



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jiro v Republic (Criminal Appeal 75 of 2016)  
[2019] KEHC 12495 (KLR) (14 March 2019) (Judgment)**

Neutral citation: [2019] KEHC 12495 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL 75 OF 2016  
HPG WAWERU, J  
MARCH 14, 2019**

**BETWEEN**

**GALGALO WAKO JIRO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence dated 26/9/2016  
in Nanyuki CM Criminal Case No 502 of 2015 – L Mutai, CM)*

**JUDGMENT**

1. The Appellant in this appeal, Galgalo Wako Jiro, was the 1<sup>st</sup> accused before the trial court. He was convicted after trial of robbery with violence contrary to section 296(2) of the [Penal Code](#) and sentenced to death. His co-accused was acquitted. It had been alleged in the particulars of the offence that on 26<sup>th</sup> April, 2005 at about 02.30 a.m. at Makutano, Nanyuki in Laikipia County, jointly with another not before the court, and being armed with a dangerous weapon, namely an AK 47 rifle, they robbed -

“(1) LG TV 24” (2) LG DVD (3) Woofer Sayona (4) Microwave make Ramtons (5) Nokia 2600 Classic IMEI 358235036 420294 and (6) 6 kg Total Meko gas with stand and burner, all valued at KShs 56,699/00, the property of Frida Kendi, and immediately after the robbery shot and wounded Dorothy Ngirote Kaburu”.

2. The Appellant has appealed against both conviction and sentence. The conviction is challenged mainly upon the ground that the Appellant’s identification was not good and free from error, the circumstances for the same not having been conducive.



3. The Republic has supported the conviction upon the ground that the Appellant's identification was good, positive and free from any error.
4. . This is a first appeal. It is therefore the duty of this court to examine the evidence placed before the trial court and arrive at its own conclusions regarding the same. I must however bear in mind that I neither saw nor heard the witnesses myself, and give due allowance for that fact.
5. The Appellant was convicted upon the identification evidence of one single witness, Dorothy Nkirote Kaburu (PW1). On 26<sup>th</sup> April, 2015 at about 2.30 a.m., she and her husband, Hilary Gitau Macharia (PW2) were sleeping when they were woken up by sounds from a neighbour's house of a metal door "being cut". They got up, dressed and went out to wake up other neighbours. One of those neighbours was called Hassan who never testified. The prosecution told the court that he refused to record a statement.
6. . When PW1 and PW2 went out they confirmed that it was the house of Fridah Kendi (PW3) that was being broken into. She was at that time away travelling to Nairobi.
7. . PW1 further testified that PW2 and Hassan went to check PW3's house, leaving her in her own house. She then heard a gunshot, and PW2 and Hassan began to run away. She did not state how she was able to see them running away while she was in her house.
8. . PW1 continued with her testimony as follows. People put on their security lights as they raised alarm. Her testimony is now worth reproducing verbatim:

"I came out to check out why my husband Hilary had not come out of the house. I saw him missing. He hid in the third row of the houses. Then I saw the two people who were chasing him. The one in front was holding something. The one behind directed the one in front to where I had seen by husband get into to hide. He was with Hassan. The one in front was about 4 to 5 metres away from (me). He was tall, black, and in a long coat (kabuti). I saw him direct what he was holding towards where my husband was hiding. There had been several gun shots after the first one. So in my mind I drew the conclusion that it must be a gun he was holding. I realised he would shoot my husband. I screamed out of fear. He turned to me and shot me. I felt as if I had hiccup. The force of the gunshot threw me back into the house. I was unconscious. I found myself at Kenyatta National Hospital where I learnt that I had been transferred from Nanyuki General Hospital. I stayed in Kenyatta National Hospital for 3 weeks ...

"On 2<sup>nd</sup> June 2015 the police came for me from home. I was told that a person had been arrested, and the police wanted me to see whether I would identify him. He was put in a parade where I identified him.

"On the fateful night I saw the person who was in front. I could see him well. He was tall (and) black. He was in a trench coat. He was slim. The one behind was shorter but the one I saw well was the one I concentrated on. The security lights were on. The one from our house was Hassan's door.

"...the security lights are at the two ends of our row. Our row has 4 houses. The 1<sup>st</sup> robber came from one end of the row. There was light there, and...all the security lights were on in the compound. I could see the person well from where I was...."



9. In cross examination PW1 stated –

“...I said the person I saw was in a trench coat - tall, dark person in a black trench coat. I had seen your face. Your face cannot leave my mind. I recorded in my statement that I can identify the person if I see him by their facial appearance. (Statement read - nothing about facial appearance).

“I picked you because I saw you. I had not known you before. The security lights were on. The jacket was black....”

10. That testimony of PW1 regarding identification so impressed the trial court that it felt confident in basing the Appellant’s conviction solely upon it. The trial court properly dealt with that testimony as follows in its judgement -

“... PW2 Hilary, although he was at the alleged scene of crime, was not able to see the suspects well. All the other witnesses for the prosecution were not at the alleged scene of crime but Nkirote (PW1) who is the key identifying witness for the prosecution.

“This court has at this juncture warned itself of that fact, and also the dangers likely to surface in arriving at a conviction fortified by the evidence of a sole witness. The evidence of a single witness must be tested with great care and caution as was held in the case of David Simiyu Wafula –vs- Republic, Nairobi HC Criminal Appeal No 1333 of 2002. In our case the court heard that the offence occurred at about 2.30 a.m. It was at night. PW1 testified that she did not know the accused before, but that she saw the 1<sup>st</sup> accused well at the alleged scene of crime. What is clear is that we are dealing with the issue of identification and not recognition.”

11. The trial court then proceeded to closely examine the testimony of PW1 as pertained to the identification of the Appellant. The trial court concluded as follows-

“From PW1’s evidence I was satisfied that the person who shot her was indeed close to her, well confirmed by the impact caused by the single bullet that shot her. On being shot the impact threw her back to the house where she fell unconscious. That bullet hit her neck, passed through her right shoulder before exiting through the back. The bullet exit wound was 5 inches long.

“From the above, I was satisfied that the person who shot her was indeed close to her, hence the said impact. He was just about 4 - 5 meters away from her. I was also convinced that the complainant was able to see the face of the thug pretty well due to the short distance between the two. She testified that before she was shot she came face to face with the thug. She was able to see him well, his physical appearance and the colour of the skin – a dark person.

“The scene was well lit with electricity security lights, well confirmed by PW2 Hilary. PW1 had sufficient time to watch the two thugs as they went after her husband and before coming face to face with the one holding the gun and who shot her. Besides, the face of the first suspect remained unmasked.

“I had no reason to doubt her evidence that she saw the first thug pretty well and was able to identify him later in the identification parade, and also before the court as the first accused. I had no reason to doubt the credibility of the identification parade which was conducted by CIP Muriithi – PW9.



“The surrounding circumstances, I found, favoured a positive identification of 1<sup>st</sup> accused, which identification was without any possibility of error or mistake. PW1 was a credible witness whose evidence I had no reason to doubt as it remained firm on cross-examination. Even if the 1<sup>st</sup> accused denied the allegation in his alibi defence, which I carefully considered, I found the same as a mere afterthought since it was not raised during the hearing of the prosecution case...

12. I have reproduced the above passages of the judgment of the trial court to demonstrate that it was so impressed by the testimony of PW1 that it overlooked other vital aspects of the case.
13. . It will be noted that although PW1 consistently told the trial court that she had noted the physical features of the Appellant and had given a description of the same to the police, her own statement recorded by the police contained no such description the appearance of the person who had shot her. The trial court (a previous Chief Magistrate) noted the same on the record.
14. . Secondly, it will be noted that even if indeed PW1 had given a description of the Appellant to the police, which as we have seen is doubtful, it was not such description that led to his arrest. The Appellant was arrested following information given to the police by an informer who never testified so that the Appellant could face his accuser! The trial court dealt with this aspect of the case in a rather cursory manner. It said -

“It was raised by the defence that the police informer was not called forth as a witness for the prosecution. The finding of this court is that failure by the prosecution to call that informer, and who may not have been at the alleged scene of crime, does not in any way water down the prosecution’s case. His evidence may not have been of any value to the prosecution’s case and his absence does not negate the fact that the said robbery indeed did occur.”

15. It will be recalled that when the Appellant was arrested at his own house more than one month after the robbery, nothing connected to the robbery was recovered from him or his house. So, what was the basis of the informer’s information to the police that directly led to the Appellant’s arrest?
16. Two other disturbing things appear to have pushed the police towards charging the Appellant. PC Mathew Nudy (PW5) was one of the arresting officers. He stated as follows during his testimony-in-chief:

“...We found the wife of Galgalo who was bathing in the bedroom.

“...We began to conduct search. We had been told that Galgalo and his colleague had an AK 47 used in (the) robbery. We never found the gun. I interrogated the wife of Galgalo. Galgalo’s child followed me on seeing me carrying my AK 47. The child told me that the gun looked like the one that belonged to them.

“I became very suspicious. I decided to investigate Galgalo’s wife. I asked what she knew about the gun, (and) where her husband was when the alleged incident happened. She told me that when they lived in Likii the husband had an AK 47 but when they moved to Ngareng’iro she had never seen it.

“I told her about the alleged offence, and she said her husband had been away for 1 month and she did not know where he was.”

17. The police thus obtained information that was highly prejudicial to the Appellant from his wife who could never have been a compellable witness against him in the proceedings at hand. It was wrong for



the trial court to allow PW5 to adduce that evidence, particularly bearing in mind that the Appellant was undefended at his trial. Although the trial court did not advert to that evidence in its judgment, no doubt it was at the back of its mind when dealing with PW1's testimony on identification.

18. The same prejudice applied in respect to what the Appellant's child told PW5. How old was the child, and why was he/she not called to testify?
19. . It appears to me that it was after the police obtained these unlawful tips from the informer, and also from the Appellant's wife and child, that they decided to conduct an identification parade at which PW1 picked the Appellant. The fact that the Appellant was not arrested because of any description of the person who shot her PW1 may have given to the police, casts her identification of the Appellant in serious doubt which must be resolved in the Appellant's favour. I am not at all satisfied that his conviction is safe.
20. . In the circumstances I will allow this appeal in its entirety. The Appellant's conviction is hereby quashed and the sentence of death imposed upon him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered

**DATED AND SIGNED AT NANYUKI THIS 11<sup>TH</sup> DAY OF MARCH 2019**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 14<sup>TH</sup> DAY OF MARCH 2019**

