Wambua v Republic (Criminal Appeal E014 of 2021)
[2022] KEHC 11830 (KLR) (19 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E014 OF 2021

JM MATIVO, J

AUGUST 19, 2022

BETWEEN

CHARLES MUTHOKA WAMBUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentence in Criminal case number 692 of 2018, Voi, R v Charles Muthoka Wambua & another delivered by Hon. F. M. Nyakundi. on 14.4.2020))

JUDGMENT

1. The appellant seeks to overturn the conviction and sentence imposed upon him in PMCC No 692 of 2018, Voi, in Republic v Chatles Muthoka Wambua and another. Briefly, the appellant was charged jointly with a one Daniel Wambua with the offence of robbery with violence contrary with section 295 as read with section 296 (2) of the *Penal Code.*[1]

   It was alleged that on July 22, 2018 at 2000hrs at Taita Village, Maungu area, in Voi Sub County, within Taita Taveta County, jointly with others not before court, while armed with dangerous weapons, namely knives and pangas, they robbed Omar Mwandogo Kengo a lorry make Axor Benz Reg No, KBQ 316 S valued at Kshs 4.5 million, black pair of shoes valued at Kshs 2000/=, one mobile phone make, tecno valued Kshs 2,000 and cash Kshs 4,000/= all totalling to Kshs 4,508,000/= and during the time of such robbery, they slightly stabbed and wounded the said Omar Mwandago Kengo.

[1] Cap 63, laws of Kenya.

2. The principles to be kept in mind by a first appellate court while dealing with appeals are:2

    a. There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.

    b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.

    c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.

    d. When the trial court has breached provisions of the *Constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

3. The prosecution case rested on the evidence of 11 witnesses. The crux of the prosecution case was that the accused violently robbed the complainant and at the time of the robbery they were armed with dangerous weapons, namely, knives and pangas, and that the appellant was arrested shortly at a bus stage in possession of a paper bag containing items which were identified by the complainant as belonging to him; and that the complainant identified the appellant at the police station. The defence case rested on their sworn statements. None of them called witnesses. The essence of their defence was that they did not commit the offence and they were wrongly implicated.

4. In order to put the appeal into a proper perspective, it is necessary to highlight, albeit briefly, the evidence tendered by the prosecution in the lower court. The complainant, PW1, Mr Omar Mwandogo Kengo recalled that on July 22, 2018, he was driving motor vehicle registration number KBQ 3168 transporting clinkers to Athi River. He slowed to go over a bump, but suddenly, the door to the turnboy side opened and three men entered into the vehicle. One of them stabbed him with a knife on the left side of his forehead near the left eye while a 4th person entered from the driver's door and took charge of the vehicle. Using a sisal rope, they tied his hands and pushed him to the back. They also tied his face with his jeans but before they blindfolded him, he saw them. They demanded the key to the fuel tank, ignition key, his phone pin number, and ATM card pin, M-peas pin and also, they demanded to know how much money he had and the luggage he was carrying. They took his phone and trouser. They stopped at Taita village and asked him to alight from and two men escorted him to the bush as the vehicle drove on. They tied him using the vehicles safety belt and ropes and beat him using blows and kicks, then they removed his shoes and left. He identified his shoes in court. He regained consciousness and after a struggle, he unfolded his face, untied the ropes and ran towards the road and flagged down a canter and the occupants agreed to took him the Maungu AP Police Post where he reported

5. He recalled that at Mangu, he saw his vehicle and he notified the police and with Administration Police Officers, they took the vehicle to Maungu Police Station. Shortly, the officers came back with two men carrying a bag which contained his black shoes, and one of the suspects was found with his phone which had been switched off but he switched it on using his pin. He identified the phone in court. The

2 See *Ganpat v State of Haryana* {2010} 12 SCC 59.

accused persons were also found with Kshs 960/= but his wallet was later found under the vehicles seat. He said he identified the two men as the ones who led him to the bush in the moon light.

6. PW2, IP Saad Mohamed, the Deputy OCS, Taita Taveta Police Station said that on July 27, 2018, he received a text from a one Peter Marango, the area chief, informing him that vehicle registration number KBQ 316 S had been stolen at Taita Village Area and Sgt Suedi sent Cpl Yusuf and APC Nyange with whom they searched for the vehicle. He said at the bus stage they saw two men and ordered them to raise up their hands and the 1st accused was carrying a nylon paper bag and upon searching it, they recovered a techno phone, black shoes while Kshs 960/= was recovered from the 2nd accused person's pocket. He said the 1st accused was wearing a cap and on examining his clothes, he had thorns and leafy fresh materials. He said the complainant identified the phone and the shoes as his.

7. PW 3, CPL Yusuf Ng'ang'a testified that he was attached to Maungu Police Post. He recalled that on July 23, 2018, the complainant came to the AP Post while bleeding at the left side of his head and as they were coming back from picking him, they spotted two men at the stage at around 2am. The 1st accused was carrying a luggage and at the police post, the complaint identified them and upon searching them, they recovered a phone, shoes and a jean from the 1st accused all of which the complainant identified as his. They were also found with Kshs 460/= and Kshs 500/= respectively. On cross-examination he stated that there was no identification parade.

8. PW4, No 20113576641 APC Nyambu Mwaniko attached to Maungu Police Post testified that on July 23, 2018 at around mid-night, PW1 who was bleeding from one side of his face reported that he had been robbed and at the bus stage they arrested the accused persons. Inside the paper bag they recovered a pair of black boots, while the 1st accused had a phone tucked into his trouser which was identified by the complainant, money and a chisel while the 2nd accused only had money. He said the complainant identified them as the persons who had attacked him and stole his property.

9. PW5 No 112442 PC Collins Kibet, based at Voi Police Station testified that on July 23, 2018 they received a phone call from the OCS Voi Police Station reporting a case of robbery at Maungu, and on arrival at the AP Post, they found two men who had been arrested by the AP officers. They picked them and took them to Voi Police Station. PW6, No 235273 IP Peter Chiro, a scene of crime officer testified that on July 23, 2018 he photographed motor vehicle KBQ 316S and trailer ZE 5644. PW7 No 39818 PC James Chiro Kanga, the investigating officer, compiled the investigation file, and took charge of the exhibits which he produced the exhibits in court.

10. At the close of the prosecution case, the trial magistrate concluded that the accused persons had a case to answer and put them on their defence. Both elected to give sworn defence.

11. The appellant, Charles Muthoka Wambua stated that he knew nothing about the offence. On cross-examination he stated that he was arrested alone, and that he had only a bottle of soda and on the way the police arrested other persons. He got to know the 2nd accused at the police station. He denied ever carrying the items brought to court.

12. The 2nd accused also denied the offence. He gave an account of his movement on the material day and denied committing the offence.

13. In his judgment, the trial magistrate was satisfied that the complainant was able to identify the accused person "since there were other vehicles and he used lights to identify him." The magistrate also observed that the complainant stated that he was able to see them and identify them when they hijacked him. The magistrate also noted that the police explained how the accused persons were arrested and how the

complainant identified them at the police camp. The learned magistrate gave the 2nd accused person the benefit of doubt and acquitted him under section 215 of the *Criminal Procedure Code*3

(the CPC). However, he was satisfied that the appellant was properly identified and that at the material time, he was carrying a paper bag and that he was found with a phone, jeans and black shoes belonging to the complainant which he did not explain. He took note of the doctrine of recent possession and concluded that the said items were stolen from the complainant. He was satisfied that the evidence against the appellant was overwhelming and convicted him under section 215 of the *CPC*. He sentenced him to serve 20 years in prison.

14. The appellant seeks to overturn the conviction and sentencing citing several grounds. One, that no identification parade was conducted. Two, if at all the complainant had seen the attackers at the time of the robbery, then he never described them at the police station. Three, citing several cases which underscored the importance of positive identification, he argued that identification was not proper. Four, on the alleged recovery of the paper bag, he submitted that no inventory was prepared at the time of the arrest.

15. His other ground was that the charge sheet was bad in law for duplicity and cited *Joseph Njuguna and others v Republic*4

and *Jackson Akumu Yongo v Republic*.5

He also argued that his right to legal representation under articles 50 (2) (g) (h) (2) of the *Constitution* was violated. He faulted the police for wrongfully arresting him arguing that they had not been provided with his description nor had a complaint been recorded at the police station. He dismissed the allegation that he was found with recently stolen goods as a fabrication.

16. The respondent submitted that the appellant was properly identified; that the charge sheet was not defective; and even if it was, the defect was curable by section 382 of the *CPC*. It also submitted that the appellant had not demonstrated violation of his rights under article 50(2) (h) of the *Constitution* nor is there a prescribed mode of arrest. Lastly, that the totality of the evidence was such that all the requisite elements of the offence were proved and cited *Isaac Nganga Kahinga alias Peter Nganmga Kahoya v Republic*6

in support of the holding that all the elements of recent possession were proved.

17. For starters, it is useful to bear in mind the ingredients of the offence of robbery with violence. The Court of Appeal in *Johana Ndungu v Republic*7

listed the ingredients of the offence or robbery with violence as follows: -

i. If the offender is armed with any dangerous weapon or instrument; or

ii. If he is in the company of one or more other person or persons, or;

3 Cap 75, laws of Kenya.

4 Criminal Appeal No 5 of 2008.

5 [1983]

6 Criminal Appeal No 272 of 2005 (UR).

7 Criminal Appeal No 116 of 2005 (UR).

iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.

18. Proof of any one of the above ingredients is enough to sustain a conviction under section 296 (2) of the *Penal Code.* 8

The assailants were armed with a knife and one of them cut the complainant on his face. They tied him and pushed him to the back. I find no doubt that the assailants were armed and they used violence.

19. The critical issue is whether the assailants were properly identified. Before addressing the question of identification, it is important to recall that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration.9

As I stated in *Stephen Mutuku Kenga v Republic*10

consolidated with *Simon Onyango v Republic*,11

human memory is not foolproof. It is not like a video recording that a witness needs only to replay to remember what happened. Memory is far more complex. Memory has been described as consisting of three stages:

Acquisition –

> " the perception of the original event";

Retention -

> "the period of time that passes between the event and the eventual recollection of a particular piece of information"; and

Retrieval -

> "the stage during which a person recalls stored information."12

20. At each of the above three stages the "information ultimately offered as 'memory' can be distorted, contaminated and even falsely imagined."13

At each of these stages, memory can be affected by a variety of factors such as was held in *S v Henderson*:-14

a. whether the witness was under a high level of stress. Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification.

8 See *Olouch v Republic* {1985} KLR 549.

9 *S v Henderson* 27 A 3d 872 (NJ 2011).

10 Criminal Appeal No E003 of 2021

11 Criminal Appeal No E068 of 2021-Voi

12 Lirieka Meintjes van der Walt, *Judicial understanding of the reliability of eyewitness evidence: A tale of two cases*, Fort Hare University, South Africa.

13 *Ibid*.

14 27 A 3d 872 (NJ 2011).

b. whether a weapon was used, especially if the crime was of short duration. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of the subsequent identification if the crime is of short duration.

c. how much time the witness had to observe the event. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.

d. whether the witness possessed characteristics that would make it harder to make an identification, such as the age of the witness and the influence of drugs or alcohol. An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who consumed a small amount of alcohol.

e. whether the perpetrator possessed characteristics that would make it harder to make an identification. Was he or she wearing a disguise? Did the suspect have different facial features at the time of the identification. The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification. Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.

f. how much time elapsed between the crime and the identification? Memories fade with time. The more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.

g. whether the case involves cross-racial identification. Research has shown that people may have greater difficulty in accurately identifying members of a different race.

h. whether the observation of the perpetrator was close or far. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.

i. whether or not the lighting was adequate during the observation. Inadequate lighting can reduce the reliability of an identification.

j. the confidence of the witness, standing alone, may not be an indication of the reliability of the identification, but highly confident witnesses are more likely to make accurate identifications. Even an identification made in good faith could be mistaken.

21. Undisputedly, the fundamental aim of eyewitness identification evidence is reliably to convict the guilty and to protect the innocent. It is important to bear in mind the types of identification evidence.

The common law recognized several categories of identification evidence because the potential dangers of identification evidence differ between the categories. One is positive identification evidence which is evidence by a witness identifying a previously unknown person as someone he or she saw on a prior relevant occasion. Such evidence may be used as direct or circumstantial proof of an offence.15

22. The second category is recognition evidence, which is evidence from a witness that he or she recognizes a person or object as the person or object that he or she saw, heard or perceived on a relevant occasion. Decisional law is in agreement that there is a special need for caution before accepting identification evidence. Significant considerations which largely depend on the facts of the case and may include the circumstances of the sighting; whether the person was known to the witness; the time that elapsed between the sighting and the reporting to police and any differences between the description of the person and their actual appearance.

23. 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.

24. As was held in *Charles O Maitanyi v Republic*,16

it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care. In *Kariuki Njiru & 7 others v Republic*17

the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

25. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

26. 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

15 See *Festa v R* (2001) 208 CLR 593.

16 {1988-92} 2 KAR 75.

17 Criminal Appeal No 6 of 2001 (unreported).

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: -

a. What were the lighting conditions under which the witness made his/her observation?

b. What was the distance between the witness and the perpetrator?

c. Did the witness have an unobstructed view of the perpetrator?

d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e. For what period of time did the witness actually observe the perpetrator?

f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g. Did the witness have a particular reason to look at and remember the perpetrator?

h. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i. 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?

j. What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

27. The trial court in assessing the demeanour of a witness is expected to make a finding as to the integrity, honesty and truthfulness of such witnesses not his or her boldness or firmness. The Court of Appeal in *Toroke v Republic*[18]

had this to say: -

> " It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So, the error or mistake is still there whether it be a case of recognition or identification."

28. Importantly, no identification parade was held in this case. Identification parades are meant to test the correctness of a witness's identification of a suspect. As was appreciated in *Njihia v Republic*:-[19]

> " ...If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly

[18] {1987} KLR 204.

[19] {1986} KLR 422.

conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

29. The court proceeded on the premise that the appellant was properly identified by the complainant. But what is more worrying is the fact that the trial magistrate dangerously descended into the arena of the dispute and introduced evidence which was not adduced before him. At page 20 of the judgment the learned magistrate stated: -

> " The people who hijacked him were four in number and he was able to see them because of use of security lights and the lights of the lorries on the road plus his vehicle."

30. As the record shows, the complainant never mentioned security lights or lights from lorries on the road. Unacceptably, the trial Magistrate converted himself into a prosecution witness and decided to adduce evidence from the bench. The trial magistrate repeated the same mistake at page 21 of the judgment when he stated: -

> " ...it is the evidence of all the prosecution witnesses that indeed the complainant was able to identify the accused persons since there were other vehicles and he used the said lights to identify him."

31. By manufacturing evidence which was not adduced before him, the trial magistrate fell into grave error and committed travesty of injustice.

32. Granted, identification of a suspect in any criminal offence is always a pivotal question and whenever it arises, the trial court has to satisfy itself, before convicting. The evidence must be such that threshold set by the rules and decided case law has been met. The evidence must leave no doubt that the suspect was positively identified. The central element of the cautionary approach recommended in case law is that identification evidence by an 'eyewitness should not be accepted unless it has been rigorously tested. The greatest care should be taken to test identification evidence, and a witness may be tested in cross-examination by requiring him to describe again the appearance of the person(s) he purports to identify. Where such identification rests upon the testimony of a single witness, such evidence standing alone can have little weight.

33. The other important question is whether the identification evidence was free from error and whether it was sufficiently corroborated. First, there was no attempt to collaborate it. The only evidence which to me cannot be sufficient corroboration is the allegation that the complaint's pair of jeans, boots and phone were recovered from the appellant. This piece of evidence is attractive. But it lacks one key missing link, which is, why didn't the police prepare an inventory of the items alleged to have been recovered from the appellant if at all such items were recovered from him. This grave omission renders this piece of evidence manifestly weak and totally unreliable. It is of little probative value.

34. The defence must be weighed against the evidence offered by the prosecution. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi.20

[20] See *Ortese Yanor & others v The State* {1965} NMLR 337

Once an accused person discharges the evidential burden of adducing evidence of alibi, it is the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the evidence adduced by the prosecution and if there is doubt in the mind of the court, the same is resolved in favour of the accused.

35. In order to convict there must be no reasonable doubt that the evidence implicating the accused is true. The correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses. It is acceptable in totality in evaluating the evidence to consider the inherent probabilities and improbabilities. The proper approach is to weigh up all the elements, which point towards the guilt of the accused against all those, which are indicative of his innocence.

36. As I have severally stated in my previous decisions, reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.21

    A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the charged crime have been proven, that the evidence irresistibly points to the accused, and that the evidence is both truthful and accurate.

37. Flowing from my analysis and conclusions on the issues discussed above, it is my finding that the trial court manifestly misdirect itself in returning a finding of guilty. The learned Magistrate dangerously descended into the arena of the dispute and played the unacceptable role of a prosecution witnesses by introducing evidence against the appellant which was not tendered before him. I find that the conviction and sentence cannot be allowed to stand. Accordingly, I hereby quash the conviction, set aside the sentence of 20 years imposed upon the appellant and order that the appellant Charles Muthoka Wambua be released from prison forthwith unless otherwise lawfully held.

    Right of appeal 14 days.

SIGNED AND DATED AT VOI THIS 18TH DAY AUGUST 2022

JOHN M MATIVO

JUDGE

Signed, dated and delivered virtually at Voi this **19th** day **August** 2022

J. N. ONYIEGO

Judge

[21] Duhaime, Lloyd, *Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary*