



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kariuki & 2 others v Republic (Criminal Appeal E046 of 2023)
[2025] KEHC 1604 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1604 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E046 OF 2023
GL NZIOKA, J
JANUARY 23, 2025**

BETWEEN

STEPHEN KIHUNGI KARIUKI 1ST APPELLANT

SAMUEL MWANGI WAMBUI 2ND APPELLANT

SAMUEL KAGIRI NDERITU 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon. Nathan Shiundu Lutta Chief Magistrate (CM) delivered on; 16th March, 2023, vide Chief Magistrate's Criminal case No. 30 of 2019)

JUDGMENT

1. The appellants were arraigned before the Chief Magistrate's court at Naivasha charged vide Chief Magistrate Criminal Case No. 30 of 2019, in count (1), with the offence of robbery with violence contrary to section 295 as read with 296(2) of the [Penal Code](#) (Cap 63) Laws of Kenya
2. The particulars of the offence are that on the 5th day of January 2019 at Chokereria area of Gilgil sub-County within Nakuru County jointly with not before the court, while armed with dangerous weapons namely swords and rungas, robbed Daniel Mwangi Ngunjiri a motor vehicle make Toyota Fielder Reg. No. KBM 318S, cask Kshs. 6,400.00 and one mobile phone Itel, all valued at Kshs. 477,900 and at the time of such robbery used actual violence to the said Daniel Mwangi Ngunjiri.
3. The appellants were charged together with Peter Geturo Wambugu and Isaac Kabugua Kimani who were subsequently acquitted.
4. The 3rd appellant together with Peter Geturo Wambugu and Isaac Kabugua Kimano were charged with an alternative charge of handling stolen goods contrary to section 322(2) of the [Penal Code](#).



5. The appellants pleaded not guilty to the charges and the case proceeded to full hearing. The prosecution case in a nutshell is that on the 5th day of January 2019, (PW1) Daniel Mwangi Ngunjiri (herein “the complainant”) was travelling from Nyahururu to Nairobi while driving a white Toyota Registration No. KBM 318S.
6. That at about 8:00 p.m. while approximately six (6) kilometres from Gilgil he slowed down due speed bumps when a man entered the co-driver seat and ordered him stop. That the man opened the left rear door and three other people entered the vehicle and instructed the complainant to co-operate as they drove towards Gilgil town.
7. That on reaching Gilgil town the complainant was gagged from screaming, and attackers took over the vehicle and drove to the highway towards Nakuru. At that time the complainant was robbed of Kshs. 6,500 and they demanded to know his Mpesa PIN. According to the complainant the attackers branched off onto a dusty road and drove for approximately four (4) kilometres before stopping and ordering him to alight.
8. That he was left with two (2) robbers who tied his hands with a rope and made him walk for about 100 meters up the hill while the other two (2) others robbers drove off. That as the robbers conversed on phone the complainant managed to untie his hands and ran away.
9. That after about 250 meters he got assistance from a nearby house and called the police and his wife PW3 Judith Ntinyari Migwi who tracked the vehicle and found it stationary at Lanet. That she coordinated with the police offices from Gilgil and the vehicle was recovered.
10. The appellant was then taken to Gilgil Police Station where he recorded his statement and taken to hospital for treated for pain in the throat and neck area. PW4 Dr David Kuria a medical officer at Gilgil sub-County Hospital produced the P3 form which that indicates that the complainant had pain in the throat due to strangulation and classified the injuries as harm.
11. That on 7th January 2019 the complainant was requested to attend an identification parade conducted by PW5 No. 235285 IP Rita Wanekaya the Deputy OCS Gilgil. PW5 testified that the parade was conduct between 4:40 p.m. to 5:00 p.m and the complainant managed to identify the 1st and 2nd appellant. That the complainant also identified the 3rd appellant as having been involved in the commission of the offence and after investigations the appellants were charged accordingly.
12. At the conclusion of the prosecution case the appellants were placed on their defence. The 1st appellant in a sworn statement testified that, on 5th January 2019 he received a call from someone in Gilgil. That the following day he went to Gilgil Police Station to inquire about his friend who was in custody. Thereafter, he proceeded to a hotel to have tea and quarrelled with someone and was arrested and subsequently charged with the offence before the court. He argued that the investigating officer did not testify and that no witness identified him.
13. The 2nd appellant gave a sworn statement where he denied committing the offence. He stated that the identification parade was not done properly and that the investigating officer did not testify.
14. The 3rd appellant chose to give an unsworn testimony and stated that police officers searched his house but they did not recover anything. That on 6th January 2021 he was taken to the DCI offices but the complainant stated that he did not know him. Nonetheless, he was arraigned and charged with the offence before the court.



15. At the conclusion of the case, the trial court vide a judgment dated 16th March 2023, found the appellants guilty on the main count and convicted them accordingly. The appellants were then sentenced to suffer death as provided for under the law.
16. However, the appellants are aggrieved by the decision of the trial court with the 1st and 2nd appellant relying on the following grounds of appeal reproduced verbatim here below:
 - a. That the appellant pleaded not guilty in the instant case.
 - b. That the learned Trial Magistrate erred in law and facts when he convicted the appellants in a prosecution case where the charge of robbery with violence was not proved.
 - c. That the learned Trial Magistrate erred in law and fact when he convicted the appellants in the prosecution case where the key issue of contention was identification and was not proved by the prosecution.
 - d. That the learned Trial Magistrate erred in law and fact by applying the wrong standards of proof in criminal case which was a standard of probability instead of reasonable doubt.
 - e. That the learned trial Magistrate erred in law and fact by convicting the appellants but did not consider the appellants' defence.
 - f. That the learned Trial Magistrate erred in both law and fact when he sentenced the appellants to a harsh sentence.
 - g. That they pray to be present during the hearing of the appeal.
17. The 3rd appellant on his part appeals against the decision on the following grounds similarly reproduced verbatim:
 - a. That the learned trial Magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence of robbery with violence were not conclusively proved.
 - b. That the learned trial Magistrate erred in law and fact by convicting the appellant on evidence of PW1 a single identifying witness yet failed to appreciate that there was no proper identification parade conducted for the appellant for positive identification thus it was an error in law to rely on dock identification.
 - c. That the learned trial Magistrate erred in law and fact by convicting the appellant yet failed to find his defence was cogent and believable.
 - d. That the learned trial Magistrate erred in law and fact when he convicted the appellant yet failed to find the prosecution did not discharge the burden of proof.
 - e. That I pray to be supplied with a copy of the original trial court proceedings and its judgment.
 - f. That further grounds shall be adduced at the hearing of this appeal.
 - g. That I wish to be present during the hearing and determination of this appeal.
18. It is noteworthy that the appellants filed same amended grounds of appeal albeit without the leave of court which states that: -
 - a. The appellant was not properly identified by the law.
 - b. The ingredients of the offence of robbery with violence were not conclusively proved as required by law.



- c. Crucial witnesses were not availed by the prosecution to testify.
 - d. The sentence awarded was harsh, excessive, cruel and unconstitutional.
 - e. The the appellant's defence was not conclusively considered.
19. Be that is it may, the appeal was opposed by the respondent based on the grounds of opposition dated; 16th January 2023 which states:
- a. That the plea was read and they pleaded not guilty.
 - b. That charge of robbery with violence was proved beyond reasonable doubt.
 - c. That the procedures of identification parade were done accordingly.
 - d. That the trial court considered the appellants defence which was full of mere denials and not substantiated.
 - e. That the sentence imposed was within the law.
20. The appeal was disposed of vide filing of submission with each appellant filing individual submissions which I have considered together. The appellants submitted that the prosecution failed to prove the ingredients of the offence herein and cited the case of, *Oluoch vs Republic* [1985] KLR where the Court of Appeal set out the ingredients of the offence being that; the offender is armed with a dangerous weapon, the offender was in the company of other people, that immediately before or during or after the time of robbery the offender wounds, beats, strikes, uses actual violence or threatens to use actual violence to any person.
21. That no evidence was adduced that showed that the appellants were armed with any dangerous weapons or used any force against the complainant as the complainant never testified to that effect.
22. Further, the P3 form was inadmissible as it was produced by PW4 Dr. Kurai who was not the maker contrary to the provisions of section 77 of the *Evidence Act* (Cap 80) Laws of Kenya. That, the prosecution never sought leave of the court to allow PW4 Dr. Kuria to produce the P3 form on behalf of of Dr. Salim who filled the same. Furthermore, the prosecution never advanced any reason why Dr. Salim could not be called to testify. Additionally, the trial court never inquired from the appellants whether they had any objection to PW4 Dr. Kuria producing the P3 form.
23. The appellants argued that, the failure to call Dr. Salim prejudiced them as they were unable to cross-examine him on the contents of the P3 form in contravention of Article 50(2)(k) of *the Constitution* of Kenya.
24. The appellants further submitted that, they were not properly identified by the complainant as the conditions during the commission of the offence were not favourable for positive identification. That, the complainant testified that, he was forced to lie down near the gear box while his attackers were driving the car therefore it was not possible for the complainant to identify the robbers even if there was moonlight and/or lights from passing vehicles.
25. Further still, that the complainant testified that the offence was committed at night between 8:00 p.m. and 2:00 a.m. and that he was taken to the forest where he stayed for about five (5) hours. However, he never gave any evidence as to the intensity and/or brightness of the moonlight, whether it was a full moon considering that the moonlight could have been blocked by the trees.
26. The appellants relied on the case(s) of, *Maitianyi vs Republic* [1986] KLR, *Wamunga vs Republic* (1989) KLR 424, *Abdalla Bin Wendo & Another vs Republic* (1953) 20 EACA 166 and *Paul Etole*



- & Another v Republic Criminal Appeal No. 24 of 2000 where the Court of Appeal stated that courts should warn itself of a need for caution where the case against an accused depends wholly or substantially on the correctness of identification.
27. Further, that the court should carefully examine the circumstances of identification and make an inquiry as to the nature of light that assisted a witness to make recognition failure of which evidence of recognition may not be free from error.
 28. The appellants further submitted that the identification parade was not properly conducted contrary to the National Police Force Standing Orders. That, the complainant was required to give a description of the robbers to the police before an identification parade was conducted as held by the Court of Appeal in the case of, Fredrick Ajode Ajode v Republic [2004] eKLR. But, there is no evidence that the complainant gave any description of the robbers to the police.
 29. That in the 3rd appellant submitted that, he never took part in the identification parade and no identification parade form produced by the prosecution to prove the same, a clear indication that the complainant did not have a clear impression of his attackers.
 30. The appellants faulted the prosecution for failing to call the investigating officer, who was a crucial witness to shed light on how he connected them to the offence taking into account that the complainant never gave a description of the robbers to the police officers. The appellants relied on the case of; Bukenya & others vs Uganda and Julius Kalewa Mutunga vs Republic [2006] eKLR where it was held that the prosecution has discretion to call any witness and that the court will only interfere where it is shown there was some oblique motive.
 31. Lastly, the appellants submitted that, the sentence to suffer death imposed by the trial court was unconstitutional, harsh and manifestly excessive. That although the sentence meted out was the only sentence applicable under the law but it interfered with the trial Magistrate discretion to impose a lesser sentence.
 32. Furthermore, the mandatory nature of the sentence offended the provisions of Article(s) 25(c), 27(1), (2) and (4), 28, 29(f), 50(2)(p) and 160 as it prevented the trial Magistrate from considering their mitigation as his hands were tied. That the court should invoke the provisions of Article 2(6), 10(2), 73(1)(a)(iii) and (v), section 333(2) of the Criminal Procedure Code, and paragraph 5.5 of the Judiciary Sentencing Guidelines and set aside the sentence imposed by the trial court and substitute it with an appropriate sentence.
 33. However, the respondent in response submissions dated 16th January 2024, argued that the prosecution proved the commission of the offence of robbery with violence beyond reasonable doubt. That, the P3 form produced confirmed the injuries sustained by the complainant which corroborated his evidence that he was robbed and injured.
 34. Further, the complainant was able to positively identify the appellants as they were in close proximity for several hours and there was enough moonlight on the day of the offence. That, the evidence adduced proved the ingredients of the offence of robbery with violence as set out in the case of; Oluoch vs Republic [supra].
 35. The respondent further submitted that the identification parade was conducted according to the laid down rules. That (PW5) IP Rita Wenekeya testified that the complainant was able to identify the appellant by touching them on different identification parades and produced the identification parade forms as prosecution exhibits 7 and 8.



36. The respondent argued that the defence offered by the appellants were hollow, shallow and mere denials lacking in substance as they failed to counter the prosecution evidence. That, the appellants did not explain the circumstances under which they were found with the subject vehicle if they were not the robbers. Further, the trial court in reaching its decision analysed and evaluated the evidence presented by both the prosecution and the defence and formed an opinion that the prosecution had proved its case beyond reasonable doubt.
37. Lastly, the respondent submitted that the sentence for the offence of robbery with violence in provided for in law and that upon conviction one should suffer death. That, the sentence as meted out was lenient considering the circumstances of the offence and urged the court to uphold and confirm the sentence.
38. At the conclusion of the arguments advanced by the respective parties herein and the materials before the court, I note that, the role of the 1st appellate court as stated in the case of *Okeno -vs Republic (1972) EA 32* is to evaluate the evidence afresh and arrive at its own conclusion taking into account that this court did not benefit from the demeanour of the witness.
39. To revert back to this matter, the appellants have been convicted of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The provision thereof state as follows: -
- “If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately 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.
40. Pursuant to the afore provisions to prove the aforesaid offence the prosecution must prove inter alia:
- a. Theft-that the offender stole something capable of being stolen
 - b. Violence-that the offender used or threatened to use violence to obtain or keep the stolen item, or prevent or overcome resistance;
 - c. Armed- that the offender was armed with a dangerous weapon and was in the company of others.
41. In the instant matter, I note that the trial court relied mainly on the evidence of (PW1) Daniel Mwangi Ngunjiri, the complainant on of identification to convict the appellants of the offence of robbery with violence.
42. According to the complainant the offence was committed between 8.30 p.m. to 2.00 a.m as such he stayed with the appellants for a long time and in close proximity. Further that, there was moonlight and lights from on-coming vehicles. Furthermore, it is the 3rd appellant who drove the vehicle for about six (6) kilometers and that the 1st appellant has a peculiar head and ears that pop out.
43. In convicting the appellants the trial court reiterated and relied on the afore evidence and stated that there was proof of robbery involving three (3) people. That the 3rd appellant drove the vehicle for six (6) kilometres, while the 1st and 2nd appellants stayed with the complainant for five (5) hours and there was moonlight. Further the 1st and 2nd appellant were identified in the identification parade.
44. However, I note that, the trial court did not consider salient matters that arose during the trial. First and foremost, when 3rd appellant cross-examined (PW1) the complainant, he stated that he could not recall the clothes the 3rd appellant was wearing on that day. Further, he could not recall whether the



- 3rd appellant participated in the robbery but could only recall that he drove the vehicle and thought the appellant was a Luhya. It suffices to note that no identification parade was conducted in respect to the 3rd appellant. The question that, arises is was he positively identified as having been involved in the robbery.
45. As regards the herein 2nd appellant the evidence of that linked him to the offence as led by both (PW1) Daniel Mwangi as stated herein and of and PW5 No. 235285 IP Rita Wanekaya is that, PW1, identified two (2) people on the identification parade. However, on the parade conducted for the 2nd appellant, the complainant identified two people that is, the 2nd the appellant and another was not a suspect.
 46. Furthermore, at the end of the parade exercise that, the 2nd appellant stated he was not satisfied the process of the parade as some members of the parade were not as tall as he was. The question in this, where a witness attends an identification parade and identifies two (2) people including one who is not a suspect, can the identification of the suspect be proper. If the complainant could mistake a “non-suspect” Is it possible he could make a mistake in identifying the 2nd appellant?
 47. As regard 1st appellant the main key features that PW1 relied on were alleged “peculiar head and pop out ears”. If indeed these features were peculiar, the question is, were the other members of the identification parade have similar features. There is no evidence to support the same. If that is so, was the identification parade properly conducted?
 48. That said, there are several other issues that evaded the trial court. First and foremost PW1 Daniel Mwangi Ngunjiri testified that, he did not give the police officers any description of the suspects when he reported the incident. Secondly he was not even aware, whether any suspect was arrested. Therefore he did not lead to the arrest of the appellants. He stated that, he was in the bush from 8.30 p.m. to 2:00 a.m. during moonlight, the question is what was the intensity of the light? Furthermore through his evidence in chief, the complainant did not testify as to whether the appellants were armed with any offensive weapon or not.
 49. The other issue not considered by the trial court is how the appellants were arrested and connected to the offence. The evidence reveals the robbery was on 4th January 2019, the vehicle recovered on 5th January 2019 and identification parades for 1st and 2nd appellant conducted on 7th January 2019.
 50. It is suffice to note that the prosecution closed their case without calling the arresting officer(s) and the investigation officer. Several questions arise; how were the appellants arrested? who led to their arrest? How were they identified and linked to the offence? Why didn't these crucial witnesses not testify? If PW1 did not give description of the suspects where then were the appellants “plucked” from. In that case why wouldn't the court believe their defence that they were not involved in the offence?
 51. The third issue raised in the submissions and which is important, albeit, not main herein is that, the P3 form and treatment cards produced herein were not produced by the maker and no basis laid for not calling the maker I think it is very critical that, the trial court do seek consent of the suspects for a document to be produced by another person in the absence of the maker.
 52. The Court of Appeal in the case of; Juma Kalio v Republic (Criminal Appeal 71 of 2000) [2001] KECA 88 (KLR) (25 January 2001) (Judgment) held that:

“The report on P3 form subject matter of the complaint is such document which under section 77 of the Act may be produced in evidence, in an appropriate case by a person other than the maker of the same. This Court has however held in earlier decisions see in particular



Boniface Karere Nderi v Republic Criminal Appeal No. 39 of 1990, and Njoroge Ndungu v Republic Criminal Appeal No. 31 of 2000(unreported):-

"That the trial court is obliged after admitting the report in evidence to inform the accused particularly where he is unrepresented of his right to require the maker of the report be called to be cross -examined on its contents."

53. Finally there is no evidence of the recovery of the stolen items from the appellants. The stolen motor vehicle was recovered in possession of the 3rd accused in the case. He testified it was parked in his residence by his cousin the night of the robbery. He did not identify any of the appellants herein as the people who had the said motor vehicle with his cousin.
54. The upshot of the aforesaid is that, there was insufficient evidence to have sustained the charges levelled against the accused and over which they were convicted of. Consequently, I quash the conviction and set aside the death sentence and order that, they be released forthwith unless otherwise lawfully held.
55. It is so ordered.

DATED, DELIVERED, SIGNED ON THIS 23RD THIS DAY OF JANUARY 2025

GRACE L NZIOKA

JUDGE

In the presence of:

The appellants present virtually

Ms. Chepkonga for the respondent

Mr. Komen: court assistant

