



REPUBLIC OF KENYA



**Githinji v Republic (Criminal Appeal E026 of 2024)
[2025] KEHC 3412 (KLR) (17 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E026 OF 2024
LN MUTENDE, J
MARCH 17, 2025**

BETWEEN

SAMUEL MUGIRI GITHINJI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Samuel Mugiri Githinji, the Appellant and Another were charged with three (3) counts of Robbery with Violence contrary to Section 296(2) of the [Penal Code](#). The particulars of the offence were;

Count I:

On the 29th day of July, 2016 at Kabazi Village, Subukia Sub-County, Nakuru County, jointly with others not before court while armed with a dangerous weapon namely firearms robbed Alice Nyambura Wanjohi of cash Kshs.45,000/- and an Alcatel touch screen mobile phone valued at Kshs.10,000/-, techno Y3s mobile phone valued at Kshs.7,500/- and a Nokia mobile phone valued at Kshs.1,900/- all valued at Kshs.64,000/- and immediately after such robbery used actual violence to the said Alice Nyambura Wanjohi.

Count II:

On the 29th day of July, 2016 at Kabazi Village, Subukia Sub County, Nakuru County, jointly with others not before court while armed with a dangerous weapon namely firearms robbed Dennis Wanjohi Kibui of a Nokia mobile phone a valued at Kshs.5,500/- and immediately before the time of such robbery threatened to shoot the said Dennis Wanjohi Kibui.

Count III:

On the 29th day of July, 2016 at Kabazi Village, Subukia Sub County, Nakuru County, jointly with others not before court while armed with a dangerous weapon namely firearms robbed Stanley Kibui



- Kanyeki of unknown amount of money and a Nokia mobile phone valued at Kshs.7,500/- and immediately before the time of such robbery fatally shot the said Stanley Kibui Kanyeki.
2. Having denied the charges they were taken through full trial, convicted and sentenced to suffer death on Count I. The sentences on Counts 2 and 3 were held in abeyance.
 3. The Appellant appeals per the amended grounds of appeal that; The learned Magistrate erred in law and fact by failing to find that the Appellant's right to fair trial under Article 50(2) (g) were grossly violated and thus caused him prejudice; identification was not proper as it was carried out contrary to Section 6(iv) (b) of Chapter 46 and the Force Standing Orders; the defence that was cogent and believable was erroneously dismissed; and, that by the magistrate stating the court defence did not provide corroboration was a misdirection.
 4. To prove the case the prosecution availed witnesses. PW1 Alice Nyambura Wanyoike testified that on 29/07/2016, she went home and while seated in the sitting she heard a sound that she believed was her husband's motorcycle being parked. As her husband Stanley Kibui Kanyeri (deceased) opened the door to the main house, some three (3) men entered the house. Lights were on hence she and her son Dennis ran to the same bedroom as her husband ran into another bedroom. Two of the three intruders carried guns, that she described as long and short/small. She described the assailants as tall with pimples, the short one had a bald head while the third one who wore a maroon jacket did not have a gun. As her husband attempted to run to the bedroom. The tall one pulled him and took him to the kitchen. They threatened to kill him. She entered into the bedroom with her son Dennis only to hear a gun shot. They followed them and demanded for money from her. She gave them Kshs.15,000/- that she had but they declared that it was not enough.
 5. She stated that the Appellant herein had the small gun. They demanded for Kshs.100,000/- money that they had been allegedly paid by business competitors to eliminate them hence they could only spare them if they raised the sum. She showed that the phones that had some money but she couldn't transfer it as ordered. They alleged that they had already killed her husband. She went to the kitchen and found him on the floor. The intruders took four (4) cell phones that belonged to them (complainants). The victims run out of the house only to find other intruders outside the house. One of them that she referred to as Murigi, the Appellant herein held her hand, they walked and crossed the road to another farm where she was made to transfer money, Kshs.30,000/- to one Frank Bett.
 6. That one of them Kamau told others to move away as it was late. He ordered her to remove her clothes. She struggled and he asked to be given the small gun with which he threatened to kill her. He ordered her to kneel down. Upon complying he raped her. After the ordeal he dismissed her as being dirty and order the rest to kill her. However, they started arguing over the money and left her. The Appellant herein told her to crawl into the maize farm and disappear.
 7. After approximately 40 minutes she managed to crawl to the roadside where a 'bodaboda' operator who took her home. Along the way they encountered her neighbours and the police. She was rushed to hospital and put on treatment. The following day she learnt of the husband's death.
 8. Three (3) days later she was taken to identify some suspects. Out of the 10 – 12 people she identified Kamau. Later on, she was called to the police station where she identified the other person, the individual who raped her. That lights were on at the scene and he had not covered his face. She was given a P3 form which was later filled.
 9. Subsequently, he was called to the police station where she identified the Appellant out of 8 – 9 people on the parade as the person who took her phones, held her hand and led her to the maize farm. That there was electric power on in the house.



10. PW2 Dennis Kinyanjui Kibui testified to have gone home having closed the shop with his mother (PW1) and younger brother J. of tender age, in class one. They did not close the gate. That upon his father's arrival on the motor-cycle, he heard a commotion at the door. He saw people at the outer door and his mother pulled him and his brother J. to the bedroom. As his mother wailed he heard a big bang. He could hear footsteps in the sitting room and the door being knocked. Then he heard gunshots. Jackson hid under the bed while his mother released the door prompting him do the same.
11. Two people entered the bedroom and demanded for money from his mother. He witnesses when PW1 took money and gave the individuals as electric power was on. He was able to see the individuals before he was ordered to lie down. He described one of them as having been bald headed. His face was spotty with hollow indents on the skin (holes on the face) and of fair complexion and stout. He could hear his father groaning. One of them pointed a gun at him and they took his mother away. He seized the opportunity to go to the kitchen where his father was, only to find him bleeding.
12. Being unable to lift him up, he run through the kitchen door, jumped over the fence and went to call neighbours. Police officers also arrived and they took his father to hospital but he passed on. They moved to Kabazi hospital where his mother had been admitted that is when he learnt that his mother had been sexually assaulted. During identification parade conducted he identified the Appellant as an individual who had withdrawn money from their M-pesa shop prior to the incident and was bald headed.
13. PW3 Samuel Mbuthe Kimotho was called out by PW2 who went to seek assistance following the incident. He led them to where his father lay. They assisted by taking him to hospital as he was bleeding profusely from the back. However, he did not make it.
14. PW4 Joseph Chege Gitua who knew the Appellant and his co-accused heard screams at the home of the deceased (Baba Dennis). The Appellant was known to him since childhood. He recollected that two months before he incident the Appellant had inquired from him about a person who had money on that Trading centre and also the residence of Baba Dennis (deceased) who used to sell clothes and owned an M-pesa shop. Having grown up together, he did not ask why he was putting to him the question.
15. On the fateful night he heard people who had gathered say Baba Dennis had been wounded. On their way they saw a person with a motor cycle. As they walked on they saw a person walk from the coffee farm towards the road holding his hands at the back and they suspected him. They were three people on the motorcycle, one of them asked him what he was doing there but he never responded. As they walked on they saw five (5) motor-cycles with three people on each. The person flashed a spotlight at them and he asked what they were doing at the place. He recognized the voice to be for Samuel Mugiri (Appellant).
16. PW6 Peter Ndirangu Ndung'u heard the commotion and gun shot and he moved to assist.
17. PW7 Isaac Gitonga Senior Registrar (Clinical Officer) examined PW1 and found her having been sexually assaulted.
18. PW8 No. 860705 Corporal Alfred Swara acting on information received arrested Samuel (the Appellant).
19. PW9 No. 101611 PC Moses Ayodi a dog handler testified to the dog known as Kali having led them to the house of Samuel (Appellant) where the scent was fresh.



20. PW10 No. 49980 Sergeant Peter Ng'ang'a who was with other officers on patrol was one of the first responders when they heard the gunshots. He alluded to the tracking dog having led them to the home of Samuel Murigi (Appellant) who was subsequently arrested.
21. Upon being placed on his defence, the Appellant who gave sworn evidence stated that he resides at Mwisho wa Rami. That on 30th July, 2016 his wife who was coming from Kabazi rang him saying she was going to where he resided on 31st July, 2016. She arrived at 4.00pm and informed him that their homestead had been burnt down and the police were looking for him following allegations that he was involved in a robbery. Therefore, he took her and their children into the house that he had rented. When the police reached them, they alleged that he was hiding. He was arrested taken to Subukia and identified by a lady on an identification parade.
22. As a first appellate court, I am obligated to re-evaluate and scrutinize evidence adduced at trial exhaustively so as to reach an independent conclusion having in mind that I had no opportunity of seeing and hearing witnesses who testified so as to assess their demeanour.
23. In doing so I am guided by the case of *Okeno v Republic* [1972] EA 32, where the court delivered itself thus;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

24. Elements of the offence of robbery with violence are provided for in Section 296(2) of the [*Penal Code*](#) that provide thus;

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.

25. To prove a case of robbery with violence, the prosecution must prove beyond reasonable doubt the fact of theft, use of offensive weapons; use of violence or the threat to do so and being in company of one or more than one person.
26. The court in *Johana Ndung'u v Republic* [1996] eKLR summed it up as follows;

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the [*Penal Code*](#). The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296



(2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument,
or
2. If he is in company with one or more other person or persons, or
3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

27. It was clarified by the Court of Appeal that the said circumstances establishing the offences having been joined by ‘or’ rather than ‘and’ would only be used alternatively. This was held in *Dima Denge & Others v Republic* [2013] eKLR where the court stated that;

“the elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

28. This is a case where the Prosecution proved the fact of the attackers having been in possession of guns, dangerous weapons that were used. The manner in which one of them was used was intended and did cause the death of Stanley Kibui Kanyeki. The prosecution demonstrated use of actual violence on the persons of Alice Nyambura Wanjohi and also Dennis Wanjohi Kibui. There was proof of the attackers having been more than one.

29. Further, Alice testified to have been taken to the maize farm and violated sexually by the attacker inserting his genitalia into her genital organs. Subsequently, she was examined and it was established that she had been sexually assaulted which was proof of actual violence upon her person.

30. All these is not disputed by the Appellant. His argument is that he was not the perpetrator. He argues that in addition, his rights were violated.

31. He submits that the identification was not positive. That the offence was perpetrated at 8.00pm under conditions of shock and fright which made it impossible for positive identification. That no description of the Appellant was given to the police. In this respect he relied on *Terekali & Another v Rex* [1952] EA 259 where the court held that;

“Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”

32. That the description of ‘short and bald headed’ could fit anyone. That as stated by PW2 that he was in shock when he heard the two (2) gunshots it was difficult for him to make a positive identification. He called upon the court to consider what was stated in the case of *Abdallah Bin Wendo & Another v Republic* [1953] 20 EACA as follows;

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult.”



33. Indeed, the conviction in the case herein was based on visual identification. PW1 and PW2 identified the Appellant. Their evidence must be reliable. In *Wamunga Otieno v Republic* [1989] KLR 424 the court stated that;

“It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

34. In *Republic v Turnbull* 3 All ER 549; the Court of Appeal stated;

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

35. With the decisions in mind, and following caution and careful consideration of evidence adduced, the prosecution witnesses testified to the house having been well lit, by electric light. PW1 described the Appellant as short and bald headed and having been in possession of the small gun. And as they were demanding for money he removed the phones he had taken from the pocket and asked which one belonged to PW1 so that she could transfer money to them. Further, she testified that he was the one held her hand and took her away from the house to the maize farm.

36. The Appellant doesn't question the stated good lighting conditions, the distance between the witness and the attackers when she saw him. Her eyesight is similarly not in question.

37. PW2 may have been shaken but did identify the Appellant as a stout short man whose colour skin was chocolate and wore muddy sports shoes on the fateful night. On cross – examination he reiterated what he had stated in evidence in chief which enabled him identify him on the police identification parade.

38. The Appellant faults the police for the manner in which the identification parade was conducted. Reliance is placed on the case of *Republic v Mwangi s/o Manaa* (1936) 3 EACA where the court stated thus;

- “1. The accused person will always be informed that he may have a solicitor or friend present when the parade takes place.
2. The police officer in charge of the case, although he may be present, will not conduct the parade.
3. The witnesses will not see the accused person before the parade.
4. The accused person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.
5. The accused person will be allowed to take any position he chooses, and will be allowed to change his position after each identifying witness has left, if he so desires.
6. Care will be exercised that the witnesses are not allowed to communicate with each other after they
7. Every unauthorized person must be excluded.



8. If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, this should be done. As a cautionary measure the whole parade be asked to do this.
 9. See that the witness touches the person he identifies.
 10. At the termination of the parade or during the parade, the officer conducting it should ask the accused if he is satisfied that the parade is being conducted in a fair manner and make note of his reply.
 11. In explaining the procedure to a witness tell him that he will see a group of people who may or may not contain the suspected person. The witness should not be told "Pick out somebody", or be influenced in any way whatsoever.
 12. The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably."
39. It was not demonstrated that all members were short and bald headed or of a similar class of life. More so that PW2 only saw the bald head but not the face of the intruder. He also questioned the time that had lapsed as the identification was conducted about eight (8) months later. An argument that is erroneous as he was arraigned a month later.
40. The police identification parade is stated to be a crucial tool in solving crimes and in using such a tool, justice must be seen to be done. According to Section 5 of the National Police Act and the Force Service Standing Orders the suspect should be placed among at least eight (8) people of similar age, height; general appearance and class of life as them. And where the suspect had any disfigurement, it should be ensured that it is not overly apparent.
41. On the question of the witnesses having not given the police the description of the suspects before the parade was conducted, this was not mandatory. In *Nathan Kamau Mugure v Republic* CRA 63 of 2008 the Court of Appeal stated that;

“As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in *GABRIEL’s* case, *supra*, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness “SHOULD” be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject



the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.”

42. Force Standing orders 6(iv) (b) of Chapter 4 on identification parade provides that;

“ The police officer in charge of the case, although he be present, will not conduct the parade.”

43. PW14 No. 216621 Chief Inspector Japheth Kilungu confirmed having been the investigating officer in the case. He was involved in investigations from the outset yet he is the one who conducted the identification parade.

44. That notwithstanding there was evidence by an informer upon which the police acted. The Appellant argues that the alleged information lacks evidence and is devoid of belief. Information provided by confidential informants can be crucial. An informer’s identity is protected as long as the information is reliable. (Also see Republic v Garfoli [1990] 2 SCR 1421).

45. In Kigecha Njuga v Republic [1965] EA 773 it was stated that;

“ informers play a useful part no doubt in the detention and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desire the courts to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

46. Additionally, this is a case where the police used a tracking dog to find the suspect. According to PW9, they went to the scene of the incident, moved to where the motor-bikes had been abandoned and the police dog did scent hunting and ultimately led them to the Appellant’s homestead and house. Using a trained scene dog to find a suspect is very effective.

47. The Appellant complains that his defence was not considered. He claimed that he had left Kabazi two (2) weeks before the date of the incident. In as much as the trial court may have misdirected itself by finding that the allegation was not corroborated, evidence adduced by the prosecution was overwhelming.

48. Having reconsidered evidence adduced in totality, I find the prosecution’s case in respect of the Appellant being one of the perpetrators of the offence of robbery with violence having been proved to required standard. Therefore, I affirm the conviction and confirm the sentence. The appeal hence fails and is accordingly dismissed.

49. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF MARCH, 2025.

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L.N. MUTENDE

JUDGE

