the [Penal Code](#) which defines the offence for which the appellants were convicted states as follows:

“296

- (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
- (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”



9. In proving their case herein against the appellants, the prosecution called thirteen (13) witnesses. On their part, each of the two appellants tendered sworn defence testimony and did not call any additional witnesses.
10. The only witness who identified the appellants as having been involved in the robbery was PW1 Benson Kago the driver of lorry with trailer KCK 076R Mercedes Benz Axor, which he drove carrying electronic cargo. He stated that he was robbed of same at night at Ndii area on the Nairobi – Mombasa road which lorry was later found at Makindu area the same night, and there is uncontroverted evidence that PW1 suffered injuries which were classified as harm.
11. The incident occurred at night and thus visibility must have been poor or challenging. In such a situation, courts have to take great caution to ensure that the identification of the alleged culprit is positive and free of possibility of error – see the case of *Hassan Abdalla Mohamed v Republic* (2017) eKLR wherein the court held as follows with respect to such visual identification;-
  - “7. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in *Wamunga v Republic* (1989) KLR 424 at page 426 had this to say:

“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 a basis of a conviction.”
  8. In *Nzaro v Republic* (1991) KAR 212 the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify a conviction.
12. In the present case where the incident occurred at night, I note that the only identifying witness PW1 did not describe any of the robbers to anybody before arrest of the appellants. None of the two appellants was arrested due to a description given by the complainant PW1. The incident occurred on October 9, 2018 and identification parades were conducted by IP Faith Chesire PW11 on October 19, 2018 ten days after the incident, and October 24, 2018, 15 days after the alleged robbery. The 1<sup>st</sup> appellant had been arrested on October 10, 2018 and taken to court on October 11, 2018.
13. In my view, though the complainant PW1 did not describe any of the assailants to any person before arrest, that cannot be conclusive reason that he could not identify them or any of them after arrest. In addition, in the present case where Nicodemus Ndunda Makau was found at the lorry site that same night with people unloading the cargo who ran away, and him insisting that he was the driver of that lorry, such fact is substantial evidence that he was connected to the robbery incident, unless he gave an explanation on how he came to be the driver of the stolen lorry a few hours after it was robbed from PW1. He did not give that explanation.
14. The said Nicodemus Ndunda Makau was also identified by PW1 at an identification parade held on October 19, 2018, and he elected not to ask questions in court to the parade officer PW1 IP Faith Chesire and instead stated that – “I will not proceed with cross-examination of this witness. I have no questions to her”. The voluntary choice of this appellant not to cross-examine PW11, which was his legal and constitutional right, left the evidence of his identification at the parade to stand unshaken and thus believable.



15. Thus, just like the trial Magistrate, I find that the identification of this appellant (Nicodemus Ndunda Makau) by PW1 as positive, and could be relied upon, as the magistrate did. I will uphold his identification as positive, and will also uphold the conviction.
16. As for Joseph Musyoka Mativo the identification parade was conducted on October 24, 2018 fifteen (15) days after the incident. He was arrested at a place called Meli Kubwa along the Nairobi – Mombasa highway, on being pointed out by Nicodemus Ndunda Makau, the 1<sup>st</sup> appellant herein. He also elected not to cross examine the identification parade officer PW1 IP Faith Chesire and said – “equally I will not cross-examine this witness”.
17. Thus the evidence of his identification by PW1 as one of the robbers by touching, was not controverted in any way and remained unshaken, as the parade officer (PW11) was not cross-examined by this appellant.
18. In my view therefore, the two appellants herein were positively identified as some of the people who robbed PW1 and injured him in the process. I will thus uphold the conviction.
19. Their contention that other persons might have been involved in the robbery, and were charged in another case does not help them, as the charge herein clearly stated that the appellants were together with others not before court, when they robbed the complainant.
20. With regard to sentence, the mandatory sentence for the offence is death. However, the trial magistrate applied the reasoning in the *Muruatetu case* (2017) eKLR decision of the Supreme Court and sentenced each of the two appellants to life imprisonment. I find no reason to interfere with the sentence imposed.
21. Consequently, and for the above reasons, I find no merits in the appeals. I dismiss both the two appeals and uphold both the conviction and sentence of the trial court. Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED THIS 30<sup>TH</sup> DAY OF JUNE 2023 IN OPEN COURT AT VOI**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

Both appellants

Mr. Sirima for State

Mr. Otolu court assistant

