Akhura v Director of Public Prosecution (Criminal Appeal E019 of 2024) [2025] KEHC 8527 (KLR) (17 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8527 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E019 OF 2024

S MBUNGI, J

JUNE 17, 2025

BETWEEN

STEPHEN MUKAYA AKHURA ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

(Being an appeal against the judgment of Hon. D. Alego SPM, delivered by Hon. J.R Ndururi SPM on 27th February 2024 and sentence by Hon. J.R. Ndururi delivered on 5th March 2024 in Kakamega Chief Magistrates Criminal Case No. 411 of 2015)

JUDGMENT

Introduction

1. The appellant, Stephen Mukaya Musita, and nine others were charged before the Chief Magistrate's Court at Kakamega with multiple counts of robbery with violence contrary to Section 295 as read with Section 296[2] of the *Penal Code*, and one count of preparation to commit a felony contrary to Section 308[1] of the *Penal Code*.

2. In Count one, the particulars were that on the night of 8th and 9th February 2015, at Ngoni Village, Makunga Sub-location, Butsotso West Location, within Navakholo Sub-county, jointly with others not before court and while armed with crude weapons namely pangas, rungus, and iron bars, they robbed Agnes Zainabu Lubale of one Sony Ericsson phone, one Huawei mobile phone serial no. 862886010786340, and cash Kshs.750/-, all valued at Kshs.15,750/-, and at or immediately before or immediately after the time of such robbery threatened to use actual violence on her.

3. In Count two, the particulars were that on the same night at Eshebire Village, Shibuli Sub-location, within Kakamega Central Sub-county, the accused persons robbed Justus Anyonje Omukuba of one HP laptop valued at Kshs.40,000/-, one mobile phone worth Kshs.15,000/-, and cash Kshs.19,100/-,

all valued at Kshs.74,100/-, and at or immediately before or after the robbery, threatened to use actual violence against him.

4. In Count three, the accused persons were charged with robbing Catherine Mrisi Mikhala of one pair of shoes, a green jacket, one Samsung phone valued at Kshs.5,000/-, and cash Kshs.5,700/-, all valued at Kshs.13,700/-, and during the robbery used actual violence on the complainant.

5. In Count four, the accused were charged with robbing David Ommani Akatu of cash Kshs.1,850/- and used actual violence at or during the time of the robbery.

6. In Count five, the accused persons were charged with robbing Jane Alutseshe Anzika of one Nokia 1800 phone, serial no. 357914047433611, and threatened to use actual violence at or immediately after the robbery.

7. In Count six, it was alleged that the accused robbed Ali Ashioya of three mobile phones, two Nokia phones and one Itel phone, valued at Kshs.15,000/- and cash Kshs.5,300/-, totaling Kshs.20,300/-, and threatened to use actual violence.

8. In Count seven, they were charged with robbing Jenipher Ashioya of cash Kshs.5,300/- and threatened to use actual violence on her.

9. In Count eight, the accused were charged with robbing Metrine Tamnai of cash Kshs.150/- and at or immediately after the robbery, threatened to use actual violence on the complainant.

10. In Count nine, the accused persons were charged with robbing Peter Mwanje Shikokoti of one Nokia phone and cash Kshs.2,000/-, all valued at Kshs.5,000/-, and used actual violence before or after the robbery.

11. In Count ten, the accused persons were charged with robbing James Olumatete of a Samsung phone valued at Kshs.6,000/- and a pair of sports shoes valued at Kshs.2,000/-, all valued at Kshs.8,000/-, and after the robbery,killed the said James Olumatete.

12. In Count eleven, the accused were charged with robbing Maurice Ofwamba of a Nokia mobile phone valued at Kshs.2,700/- and cash Kshs.3,000/-, totaling Kshs.5,700/-, and used actual violence against him.

13. In Count twelve, they were charged with the offence of preparation to commit a felony. The particulars were that on 12th February 2015, at Mahondo Village, Eshisiru Sub-location, within Kakamega Central Sub-county, the accused were found jointly armed with crude weapons—including pangas, a wooden club, five litres of petrol, a black mask, one jungle raincoat and an iron bar, while in a Toyota Corona vehicle registration number KBH 872Z, in circumstances that indicated an intention to commit the felony of robbery with violence.

14. An alternative charge was preferred against the 10th accused person, Kevin Amayi Shitambasi alias Boyi, for the offence of handling stolen property contrary to Section 322[1] of the *Penal Code*. The particulars were that on 17th February 2015, at Makunga Area, Navakholo District, he dishonestly retained one Huawei phone, one Samsung phone, and one Nokia 1800 phone, property believed to have been stolen, knowing or having reason to believe them to be stolen goods.

15. During trial, the prosecution called nine [9] witnesses in support of their case. Upon close of the prosecution case, the appellant and his co-accused were found to have a case to answer and were accordingly placed on their defence.

16. After hearing the defence and evaluating the entire evidence on record, the learned trial magistrate found the appellant and the co-accused guilty on all counts of robbery with violence and convicted them accordingly. They were thereafter sentenced to death as provided for under Section 296[2] of the *Penal Code*.

Facts at Trial.

17. PW1, Agnes Zainabu, testified that on 8th February 2015 at about 8:00 p.m., she was in her house in Navakholo Sub-county with her guests when they heard dogs barking. Upon peeping through the window, she saw approximately ten people in her compound under the glare of her security lights. These individuals broke into her house. Owing to a prior disability, she was unable to run and was assaulted. They demanded money and hit her with a blunt object, inflicting injuries on her face and hand and knocking out her teeth. Her phone apparently dialed her neighbor during the ordeal. The attackers took various items including her ATM card, IDs, handbags, and money. She lost consciousness after hearing one of them say, "maliza yeye". She later identified her missing phone and her husband's Somali sword which were recovered and produced in court as Exhibits 1 and 2, respectively. Though she did not visually identify her attackers as they were masked, she recognized Accused 6 as a boda boda rider who was her neighbour and had previously worked at her home.

18. PW2, David Omani Akatu, a mason residing in Shibuku, testified that at around 2:00 a.m. on the same night, he heard screams from his neighbors, the Anyanges. When he stepped outside, he saw one Moses Okwaro and called him on the phone. As he proceeded towards the Anyange's gate, he was struck on the head, ear, and thigh, and lost consciousness. He was later treated at Kakamega General Hospital and Busunga Health Centre. He lost his wallet containing Kshs. 1,800. Though he did not see his attackers, he knew A6 and A7 as relatives and people he had worked with previously.

19. PW3 Joseph Mutenyo Ofwamba, a teacher from Shibuki, testified that at about 10:00–10:30 p.m., his son, Juma Mutenye, encountered a group of people in their compound. PW3 stated that his brother struck him, and amidst the confusion, he saw Shivachi [A7] strike his son with a knife. He identified Ngana [A6] and Shivachi [A7] by voice and physical appearance, including Ngana's cap which fell during the incident. The attackers wore what appeared to be police or AP uniforms and used swords, pangas, and rungus. PW3 testified that his son later died from the injuries sustained. The said sword was produced as Exhibit 2.

20. PW4, Livingstone Mutenyo, corroborated PW3's account. He stated that he was at his brother's home when A6 and A7 entered the house claiming to be police officers. He identified both accused as neighbours. They assaulted him and searched the house before leaving. They later found James, his brother, gravely injured and rushed him to MTRH where he succumbed to his injuries. PW4 testified that A6 was in civilian clothes with a panga and A7 wore a jungle jacket. A6 and A7 were positively identified in court.

21. PW5, Ali Ashioya Mwanje, a pastor in Kakamega Central, testified that at around 8th August 2015, he was attacked by men claiming to be police officers. He was forced to lie on the floor, handcuffed, and threatened. They stole household items, phones, and cash. His daughter, who was seven months pregnant, was raped, and his nephew, Peter, was found bleeding at the gate. A sword recovered from his compound was marked as Exhibit 2. He identified A5, A6, A7, and A8 as persons known to him and his neighbours.

22. PW6, Jane Ashika, a peasant farmer from Shibuli, testified that she was abducted by masked men from Justus's home and held hostage. Her phone was stolen, and her companion Catherine was seriously

injured. She positively identified the accused persons as her neighbours and recognized A4 and A5 as among those who assaulted her.

23. PW7, Dr. Dickson Muchana, a consultant pathologist at Kakamega Referral Hospital, presented various P3 forms. He testified on behalf of Dr. Hilda Mubisis. The P3 form for Agnes Zainabu [PW1], marked as Exhibit 9, classified her injuries as maim. That of Geoffrey Nabwayo, Exhibit 10, showed harm. The P3 for Peter Mwenje, Exhibit 11, indicated grievous harm. These medical reports corroborated the severity of injuries inflicted during the robberies.

24. PW8, No. 67238 PC Benjamin Mwaniki, attached to Navakholo Police Station, was among the officers who investigated the series of robberies. He testified that a group of suspects had been apprehended and brought to the station in connection with a spate of violent robberies in Shibuli and Navakholo areas. He recorded statements from various complainants and recovered exhibits from the suspects' residences, including a Somali sword, mobile phones, and clothing resembling police uniforms. He produced a police inventory and property recovery register that were marked as Exhibit 13. He also coordinated identification parades, which were conducted in accordance with established procedures, during which several complainants positively identified A6, A7, and A8.

25. PW9, No. 220383 CIP George Okumu, an officer then based at the Kakamega DCI Office, testified that he was assigned to lead investigations into what had been termed a reign of terror in the Shibuli-Navakholo area involving armed robbery and murder. He visited several crime scenes and recorded statements from victims. He confirmed that some suspects were arrested based on intelligence reports and were found with items reported stolen. Notably, A6 was found in possession of a mobile phone belonging to PW1, while a blood-stained Somali sword.

26. The evidence by PW9 marked the close of the prosecution case after which the Court ruled that a prima facie case had been established and the accused persons were placed on Defence.

Defence Case

27. The appellant [DW5] stated that he hails from Lurambi, Kakamega. He told the court that he was arrested on 11.02.2015 by Sergeant Hezron Mkenya who was known to him. He averred that he was asleep contrary to the submission that he was arrested in the streets and pleaded innocent.

28. The trial court considered the evidence adduced and found the Appellant, among 9 others, guilty for the offence of robbery with violence contrary to section 296[2] of the CPC and proceeded to sentence the accused to death.

The Appeal.

29. The Appellant being dissatisfied by the conviction and sentence filed this petition of Appeal on the following ten grounds: -

    i. That the Learned Magistrate erred in law and in fact in convicting the accused on the unreliable evidence of the prosecution witnesses without properly evaluating it and making a finding on it.

    ii. That the learned trial magistrate erred in points of law and fact by relying on evidence of identification, without observing that the conditions prevailing at the locus quo were absolutely difficult, for a witness to make any significant identification.

iii. That the learned trial magistrate erred in points of law and fact by failing to appreciate that the credibility of an identification parade was utterly at stake and none was conducted in line with the force standing orders pertaining to an identification parade.

iv. That the learned trial magistrate erred in points of law and fact in basing the reason for conviction on inconsistent and incredible evidence of possession of alleged goods recovered from the offences with none recovered from the appellant.

v. That the learned trial magistrate erred in points of law and fact by failing to consider the appellant's plausible defense without considering that the same was not rebutted or rather displaced by the prosecution pursuant to the provisions of section 309 of the criminal procedure code.

vi. That the learned trial magistrate erred in law and in fact by failing to appreciate that the nature of his arrest was inconsistent with guilt.

vii. That the learned trial magistrate erred in points of law and fact by failing to appreciate that the evidence adduced as a whole by the prosecution did not entirely discharge the prosecution burden of proving its case beyond any reasonable doubt.

viii. That the Learned Magistrate erred in law and in fact by not considering the reasonable doubts available in the case against the appellant and erred in law in not giving the appellant the benefit of those doubts.

ix. That the Learned Magistrate erred in law and in fact in convicting the accused without the prosecution having proved all the ingredients of the offence.

x. That the Learned Magistrate erred in law and in fact by meting out too harsh of a sentence in the circumstances.

30. The Appellant prayed that the Appeal be allowed and that the High Court do quash the trial Magistrate's judgment, conviction and set aside the sentence so imposed by the trial Magistrate and the Appellant be set at liberty forthwith.

31. The merits of this appeal were canvassed by way of written submissions. On record are the appellant's submissions dated 29th April 2024 and the respondent's submissions dated 28th June 2024, both of which this court has carefully considered.

Appellant's submissions

32. The appellant submitted that the trial court erred in convicting him on the basis of evidence that was unreliable, inconsistent, and insufficient to sustain a conviction. It was contended that the evidence on record failed to meet the threshold required for a positive identification, and the trial court did not properly analyze this crucial aspect of the prosecution's case.

33. It was argued that none of the key prosecution witnesses, including PW1, PW2, and PW3, made any first reports that mentioned the 5th accused or offered any physical description that could be linked to him. The appellant relied on the Court of Appeal decision in Moses Monyua Mocheru v R Cr. App. No. 63 of 1987, which held that first reports to the police in matters of identification are critical and must be placed before the court to test the credibility of the witness's claims of identification.

34. Counsel for the appellant further submitted that no identification parade was conducted to test the ability of the witnesses to identify the accused. The absence of such a procedure rendered the dock

identification worthless and of no probative value. Reliance was placed on Walter Amolo v R [1991] K.A.R 254, where the Court held that dock identification alone is insufficient unless preceded by a description and proper identification parade.

35. The appellant emphasized that the trial court erred by failing to caution itself on the dangers of convicting on visual identification evidence, especially in circumstances where the assailants were described as being heavily masked. The court was referred to the decisions in R v Turnbull [1976] 3 All ER 549 and Cleophas Otieno Wamunga v R Cr. App. No. 20 of 1989, which underscored the need for courts to approach visual identification with great care, as mistaken identity remains a real possibility even in cases of alleged recognition.

36. It was also submitted that the spatial and geographic elements of the offences were inconsistent with the charge sheet and testimony. The appellant pointed out that the crimes occurred across different sub-counties, including Shibuli in Ikolomani and Navakholo, which are approximately 20 kilometres apart. He submitted that there was no plausible explanation on record as to how he could have participated in multiple coordinated attacks across such locations within the same window of time.

37. The appellant contended that the trial court wrongly attributed culpability collectively among the accused persons without linking him individually to any specific offence. The effect, he argued, was to convict him by association rather than on the basis of evidence pointing to individual criminal liability.

38. The appellant also challenged the credibility and sufficiency of the prosecution's investigative process, particularly the testimony of PW8, the investigating officer. He argued that crucial material witnesses were not called, and the purported raids that led to the arrests were conducted after he had already been placed in custody, casting doubt on the authenticity and legality of the investigations. The appellant relied on Ramson Ahmed v R [1955] EACA 395, where the Court held that the prosecution must call all material witnesses and present all relevant facts, even if adverse to its case.

39. Lastly, the appellant submitted that his defence, which amounted to an alibi, was not properly considered or rebutted by the prosecution. He cited Wang'ombe v R [1980] KLR 149 to support the proposition that an alibi, even if raised late in the trial, should be tested against the prosecution's case. He contended that the burden of proof remained on the prosecution to disprove the alibi, which they failed to do.

40. In conclusion, the appellant submitted that the prosecution's evidence was riddled with inconsistencies, failed to establish individual culpability, and fell far below the threshold of proof beyond reasonable doubt. He prayed that the conviction be quashed and the sentence set aside.

Respondent's submissions

41. The respondent submitted that the conviction entered by the trial court was unsafe and ought not to stand due to the prevailing circumstances under which the identification of the accused persons allegedly took place. It was argued that the offences occurred at night in a chaotic scene with approximately fifty individuals present, thereby casting serious doubt on the accuracy and reliability of visual identification by the complainants and prosecution witnesses.

42. It was the Respondent's position that the trial court failed to sufficiently interrogate the circumstances surrounding the alleged identification, particularly the quality and source of lighting, the distance between the witnesses and the assailants, and whether the alleged attackers were masked. These omissions, it was submitted, rendered the identification evidence shaky and prone to error.

43. In support of this position, the Respondent relied on the authority of Wamunga v. Republic [1989] KLR 424, where the Court of Appeal emphasized the necessity of caution when a conviction is based

solely on identification evidence. The court therein noted that in the absence of clear details about the type of light, its strength, and its position relative to the suspect, a careful test of identification cannot be said to have been conducted. The Respondent contended that no such detailed inquiry was made by the trial court in this case.

44. The Respondent further pointed out material inconsistencies in the evidence of the prosecution witnesses, particularly on the circumstances under which the accused were identified. While some witnesses claimed to have seen the assailants using solar lights or torches, none specified the strength or proximity of that light. Others mentioned the attackers had their faces covered or wore masks, yet still claimed to recognize them. These contradictions, the Respondent argued, created reasonable doubt which the trial court failed to address.

45. On sentencing, the Respondent took issue with the manner in which the trial court imposed the penalty. It was submitted that the accused persons had been charged with 11 counts of robbery with violence and one count of preparation to commit a felony; making a total of 12 counts. However, the sentencing court imposed a blanket death sentence without clarifying whether it applied to each count individually or collectively, and failed to give directions on the non-capital count.

46. The Respondent also highlighted an apparent misdirection in the sentencing remarks of the trial magistrate, who stated that the accused persons had been convicted on twelve counts of robbery with violence, contrary to the actual charge sheet and judgment which clearly indicated that the 12th count was for preparation to commit a felony under Section 308[1] of the *Penal Code*. The court's failure to distinguish between the nature of the offences, and to address each count separately, was submitted to be not only erroneous but also rendered the sentence imposed unlawful.

47. To reinforce this argument, the Respondent cited the Court of Appeal decision in Peter Mbugua Kabui v. Republic[2016] eKLR, which reiterated that while concurrent sentences are appropriate where offences arise from a single transaction, distinct and separate criminal acts, particularly involving multiple victims, may warrant consecutive sentences. Moreover, the Sentencing Policy Guidelines under paragraph 7.13 require that each offence, especially where victims differ, be treated distinctly during sentencing.

48. In the instant case, it was submitted that the trial court failed to comply with these principles, and in doing so, arrived at an illegal and unsustainable sentence. The Respondent therefore prayed that this court to find that both the conviction and sentence were unsafe and to order a retrial in the interest of justice, particularly now that the accused persons are represented by counsel on appeal.

Analysis and Determination.

49. This being a first appellate court, it is guided by principles set out by the court of appeal in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the court stated as follows:

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

50. The court has dutifully considered the entire lower court record, the trial court's judgment, the petition of appeal, and the comprehensive written and oral submissions advanced by both parties.

51. I find that the central issue for determination in this appeal is whether the identification of the appellant was proper and sufficient to sustain a conviction.

52. In this case, the incident giving rise to the charges was alleged to have taken place at night and involved a large group of assailants, with some witnesses estimating the number to be as many as fifty. The sheer number of persons present, the time of night, and the frenzied nature of the attack created an environment inherently challenging for positive identification. The law requires a court to warn itself on the dangers of convicting based on such identification and to conduct a careful inquiry into the circumstances under which the alleged identification was made including the intensity, type and direction of light, the duration of the encounter, distance between the assailant and witness, and the mental state of the witness at the time.

53. The law is clear that identification evidence, especially where it forms the sole basis of the conviction, must be tested with the greatest care. The Court of Appeal in Wamunga v. Republic [1989] KLR 424 emphasized that:

> " It is trite law that when the evidence relied on to implicate an accused person is entirely of identification, that evidence must be absolutely watertight to justify a conviction."

54. Similarly, in Roria v. Republic [1967] EA 583, it was held:

> " A conviction resting entirely on identity invariably causes a degree of uneasiness. That danger is, of course, greater when the only evidence against an accused person is identification by one witness."

55. Only one witness, PW3, purported to identify any of the accused persons. His testimony, however, only implicated Accused 6 and Accused 7. At no point in his testimony did PW3 identify or mention the appellant herein [Accused 5] as one of the persons he saw or recognized during the incident.

56. PW1, the complainant in one of the counts, explicitly stated that she did not see the faces of the attackers as they had covered themselves. Her only link to the appellant was he was arrested by the police. She made no assertion that she had seen or identified the appellant at the scene of the crime.

57. PW2 also testified that he did not see the accused persons, but knew A6 [Sixth Accused – Ngana]and A7 [Shivachi]who were in court since they had worked in various places together. PW3 testified to seeing A6 since his cap fell when he tripped PW3's son. He testified that he recognized A7 from his voice. He does not mention A5 - the appellant herein.

58. Similarly, PW5 confirmed that all the assailants were masked or had their faces covered, and were armed and testified thus:

> " ...All the assailants were armed and faces covered. You were all talking in coded language. I recognized 8 of you today. I am here to say the truth...."

Upon cross examination by the appellant herein, he stated and I quote:

> " ...I know Accused 5. He is my brother in law and he also assaulted me. I recognized him properly in court..."

59. The appellant herein was only known to the witnesses due to social relations, not the crime committed herein. None of the witnesses attributed any specific conduct, role, or action to the appellant during the commission of the offences.

60. The trial court, despite this glaring evidentiary gap, proceeded to convict all accused persons, including the appellant, without first making a finding as to the specific evidence connecting each accused person to the charges.

61. The court failed to individually evaluate the evidence against each accused, and the judgment contains a general conviction of all ten accused persons, without isolating the evidentiary foundation for each. This failure was contrary to the cardinal rule that each accused person must be convicted based on evidence that connects them individually to the offence.

62. Further, it is not lost on this court that the trial court did not issue a warning to itself, either orally or in writing, on the dangers of relying on visual identification as the sole basis of conviction, especially in difficult conditions such as nighttime robberies with masked attackers. In Cleophas Otieno Wamunga v. Republic [1989] KLR 424, the court reiterated that:

> " What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."

63. In the present case, no evidence was led by the prosecution on the nature or strength of the lighting at the scene. No witness described where the source of light was, or how it enabled them to see the appellant. This omission is fatal to the prosecution's case.

64. In its submissions, the respondent rightly conceded that the conviction was unsafe. The prosecution submitted that while the offences were grave and committed in one transaction, the evidence did not sufficiently link the appellant to the offences. It was noted that the only eye witness did not mention the appellant, and no exhibits were recovered from him. There was also no forensic or circumstantial evidence linking him to the crimes. I agree with the respondent on this.

65. The respondent further pointed out material inconsistencies in the judgment of the trial court. For instance, the court erroneously stated that the accused persons were convicted on twelve counts of robbery with violence, whereas the charge sheet disclosed only eleven counts of robbery with violence and one count of preparation to commit a felony. The sentencing portion of the judgment also lacked clarity, as the trial court did not specify whether the death sentence imposed was in respect of each of the eleven robbery counts or whether it was a blanket sentence. The court further failed to address the twelfth count which did not attract a capital sentence, making the judgment internally inconsistent and procedurally flawed.

66. All these errors and oversights, combined with the lack of evidence connecting the appellant to the offences, render the conviction unsafe and untenable in law. A court cannot uphold a conviction that is not grounded in cogent, direct, or circumstantial evidence.

67. For these reasons, this court finds merit in the appeal. The conviction of the appellant in Kakamega Chief Magistrate's Criminal Case No. 411 of 2015 is hereby quashed, and the sentence imposed is set aside.

68. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

69. It is so ordered.

70. I note that the respondent in its submissions sought for a re-trial. Submissions are not pleadings, an appropriate application seeking for the same should have been filed and serve upon the parties.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF JUNE, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a

Ms. Okanyo for the Applicant, present online.

Applicant present.