



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karobia v Republic (Criminal Appeal E074 of 2024)  
[2025] KEHC 11025 (KLR) (25 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11025 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E074 OF 2024  
DKN MAGARE, J  
JULY 25, 2025**

**BETWEEN**

**KEVIN MWANGI KAROBIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the conviction and sentence meted out by the Hon. Dennis Matutu, Senior Principal Magistrate in Múkûrwe'inî in SPMCCRC No. E007 of 2023 on 11.9.2024)*

**JUDGMENT**

1. This is an appeal from the conviction and sentence meted out by the Hon. Dennis Matutu, Senior Principal Magistrate in Múkûrwe'inî in SPMCCRC No. E007 of 2023 on 11.9.2024. The Appellant was sentenced to 20 years imprisonment.
2. The trial court found the Appellant guilty on two offences of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the charge were that on 28.10.2022, at 2000hrs at Gaikuru village, Muhito Location in Múkûrwe'inî sub-county of Nyeri County, the Appellant robbed Teresiah Wambui Kihara of an Identity Card, Plastic Thermos Flask, plastic water bottle, travelling bag, lesso and a purse all valued at Ksh. 2,450/- and immediately after the time of such robbery wounded Teresiah Wambui Kihara.
3. The Appellant was also charged in Count II with robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the charge in Count II were that on 28.10.2022 at 2000hrs at Gaikuru village, Muhito Location in Múkûrwe'inî sub-county of Nyeri County, the Appellant robbed Agnes Wangechi Githiga of Mobile Phone make Itel A35, Cash of Ksh. 1,500/= an Identity Card, and a Bluetooth earpiece all valued at Ksh. 8,900/- and immediately after the time of such robbery wounded Agnes Wangechi Githiga.
4. The Appellant filed a petition of appeal dated 8.10.2024 setting out the following grounds of appeal:



- a. That the trial magistrate erred in both law and in fact in convicting the appellant while the complainant failed to place the Appellant at the scene of crime on the material night, and the intensity of the security lights, which allegedly enabled their identifying the perpetrator was doubtful. A miscarriage of justice was thereby occasioned.
- b. The trial magistrate erred in both law and in fact in rejecting the appellant's possible three (3) individuals' evidence of alibi, that during the said hour he was at his grandmother's (DW2) busy cooking chapatis.
- c. The trial magistrate erred in law and in fact in convicting the Appellant on complainants' evidence, which was insufficient particularly police recovered nothing from the Appellant. A miscarriage of justice was thereby occasioned.
- d. That the trial magistrate erred in law and in fact in meting out a harsh and oppressive sentence in the circumstances.

### **Evidence and proceedings**

5. PW1, Teresiah Wambui, testified that on 28th October 2022 at around 8:00 p.m., she was walking home in the company of Agnes Wangechi after visiting a pharmacy. Agnes crossed the road to buy batteries from a shop and then rejoined her. As they proceeded along Gituro Road, the Appellant approached from behind Teresiah, overtook her by using a shortcut, and reappeared facing both her and Agnes. She continued that the Appellant then snatched Agnes' handbag from her shoulder. He was armed with a stone, which he used to hit Agnes on the shoulder. As Teresiah and Agnes attempted to flee, the Appellant tripped Teresiah, causing her to fall. He then struck her on the forehead with the stone and snatched her handbag as well. According to Teresiah, her bag contained a lessa, national identity card, water bottle, purse, and sanitary pads.
6. It was her further testimony that the Appellant wore white trousers, black jacket and a cap. There was security light from a homestead nearby the road. Teresiah informed her brother Francis Karugu and John Kihara who went to search for the Appellant and took the Appellant to Mûkûrwe'inî Police Station on 29.10.2022. On cross examination, Teresiah reiterated this testimony and testified that the Appellant had dreads when he was arrested. That she saw him at the miraa base.
7. It was her further testimony that the Appellant was dressed in white trousers, a black jacket, and a cap at the time of the incident. She stated that there was a security light from a nearby homestead, which illuminated the scene. Teresiah reported. During cross-examination, Teresiah maintained her account and added that at the time of arrest, the Appellant had dreadlocks. She further stated that she saw him at the miraa base.
8. PW2, Agnes Wangechi, testified that she did not know the Appellant prior to 28th October 2022. According to her, when she went to buy the batteries, the Appellant followed her, he took a shortcut and came ahead of herself and Teresia. He told Agnes that she was not his relatives and he snatched her bag from her shoulder. He then hit her shoulder with a stone. He tangled Teresiah who fell down and he hit her on the face. Agnes' bag had ITEL A35 phone, ATM, earpiece, Bluetooth, handkerchief and Ksh 1,500/= and tissue. The Appellant had white trouser and black jacket and a cap. When arrested, he had dreadlocks.
9. PW3 was John Kinagati. He was brother to Teresiah. He heard her sister scream that she was robbed. He rushed on the road and found Teresiah injured on the forehead. Teresiah later identified the Appellant at the miraa base and he was arrested. On cross examination, it was his case that the Appellant was identified at the miraa base. He had a black jacket.



10. PW4 was Martha Wanjiku the clinical officer. According to her, Teresiah had a blackening and swelling face with age of injury of 2 days. Weapon used was bare hand and stone. She produced the treatment notes. On Agnes, it was her testimony that there was no notable injury.
11. PW5 was Paul Njuiri. He was with John Kinagati. They went and found the Appellant at the miraa base where he was arrested. He did not know the Appellant before then. On cross examination, it was his case that the Appellant was in a black pullover and had dreadlocks.
12. PW6 was No. 8109 PC Michael Muchiri. He was the Investigating Officer. There was a prior alarm that a robber was robbing members of the public of their bags. The Appellant was said to be a bystander at the kiosk where Agnes was buying batteries and the Appellant took a short cut and came face to face with Teresiah and Agnes before robbing them of their bags and using a stone to hit them. They searched the house of the Appellant but made no recovery. On cross examination, it was his case that the Appellant was identified at the miraa base. They zeroed in on the Appellant as the assailant upon concluding the investigations.
13. The appellant was placed on his defence. He gave sworn evidence and called two other witnesses. The nature of his evidence was that he was at home cooking chapatis.
14. DW1 was the Appellant, aged 25 years. On 28.10.2022, he was with his father working on powersaw at Gikondi. They closed at 2.00 pm. He went to his grandmother who asked him to split firewood and by 9.00 pm, he had done the firewood and prepared chapatis whereupon he went to sleep at 10.00 am. He did not rob anyone and nothing alleged to be stolen was found in his house. On cross examination, he testified that he was with his aunt Purity on 28.10.2022 and his grandmother. He prepared chapatis at 9.00 pm and went to sleep at 10.00 pm.
15. DW2 was Veronica Wangechi Wangunyi. She was grandmother of the Appellant. The Appellant, according to her, was home on 28.10.2022. He came at 2.00 pm. He went to feed goats at 5.00 pm. She asked the Appellant to prepare chapatis which he did until 9.00 pm. Earlier on 28.10.2024, the Appellant had gone for power saw work.
16. DW3 was Beatrice Njeri. He was aunt to the Appellant. She was a teacher and was home on 28.10.2022 and the Appellant came for lunch. He went to find grass for goats and rabbits. His grandmother asked the Appellant to prepare chapatis. On cross examination, she testified that the Appellant was her nephew. She was home and the Appellant was also there on 28.10.2022.

### **Submissions**

17. The Appellant filed undated submissions by which it was submitted that he was convicted on mistaken identity. That the alleged source of light was not proved to be sufficient to identify the Appellant. Reliance was placed on the case of Kariui Njiru & 7 Others v R (2001) eKLR. It was also submitted that the Appellant was not identified at the scene of crime and he was home at the time of the alleged offence. He cited Moses Manyua Mucheru v R Criminal Appeal No. 63 of 1987 to submit that identification was inadequate. On mistaken identify, he also relied on Joseph Ngumbao Njoro v Republic (1982) KAR 212.
18. The Respondent also filed submissions dated 9.6.2025. It was submitted that the Respondent proved the ingredients of robbery with violence under Section 296(2) of the *Penal Code*. Reliance was placed on Oluoch v Republic (1985) KLR.
19. The Respondent also submitted that the elements of the offence of robbery with violence were proven beyond reasonable doubt. The Appellant was positively identified by the prosecution witnesses and



placed at the scene on the material night. The prosecution submits that all the grounds raised by the Appellant are not supported in fact and in law. The grounds raised are mere attempt to mislead the court and are a misrepresentation of facts of what transpired during the trial process.

20. The Appellant also submitted that only one ingredient was enough to convict the offender. Reliance was placed inter alia on *Dima Denge Dima & Others v R* (2013) KECA 480.

### **Analysis**

21. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

22. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in *Elizabeth Waithiengi Gatimu vs. Republic* [2015] eKLR expressed himself as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”



23. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

24. The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the state has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

25. According to Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”



26. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 that:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

27. Reasonable doubt needs not reach certainty, but it must carry a high degree of probability. It was held by the Court of Appeal in *Moses Nato Raphael vs. Republic* [2015] eKLR as doth:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in *Miller v. Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

28. PW1 and PW2 were categorical that they saw the Appellant. There was light coming from a nearby home. The Appellant was wearing a black sweater, white trousers and a cap. He respectively snatched their hand bags after which he hit them using a stone that he had in his hands.

29. The evidence of PW1 and PW2 was not supported by any eye witness. On his part, the Appellant maintained the defence of alibi. It was his case that he went to work on a power saw with his father on the material day, 28.10.2022. He came back home at 2.00 pm and went to fetch food for the goats until 5.00 pm when he returned.

30. Further case of the Appellant was that the period between 5.00 pm and 10.00 pm was spent such that he was with his grandmother DW2, whereby he prepared chapatis until 9.00 pm. They ate and then the Appellant went to sleep at 10.00 pm. This testimony was supported by DW2 and DW3, the grandmother and aunt of the Appellant who testified for the Appellant.

31. The appellant raised a defense of alibi. His defence was supported by witnesses. The state had an opportunity to call rebuttal evidence which they did not call. The appellant relied on the defence of alibi. With reference to alibi evidence, the Court of Appeal in *Erick Otieno Meda vs. Republic* [2019] eKLR stated thus:

“In considering an alibi, we observe that:

- a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
- b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.



- d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.

32. The first aspect was the alibi defence set out. The state did not find it fit to challenge any of the statements made by the Appellant in relation to the alibi. The state, in its cross examination confirmed the consistency of the defence evidence. The appellant was in their home from 5.00 pm up to 10.00 pm when the parties took dinner. This piece of evidence was not impeached at all. The Appellant's evidence remained unrebutted. In the case of *Erick Otieno Meda v Republic* [2019] eKLR, the Court of Appeal [*Asike Makhandia, Kiage & Otieno-Odek JJA*] posited as follows regarding an alibi: -

In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie – v- Republic* [1984] KLR, this Court stated:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.....”

33. In the South African case of *S -v- Malefo en andere* 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:

- i. There is no burden of proof on the accused to prove his alibi.
- ii. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.
- iii. An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."
- iv. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").
- v. The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

34. The burden of proving the falsity of an alibi was addressed in case of *Victor Mwendwa Mulinge –v- R*, [2014] eKLR as follows: -

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution....”

35. In another persuasive South African case of *R - v - Biya* 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:

If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a



reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.

36. From the totality of the evidence, the appellant was in his house. To compound this, none of the items were found on him. The period between the robbery and arrest of the appellant was so short, that, under the doctrine of recent possession, had anything been found on him, then the doctrine could apply. Conversely, failing to find any item from the recent robbery, barely 14 hours earlier adds to the doubt. Those doubts have to be resolved in favour of the accused person. In the case of William Ongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) *v Republic (Criminal Appeal 49 of 2020)* [2022] KECA 23 (KLR) (21 January 2022) (Judgment), the court of appeal [A Mbogholi-Msagha, SG Kairu & P Nyamweya, JJ] stated as follows:

We start with the question whether the doctrine of recent possession was properly invoked. As regards the circumstances under which the doctrine of recent possession may apply, in *Athuman Salim Athuman vs. Republic* [2016] eKLR, this Court held that:

“The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See *Malingi V. Republic* (1989) KLR 225 H.C and *HASSAN V. Republic* (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in *Isaac Ng’ang’a Kahiga Alias Peter Ng’ang’a Kahiga V. Republic*, Cr. App. NO. 272 of 2005, where this Court stated:

“Before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.”

37. In this case, that doctrine was in favour of the appellant. Nothing was recovered on him. The Supreme Court of Uganda, in the case of *Bogere Moses v Uganda* 1998 UGSC 22 (6 July 1998) stated as follows:

It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye-witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable while the latter solely depends on the credibility of the eyewitness.

38. The second aspect was the nature of identification. This was done through recognition and not identification. In *Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republic* [1980] KECA 23 (KLR), the court stated thus:

Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than



identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v Republic* (unreported).

39. In regard to recognition the decision in the case of *Peter Kifue Kiilu & another v Republic* [2005] eKLR, the court of appeal [Tunoi, Waki & Onyango Otieno, JJ.A] comes in handy, where the court held as follows:

In the well-known case of *Abdalla bin Wendo and Another v. R* [1953], 20 EACA.166 the predecessor to this Court stated as follows:

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by 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 probability of error”.

40. Positive identification of the appellant was crucial for the conviction. The case resulted in arrest of two persons from the description, which was dreadlocks. Nothing was shown that the identification was free from error. Given the doubts. Factors influencing identification accuracy include lighting conditions, observation time, distance, and whether the witness is familiar with the accused.
41. Positive identification of the Appellant was crucial to securing a conviction. However, the arrest was based solely on a general description, that is the black jacket, a cap, white trouser and that the suspect had dreadlocks. This led to apprehension of two individuals. There was no identification parade carried out to identify the appellant.
42. Nothing in the evidence established that the identification was free from the possibility of error. In light of these doubts, it is important to consider the well established factors that affect the accuracy of visual identification, such as the lighting conditions at the scene, the amount of time the witness had to observe the suspect, the distance between the witness and the suspect, and whether the witness was previously familiar with the accused.
43. PW1 did not show how violence was applied on her. She was tangled and fell. PW1 stated that there was light from a homestead. The assailant was said to have come from behind. It is therefore possible that the fleeting nature of the encounter was not enough to identify the assailant. It is no wonder two people were arrested fitting the same description. PW1 spotted the appellant at a Miraa base and had the brothers to arrest him at 6.30 pm. How did the brothers arrest him if the witnesses were not sure? The next issue is the identification parade. The witnesses did not know the assailants or the appellant before the incident. Nothing was harder than conducting a parade so as to test a witness's ability to identify a suspect in a crime. In the case of *Mutai & another v Republic (Criminal Appeal E060 of 2021)* [2022] KEHC 10472 (KLR) (19 May 2022) (Judgment), R. Nyakundi J held as follows:

Courts have held that where identification is based on visual identification it is paramount that the court warns itself on the dangers of relying on visual identification. In the case of. In *R-V-Turnbull*, (1976) 3 All ER 551 the court stated that:

“... 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 with the



Accused under observation? At what distance? In what light? Was the observation impeded in any way....? 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?...”

27. Coming back home, In the case of Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 KLR 424 , the Court of Appeal held that:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

44. On evaluation of the witness testimony, and on the strength of the holding in R v Turnbull (supra), it is my considered opinion that as per the set guidelines, I am of the view that the accused persons were not positively identified. Indeed, dock identification is virtually useless. In the case of Waithaka v Republic (Criminal Appeal E037 of 2022) [2024] KEHC 3523 (KLR) (18 March 2024) (Judgment), this court held as follows:

Dock identification is the worst forms of identification. In the case of Donald Atemia Sipendi v Republic [2019] eKLR, Justice Mativo J, as then he was stated as follows:

43. In such matters, the importance of the first statement to the police cannot be downplayed. If the description of the attackers is not given to the police then the evidential value of the identification parade from which the attackers were purportedly picked would be substantially diminished though the parade itself may not, merely for that reason, have been rendered invalid.[20] In Ajode v Republic[21] the Court of Appeal held that it is trite law that before an identification parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade. On the validity or otherwise of an identification parade, I rehash the pronouncement in John Mwangi Kamau v. Republic[22] where the Court of Appeal held as follows:-

- “15. Identification parades are meant to test the correctness of a witness’s identification of a suspect. See this Court’s decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003;

The assailants’ were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-“A dock identification is generally worthless and the court should not place much



reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

45. By this court, it is not difficult to find that the trial court found the Appellant guilty when there was doubt as to whether the Appellant was indeed the person who committed the offence. I say so because whereas the prosecution’s case on all its fours was that PW1 and PW2 identified the Appellant as the violent robber on 28.10.2022 at 8.00 pm, the identification clearly emanated from the observation of the Appellant at the miraa base on 29.10.2022 shortly before his arrest and not at the scene of the crime. At the said identification miraa base, the Appellant was described to have dreadlocks.
46. The presence of dreadlocks was not a feature described of the robber prior to seeing the Appellant at the miraa base. The robber was only said to have been wearing a black Jacket, white trouser and a cap. The intensity of the light emanating from a nearby home was not tested in evidence and this court is in doubt whether the Appellant was identified beyond reasonable doubt.
47. Further, it was the confirmed case of PW1, PW2 and PW6 that no inventory of recovered items could be prepared as none was found in the precincts of the Appellant’s home or at all. Coupled with the insufficient identification of the Appellant as described herein, I think the Appellant’s defence of alibi as supported by consistent and credible witnesses, DW2 and DW3 was insurmountable. The prosecution failed to prove a case against the Appellant. This is particularly because PW1 and PW2 were also clear that they did not know the Appellant prior to alleged robbery with violence.
48. Section 296(2) of the *Penal Code* provides 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.

49. The evidence produced by the prosecution created doubt as to the guilt of the Appellant. Section 111 of the *Evidence Act* provides as follows:
- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
- Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
- Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.
- (2) Nothing in this section shall—
- (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or



- (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
- (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

50. The court finds that the conviction of the Appellant was based on recognition, was weak and cannot be relied on. The evidence did not point to guilt of the Appellant. Even circumstantial evidence did not irresistibly point to the appellant as the perpetrator. Further on circumstantial evidence, the threshold as stated in R vs Kipkering Arap Koske [1949] 16 EACA 135 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In Sawe vs Rep [2003] KLR 364, the Court of Appeal expressed that:

In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

51. Based on the above analysis, I also find that the conviction was not supported by evidence on record. In the circumstances the appeal against the conviction allowed. Having found that the conviction was unfounded and set it aside, I find no utility in dealing with the issue of sentence. The Appellant is set free unless otherwise lawfully held.

#### **Determination**

52. In the circumstances I make the following orders:
- a. The appeal on conviction and sentence is allowed. The conviction and sentence are set aside, the Appellant is set free unless otherwise lawfully held.
  - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25<sup>TH</sup> DAY OF JULY, 2025.**

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Ms. Kikunju for Mr. Kimani for the State

Appellant in person

Court Assistant – Michael

