Brian v Republic (Criminal Appeal 109 of 2023)
[2025] KEHC 5699 (KLR) (Crim) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5699 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL 109 OF 2023

KW KIARIE, J

MAY 8, 2025

BETWEEN

BYAYO LEVITICUS ALIAS BRIAN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the original conviction and sentence in Criminal Case No. E1401 of 2022 of the Principal Magistrate's Court at Engineer by Hon. E. Wanjala– Principal Magistrate)

JUDGMENT

1. Byayo Leviticus, also known as Brian, the appellant herein, was convicted 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 22nd day of October 2022, at Kwa Farm in the Gillet area, Kipipiri sub-county of Nyandarua County, he robbed Naomi Wanjugu Gicheha of a mobile phone and cash, Kshs. 25000.00, all valued at Kshs. 26,000.00 and immediately before the time of the said robbery, wounded the said Naomi Wanjugu Gicheha.
3. The appellant was also convicted of being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the *Kenya Citizenship and Immigration Act* No. 12 of 2021.
4. The particulars were that on the 22nd day of October 2022, at Kwa Farm in the Gillet area, Kipipiri sub-county of Nyandarua County, being a Ugandan national, was found present in Kenya unlawfully without a permit from the immigration office.
5. In count one, the appellant was sentenced to death, and in count two, he was sentenced to twelve months' imprisonment. He was aggrieved and filed this appeal concerning the first count.

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

    a. The learned trial magistrate erred in law and fact when he convicted the appellant in a prosecution case where identification was not conclusively proved against the appellant.

    b. The learned trial magistrate erred in law and fact when he convicted the appellant without proof of the elements of robbery with violence.

    c. The learned trial magistrate erred in law and fact by applying the wrong standard of proof in a criminal case.

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

8. 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 the Republic [1972] EA 32.

9. The ingredients of the offence of robbery, contrary to section 296 (2) of the *Penal Code*, were stated clearly by the Court of Appeal in the case of Johana Ndungu vs Republic [1996] eKLR, where it said:

> 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 the 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
>
> . 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.

10. In this case, the complainant's evidence was that a single person attacked her. Her evidence was that when she screamed upon realizing someone was in her bedroom, the intruder put his thumb in her mouth. This finger injured her in the mouth.

11. The medical evidence Dr. Mburu (PW5) presented indicated that the complainant experienced pain in the lower jaw and felt discomfort while swallowing saliva.

12. The prosecution did not attempt to reconcile the contradiction between the complainant and the doctor. The prosecution, therefore, failed to prove that the complainant was injured during the robbery complained of. This was not robbery under section 296 (2) of the *Penal Code*.

13. Whenever an offence is committed under circumstances not conducive to identification or recognition, care must be taken to avoid a miscarriage of justice. 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.

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?

...

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.

14. This timeless authority will guide me in determining whether the alleged identification was error-free.

15. According to Naomi Wanjiru Gicheru, PW2, the incident was at about 11.30 p.m. She was roused from sleep by some screams in the bedroom. When she screamed, the intruder put his thumb in her mouth. She recognized his voice when he demanded some money. The voice was that of the appellant. The Court of Appeal in the case of Simeon Mbelle vs Republic [1982] IKAR 578, said:

In relation to the identification by voice, one it would obviously be necessary to ensure: -

(a) That it was the accused person's voice;

(b) That the witness was familiar with it, and they recognized it, and

(c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

16. The complainant testified that the appellant told her, "nataka pesa". Although she testified that she had known the appellant for two years when he was her employee, these two words were insufficient for her to make an informed judgment on recognition. She had been roused from sleep. We take cognizance that even when circumstances are favourable, there are instances when individuals make mistakes in recognizing the voices of close relatives.

17. The prosecution did not establish the origin of the screams that the complainant heard in her bedroom. Was there another person in the house? This question went unanswered.

18. Naomi Wanjiru Gicheru, PW2, informed the trial court that she recognized the appellant when she switched the lights to give out the money the intruder had demanded. Unfortunately, no evidence was provided for the intensity of the light. The prosecution further failed to elicit evidence on whether the intruder's face was covered in any way. This was crucial evidence to assist the court in finding whether the purported recognition was error-free.

19. 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 the 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.

20. In the instant case, I will be hesitant to conclude that the identification was flawless. I have pointed out some pertinent areas of her evidence. Secondly, the medical evidence by Dr. Mburu (PW5) and that of the complainant are at variance. According to the complainant, the perpetrator of the offence inserted his thumb in her mouth. Still, according to PW5, she experienced pain in the lower jaw and felt discomfort while swallowing saliva.

21. During cross-examination, the complainant testified that the appellant entered her house at about 8:30 p.m. No attempt was made to establish what led her to this conclusion, so this fact was left hanging.

22. When there is unreconciled evidence, the doubts are resolved in favour of an accused person.

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

DELIVERED AND SIGNED AT NYANDARUA THIS 8TH DAY OF MAY 2025

KIARIE WAWERU KIARIE

JUDGE