Mdamu v Republic (Criminal Appeal E005 of 2021)
[2022] KEHC 12973 (KLR) (21 September 2022) (Judgment)

Neutral citation: [2022] KEHC 12973 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E005 OF 2021

JM MATIVO, J

SEPTEMBER 21, 2022

BETWEEN

RAMADHAN MDAMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Appeal against conviction and sentence in Criminal case number 720 of 2017, Voi, R v Ramadhan Mdamu delivered by Hon. D. Wangechi on 21st April 2021)

JUDGMENT

1. Ramadhan Mdamu (the appellant) was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (1) of the *Penal Code*.[1] The facts were that on December 7, 2017 at 8.00pm at railways quarters in Voi town, within Taita Taveta county, he robbed Mary Wanja Kamau the items listed in the charge sheet all valued at Kshs 32,000/= and immediately before such robbery used actual violence on her.

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.

1 Cap 63, Laws of Kenya.

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

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 4 witnesses. The crux of the prosecution case was that the accused violently robbed the complainant; that the appellant identified by the complainant at an identification parade. The defence case rested on evidence and that of two witnesses. The essence of their defence is that he did not commit the offence and that identification was not free from error.

4. PW1, Mary Wanja Kamau testified that on December 7, 2017 at 8.00pm on her way home a man pounced on her, held her neck, she fell down and he snatched her hand bag and ran away. She said she saw him because the place is well lit, that he was wearing a ¾ trouser and he had a deadlock. A few days later she identified him at an identification parade at the police station. On cross-examination, she said she had previously seen him, and that he operates a boda boda.

5. PW2, Mark Mwaura testified that he as at home on the material day, that he heard someone screaming and went out and 20m, from his house, he saw a person wearing a ¾ short and a whitish shirt running. He found his wife surrounded by neighbours who had responded to the screams. He said it as dark, so, he did not identify the person.

6. PW3, IP Patrick Amwayi testified that he conducted a 9-man parade, eight of whom had similar height and stature; that the suspect had no objection to the parade and he said he did not need a lawyer or a witness. He said the complainant positively identified the suspect, and that the appellant had no objection with the manner he was identified.

7. PW4 PC Linet Mukuta testified that on December 15, 2017 at around Mazeras he saw the appellant whom he knew and against whom a complaint of assault had been lodged, so she asked him to accompany him to the police station. She also said unknown to her, her colleague, PC Kirui was also investigating the appellant for a case of robbery.

8. In his defence, the appellant recalled that on December 14, 2017, he was at Mazeras when police arrested him on allegations of damaging property at Kaloleni. He was arraigned in court, but later returned to the station where a parade was to be conducted. He said PC Kirui told him to go back as he had enough members in the parade but he was later called and asked to join the parade, and at that point the complainant walked in and touched him.

9. DW2 Nancy Wachi Mwakori, his mother said that she was at the police station, and the appellant was assaulted by a police officer, She said the complainant was taken to the cell where she identified the appellant.

10. DW3 Philister Mboli Mwakoi was also at the police station where the appellant was facing a charge of damaging property. She said an officer claimed that the appellant was facing another case, so he was moved to the CID office and they started beating him calling him a thief. She said PC Kirui called the complainant who came and said she did not know the appellant, but they called the appellant and exposed him to her then he was taken back to the cells after which she was called to identify him.

11. In her judgment, the learned magistrate distilled the following issues, namely, whether the offender was armed with dangerous weapons; whether the offender was in the company of one or more persons; or whether immediately before or immediately after the robbery, the offender wounded, beat, struck or used other personal violence against the victim. After evaluating the evidence and case law, the magistrate was persuaded that the facts only disclosed simple robbery. On identification, she was persuaded that the scene was well lit, hence, the appellant was positively identified. She was also persuaded that the identification parade was free from error. She convicted the appellant for the offence of robbery as charged and sentenced him to serve 5 years imprisonment.

12. Aggrieved by the verdict, the appellant appealed to this court. His grounds can be summarized as : - (i) identification was not free from error, (ii) defective charge sheet, (iii) identification parade breached the standing orders; (iv) crucial evidence was not adduced; (iv) the evidence was marred by contradictions and inconsistencies; (v) that the burden of prove was shifted to him; (vi) his constitutional rights were violated.

13. In his amended grounds of appeal, the appellant offers mitigation, apparently guided by the *Muruatetu case*, such that he seems to be seeking re-sentencing. He states that he was aged 17 years at the time he was convicted, and that he pleads for non-custodial sentence. He urged the court to consider that he is a first offender, that he is remorseful, that he was addicted to alcohol, that he had reformed.

14. The respondent's counsel argued that the offence carries 14 years, hence the sentence imposed is lenient and urged the court to dismiss the appeal.

15. Even though the appellant in his submissions opted to offer mitigation, evidently, seeking re-sentencing in line with the *Muruatetu case*, it is my duty to re-evaluate and re-analyse the evidence before the lower court and satisfy myself that the conviction was supported by the evidence. As was held by the Supreme Court of India: -[3]

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the judge to see that justice is appropriately administered, for that is the paramount consideration of a judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely, ... The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

16. The ambit for the interference by a first appellate court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong.[4] Factual errors may be errors where the reasons which the trial magistrate provides are unsatisfactory or where he/she overlooks facts or improbabilities. Also, where the finding on fact is not dependent on the personal

[3] *K. Anbazhagan v State of Karnataka and Others*, Criminal Appeal No. 637 of 2015.

[4] See *S v Hadebe* and Others 1997 (2) SACR 641 (SCA) t 645e- f.

impression made by a witness' demeanour, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court.[5]

17. When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.[6]

18. The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.[7]

19. This court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions / findings or judgment.[8] In other words, this court must consider whether the magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the convictions and sentence. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.[9]

20. A fundamental issue that warrants attention is the identification evidence, and whether it was free from error. I have stated in several previous decisions that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration.[10] 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: –

> " 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."[11]

5 Ibid.

6 As Nugent J (as he then was) in *S v Van der Meyden* 1999 (1) SACR 447 (W) stated at 450.

7 As was stated in *S vs Singh* 1975 (1) SA 227 (N) at 228:.

8 Ibid.

9 Ibid.

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

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

21. At each of the above three stages the "information ultimately offered as 'memory' can be distorted, contaminated and even falsely imagined."[12] At each of these stages, memory can be affected by a variety of factors such as was held in *S v Henderson*: -[13]

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.

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.

12 Ibid.

13 27 A 3d 872 (NJ 2011).

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.

22. 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.[14]

23. 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.

24. 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.

25. As was held in *Charles O. Maitanyi v Republic*,[15] it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. 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. In absence of collaboration, the court needs to treat it with caution. At paragraph 21 above, I listed crucial tests in cases of this nature. Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. To me, this was a pertinent issue the trial court did not consider. Even though the complainant said the place was lit, it was necessary for the trial court to properly satisfy itself that the identification was free from error.

26. However, I note that the trial court placed more weight on the identification parade. Identification parades are meant to test the correctness of a witness's identification of a suspect. This position was appreciated in *Njihia v Republic*[16] which held: -

> "...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

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

15 {1988-92} 2 KAR 75.

16 {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."

27. The appellant and his witnesses faulted the identification parade on several fronts. DW3 is on record saying they were at the police station when the complainant was called to identify the suspect. They said she came very fast, and the appellant was called from the cell and exposed to the complainant. This allegation seriously dented the ensuing identification. It eroded its evidential value. The witnesses were not questioned on this crucial assertion which touches on the credibility of the prosecution case.

28. For an identification parade to be fruitful and of evidential value, the identification rules must be complied with. Failure to adhere to the identification parade guidelines affects the evidential value of a resulting identification. The Court of Appeal in *Samuel Kilonzo Musau v Republic*[17] stated: -

> " The purpose of an identification parade, as explained in *Kinyanjui & 2 Others v Republic (1989) KLR 60*, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

29. The procedures governing police identification parades are provided for in the Police Force Standing Orders pursuant to the *National Police Service Act*.[18] These procedures were explained in *R v Mwango s/o Manaa*[19] and *Ssentale v Uganda*.[20] The rules include: -

    a. The accused has the right to have an advocate or friend present at the parade;

    b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

    c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;

    d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);

17 {2014} e KLR.

18 Act No. 11A of 2011.

19 {1936} 3 EACA 29.

20 {1968} E.A.L.R 365.

e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

30. 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. If the police force standing orders in respect of conduct of identification parades are flouted, the value of the evidence of identification depreciates considerably. In *Ajode v Republic*[21] the Court of Appeal held that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade. In *John Mwangi Kamau v Republic*[22] the Court of Appeal held: -

> " 15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this court's decision in *John Kamau Wamatu v Republic* – criminal appeal No 68& 69 of 2008. In this case *Eliud, George and Joseph* testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them..."

31. A cautionary rule with particular application to identification evidence was formulated by Dowling, J. in the much-cited case *R v Shekele*.[23] It is worth repeating: -

> "questions of identification are always difficult. That is why such extreme care is always exercised in the holding of identification parades - to prevent the slightest hint reaching the witness of the identity of the suspect. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks, or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement, unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake. Where the accused is an ignorant native who is unrepresented by counsel or attorney and who is therefore unable himself to probe the evidence of identification and where the prosecutor has not done so, the court should undertake this task, as otherwise grave injustice may be done."

21 {2004} 2 KLR 81.

22 {2014} e KLR.

23 *R. v. Shekele and another* 1953 (1) (SA) 636 (T). Although judgement was delivered in this case in 1947, it was not reported until 1953. In the period between 1947 and 1953 it was frequently referred to, in its unpublished form.

32. The central element of the cautionary approach recommended in the above case 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 and the accused was identified at a parade which was conducted in a manner which did not guarantee the standard of fairness observed in the recognised procedure, but was calculated to prejudice the accused, such evidence standing alone can have little weight.

33. I am not satisfied that the identification evidence was free from error nor was it was sufficiently corroborated. Its my finding that the ensuing finding of guilty, conviction and sentence are supported by very weak evidence. I find and hold that this appeal succeeds. The up shot is that the conviction is quashed and the sentence is set aside. I order that the appellant Ramadhan Mdamu be released from prison forthwith unless otherwise lawfully held.

Right of appeal 14 days

SIGNED AND DATED AT VOI THIS 19TH DAY OF SEPTEMBER 2022

JOHN M. MATIVO

JUDGE

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2022

OLGA SEWE

JUDGE