Wanjiku v Republic (Criminal Appeal 3 of 2024)
[2025] KEHC 4258 (KLR) (Crim) (4 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4258 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL 3 OF 2024

KW KIARIE, J

APRIL 4, 2025

BETWEEN

BENSON MURAYA WANJIKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in Criminal Case No. E225 of 2020 of the Chief Magistrate's Court at Nyahururu by Hon. O. Mogute– Principal Magistrate)

JUDGMENT

1. Benson Muraya Wanjiku, the appellant herein, was convicted after pleading guilty to the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*.

2. The particulars were that on the 16th day of October 2020, at Kwa Farm in the Kabazi area, Subukia sub-county of Nakuru County, jointly with others not before the court, robbed Micah Gathogo Muturi of a mobile phone valued at Kshs. 15,000.00 and immediately after the time of the said robbery, wounded the said Micah Gathogo Muturi.

3. The appellant was convicted and sentenced to death. He was aggrieved and filed this appeal.

4. The appellant was in person. He raised the following grounds of appeal:

    a. That the learned magistrate erred in law and, in fact, by failing to consider that identification was not properly conducted, considering that it was at night.

    b. That the learned magistrate erred in law and, in fact, by considering the evidence of the investigating officer that the appellant's hair was purportedly shaved without calling the person who shaved it.

c. That the learned magistrate erred in law and, in fact, by failing to consider the appellant's defence.

d. The learned magistrate erred in law by failing to consider the dispute between the complainant and the appellant over an alleged relationship with his wife.

5. The state did not file any grounds of opposition or submissions.

6. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.

7. The appellant argued that the alleged identification was mistaken. In the well-known case of R v Turnbull and others [1976] 3 All ER 549, Lord Widgery CJ stated as follows:

> Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification.
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> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?
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> ...
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> 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 relative and friends are sometimes made.

8. Thus, I shall be guided by this timeless authority to determine whether the alleged identification was free from error.

9. According to the complainant's evidence, he transported a passenger from Kabazi to Subukia at approximately 9:30 pm. After dropping off the passenger, he encountered his assailants on the way. He was hit with something on the head as he was passing the two attackers.. The two assaulted and robbed him.

10. The first issue the learned trial magistrate should have examined was the position of the individual purported to have been recognized by his motorcycle's light for accurate identification. He testified as follows:

> I did take her and on way back. I found two people on the way and when I shone the lights on him, I identified one of them as I used to see him around. As I as passing them, they hit me with something on my head and I was unable to ride anymore I was hit on my forehead and it was like they used a metal, rod or club and when I stopped, they came from behind and hit me at the back of the head.

> This crucial evidence was not obtained, leaving unresolved questions about the alleged identification. It is essential to note that his motorbike was in motion, and he may have had only a fleeting glimpse of his attackers.

11. At the time of the robbery, although he stated that the appellant was in front of him, it was again unclear how his motorcycle's headlamp could have helped him.

12. The only description the complainant gave that led to the arrest of the appellant was that Jedida's son attacked him. He said he was short and had Rasta hair. There was no attempt to establish if, indeed, the appellant was Jedida's son. There was no evidence about his hair style at the time he was arrested. This is a case that should have called for an identification parade. The purpose of an identification parade is to test a witness's ability and accuracy in identifying the person he/she claims to have seen. This was a fatal omission to the prosecution's case.

13. It is a well-established principle of law that a conviction can be based on the evidence of a single witness. However, great care must be taken before such a conviction. In the case of Abdullah Bin Wendo vs. Rex 20 EACA 166, the Court of Appeal emphasized the need for such care in the following words:

> Subject to certain well-known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.
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> In the instant case, I find that it was erroneous to rely on the purported identification.

14. The complainant raised a credibility issue in his evidence. He testified as follows:

> I do recall that on the 16th day of October 2020 at around 9.30 p.m., I did my usual duties and, in the evening, I got a customer on my motorbike KMCQ 867M, make King Bird at 8 p.m. to take to Subukia.
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> This was incoherent, and there was no attempt to reconcile this obvious contradiction. The Court of Appeal in the case of Ndungu Kimanyi vs Republic [1979] KLR 283 (Madan, Miller and Potter JJA) held:
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> The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

15. The conviction of the appellant was unsafe. The conviction is therefore quashed, and the sentence set aside. He is set free unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA THIS 4TH DAY OF APRIL 2025

KIARIE WAWERU KIARIE

JUDGE