



**Mate v Republic (Criminal Appeal E066 of 2023)
[2025] KEHC 10646 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E066 OF 2023
SC CHIRCHIR, J
JULY 17, 2025**

BETWEEN

BRIAN MATE ALIAS BRAVIN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgement of Hon. J.R NDURURI delivered on
17th October 2023 at the Chief Magistrate's Court in Kakamega in Criminal
Case No E 843 of 2022 as consolidated with Criminal Case No E 1443 of 2022)*

JUDGMENT

1. The Appellant, was charged , alongside 2 others, with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars were that on the 1st day of July 2022 at about 3.00hrs at Shiina village, Lesa Location ,in Kakamega East - Sub-county within Kakamega county jointly while armed with dangerous weapons namely pangas, robbed Lydia Iganyo one phone make techno, two black troughs ,a sack of beans, 6 hens, 2 chargers, cash - 2000/= all valued at Kshs.42,600 and at the time of the robbery used actual violence against Lydia Iganyo. The three were convicted of the offence and sentenced to 30 years in prison.
2. He was aggrieved by both the conviction and sentence and brought this appeal.

Petition of Appeal

3. The Appellant has presented the following grounds for consideration:
 1. The Learned Trial Magistrate erred in law and fact in convicting the Appellant when there was no evidence linking him to the alleged commission of the offence.



2. The Learned Trial Magistrate erred in law and fact in convicting the Appellant when the evidence on recognition of the Appellant by Prosecution Witnesses fell short of the required standard of proof.
 3. The Learned Magistrate erred in law and fact in failing to properly evaluate the evidence on record thereby occasioning miscarriage of justice.
 4. The Learned Magistrate erred in law and fact in convicting the Appellant by relying on the evidence of the Complainant (Lydia Inganyo) despite her evidence being contradictory.
 5. The Learned Magistrate erred in law and fact in conducting a fresh trial when the case against the Appellant had been concluded and only pending judgement.
 6. The Learned Magistrate erred in law and fact in giving a sentence which was manifestly excessive given the nature and circumstances of the case.
4. The Appeal proceeded by way of written submissions.

Appellant's Submissions

5. It is the Appellant's submission that the two key prosecution witnesses that is PW3 and PW4 contradicted each other rendering their testimonies incredible. While referring to PW3, he submits on being recalled ,she contradicted her earlier testimony ,on what woke her up on the material night. It is further stated that the witness also contradicted herself as to whether the attacker had a panga or a slasher. The other contradiction is on whether she recognized the 3rd accused or it was her daughter, April, who recognized him.
6. The other contradiction Appellant has referred to is whether two stolen basins were found at his house or the 3rd Accused's house: that this contradiction is significant considering the fact that the 3rd Accused was convicted by the trial court invoking the doctrine of recent possession. It is further submitted that there was also contradiction on the layout of the complainant house as described by the complainant vis-a- vis the sketch diagram produced.
7. On the evidence of PW4, the Appellant faults the trial court for arriving at a finding that the said witness saw the Appellant ,while the evidence on record shows that PW4 identified the 3rd Accused only. It is further submitted that PW4 never mentioned seeing the Appellant on the night of 01/7/2022 but only saw him on the night of 02/7/2022 outside the house, and while wearing a mask; that in the circumstances, she could not have identified the Appellant.
8. The Appellant further submits that the court did not give due consideration to the fact that the Complainant never mentioned the name of the Appellant when she went to report the incident at the police station.
9. It is further submitted that failure to recall PW2 (Gilbert Shimanyola,), and one Selina , the sister to the Appellant was prejudicial to the Appellant and the 3rd Accused as they did not get a chance to cross-examine these witness; that their testimonies were crucial ; and that by the prosecution's failure to call the two witnesses the court should make an inference that their evidence would have been adverse to the prosecution's case.
10. It is submitted that, based on the complainant's testimony, she was hit while a torch-light was being directed at her ; that in the circumstances she could not have been in a position to identify her attacker.; that PW3 on the other hand lost consciousness ,was full of fear and due to the violence involved in the attack , she too could not have been in a position to identify the assailants. It is therefore submitted that



the trial magistrate failed to interrogate the prevailing circumstances, to determine whether positive identification was possible.

11. On the sentence, it is submitted that the same was excessive in view of the fact that there was no evidence that the Appellant was armed, or attacked any of the victims. That the court did not consider these mitigating factors.

Respondent's Submissions

12. The Respondent submits that it was the evidence of PW3 that the 3rd Accused was flashing the flashlight around, and that the flashing of the flashlight gave her a chance to positively identify the Appellant. It is further stated that the Complainant recognized the Appellant herein as he strangled her. It is further submitted that the Appellant was also seen the following night by PW1 when the Appellant and the 1st Accused went back to her house; and that the two plastic basins were recovered from the Appellant's house.
13. The Respondent further submits that PW3 recognized the clothes the Appellant wore, both on the night of the attack, and the following night when he and the 3rd Accused went back to the complainant's house.
14. It is further submitted that PW4 (The minor) too recognized the Appellants ; that she identified them by their first names by referring to them as Kutosi, Ngaira and Jokinder.
15. While highlighting the factors which the court should consider when determining whether positive identification has been achieved, the Respondent submits that the light from flashlight was sufficient ; that the witnesses and the attackers were within the same space ;that the Complainant gave a detailed description of the Appellant's clothes and finally that that the victims and attackers were together for an approximate period of one hour. The respondent concludes by stating that the above conditions favoured positive identification.

Analysis of the Evidence and determination

16. It is trite law that an Appeal to this court is by way of a retrial and therefore its mandate is to review the evidence, evaluate it and arrive at its own independent finding but making room for the fact that the trial court had the advantage of seeing and hearing the witnesses first hand (Ref. [Gitobu Imanyara & 2 others v A.G](#) (2016) eKLR).
17. I have considered the proceedings of the trial court, the grounds of Appeal and the parties' submissions. The Appellant herein and one Wycliffe Ambogo alias Jokinda were initially charged alone with the offence. On 29th march 2023, the case was consolidated with criminal case No. 1443 of 2022 under which the Allan Ngaira had been charged . They were then charged afresh and identified as the 2nd, 1st and 3rd Accused respectively . They were all convicted of the charge and sentenced to a prison term of 30 years as aforesaid.
18. I am of the view that the following issues arise for determination:
 - a). Whether the Appellant was positively identified.
 - b). Whether the prosecution's case was marred with contradictions and inconsistencies
 - c). Whether crucial witnesses were not called.
 - d). Whether the offence was proved .
 - e). Whether the sentence was excessive.



Whether the Appellant was positively identified.

19. On identification of the Appellant, it is not disputed that the incident took place at night. The imperative question therefore is whether the prevailing conditions were favourable for positive identification of the Assailants.
20. The evidence of identification was given by PW3 (the Complainant) and PW4 her child. The fact that the 1st Accused had a flashlight is not in dispute. The complainant told the court that a young man entered her bedroom and flashed a torchlight at her, she tried to scream but he hit her with a panga on the head and strangled her. Her daughter (PW4), woke up and addressed the man as Ngaira, the 3rd Accused. She could hear two other people walking around the house. The 3rd Accused walked around the bedroom while flashing the torch, then he would get out to monitor the others who were removing items from the store. She recognized all of them, she stated. She stated that her house had a bedroom, a store and a sitting room; that the store and the bedroom door were facing each other; that because the 3rd Accused was moving between the two rooms while flashing a torch, she could clearly see the other two people in the store. Before leaving, the 3rd Accused went back to the bedroom and assaulted her again. She stated that the three assailants were her neighbours.
21. She further stated that on the following night she heard a commotion outside her house and she called "Nyumba kumi" people. They came and together they went looking for the suspects.
22. On cross-examination, she was shown a sketch plan of her house which indicate that there was no store, but she insisted that the sketch was incorrect and doesn't depict the layout of her house. She further stated that it was her brother and not the police who took the photographs of the house.
23. In his evidence-in-chief, PW4 never talked of seeing the Appellant. She only testified of seeing the 3rd Accused. On cross-examination, she stated that he saw Jockinda Kulosi (1st Accused). She stated that there was electricity in the house; that their house has no store. On further cross-examination she stated that she only recognized one person, but there were three people in the house.
24. In view of the foregoing, it is evident that PW4 did not recognize the Appellant. It follows that the only evidence of identification was that given by the complainant, and consequently, the trial court ought to have warned itself on the danger of relying on the testimony of a single witness for the issue of identification.
25. In the case of *Roria v R* (1967) EA 853 cited in *Njoroge v Republic* [1982] KECA 19 (KLR) the Court of Appeal in East Africa held, "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 not based on the testimony of a single witness can safely be accepted as free from the possibility of error".
26. In determining whether an attacker has been positively identified, the factors to be considered were stated in the case of *R v Turnbull* [1976] 3 All ER 549, where the court stated that the following should be considered: "How long did the witness have the accused under observation", At what distance and in what light; Was the observation impeded in any way e.g by passing traffic or a presence 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 had lapsed 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 him and accused's actual appearance?
27. According to the Complainant, the Appellant and 1st Accused were carrying out items from the store; that her bedroom faced the store, and because the 3rd Accused was flashing the flashlight around, she managed to see the other two. The pertinent question is were the prevailing conditions conducive to positive identification? The circumstances were that the Appellant was in the store with the 1st Accused. The 3rd Accused was already in the complainant's bedroom. The 3rd Accused was hovering around her, and the children were screaming. The only available light was the torch light. With all this commotion going on, was it possible for the complainant to see and identify the other two who included the Appellant? My conclusion is that it is doubtful. Even though the complainant stated that the assailants spent about an hour in her house, at no one time did the Appellant enter her bedroom.
 28. There was also contradiction between her testimony and that of her child (PW4) and that of the investigations officer (PW2). PW4 stated that there was no store in their house. The investigations officer talked of two bedrooms then 4 bedrooms. He stated that he was the one who drew the sketch. The sketch plan was a critical piece of evidence as it went directly to the question of identification of the Appellant, who was not in the same room with the complainant during the entire robbery. The complainant having denounced the sketch drawn by PW2, there is no certainty therefore on whether from where she was being attacked in her bedroom she could directly see the store from which the items were being removed by the Appellant and the 1st Accused to be able to identify the Appellant.
 29. Further there are other circumstances that negate her testimony of positive identification. According to PW2, when the complainant reported the incident she only named the 3rd Accused as the person who robbed her and thus the OB entry for that day had the name of the 3rd Accused only. It was later when she recorded her statement that she added the Appellant and the first Accused. The statement was recorded the following day while the OB report about the robbery was made the same day of the robbery.
 30. What has caught my attention about the subsequent naming of the 1st and 2nd Accused is the fact that this was being made after the 1st and 2nd Accused had been arrested. The complainant recorded her statement after the 2nd incident in her house. It was after this 2nd incident that she accompanied "Nyumba kumi" to look for the suspects and arrested them. The complainant then recorded her statement. Why was the Appellant being named only after he was arrested and not before?
 31. I have carefully considered the above conditions appertaining at the time of the robbery, the uncertainty of the layout of her house; the circumstances of the Appellant's arrest and initial report to the police station, which excluded his name, and am not convinced that the complainant identified the Appellant that night. If she did, there was no reason why his name was not given to the police at that first instance. In any case, according to the complainant, her and her attackers were neighbours. If she could easily identify the 3rd Accused that night why not the Appellant who was equally a neighbour.
 32. The complainant told the court that she knew all the accused persons as they were her neighbours. The Appellant corroborated her testimony. He told the court that they were all from the same village. Then if indeed the Complainant saw him then this was a case of identification through recognition. However mistakes can also be made even when identification was through recognition. The court took cognizance of this fact in *R v Turnbull* (*supra*) where the court further held: "Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."



33. Further in *Sango Mohamed Sango & another v Republic* [2015] KECA 178 (KLR) the court of Appeal held: “The necessity of close scrutiny of evidence where a conviction is based solely on identification, particularly under difficult or unfavourable conditions, cannot be gainsaid. This Court has stated time and again that even honest witnesses tend to make genuine mistakes when it comes to identification of close relatives and friends. (See *Wamunga v Republic* [1989] KLR 424). It is on that basis and to mitigate the risk of unsafe convictions that close evaluation of identification evidence is insisted upon, including the need for the trial court to warn itself of the danger inherent in such evidence.”
34. In *Sango’s case* (*supra*) the facts on identification were almost similar to the present case as identification was through a torch that was being brandished around. The court took the position that the light from the touch was not sufficient in the circumstances of the case.

Whether the prosecution’s case was marred with contradictions and inconsistencies

35. The law on contradictions and inconsistencies is that inconsequential ones may be ignored. They become material when they affect the substance of the prosecution’s case or appear to indicate an attempt on the part of the witness to deliberately mislead the court. This is what the court has to say on contradictions in the case of *Twehangane Alfred v Uganda* Crim APP No.139/2001(2003) UGCA 6 cited in *Erick Onyango Odeng v Republic* [2014] KECA 523 (KLR). The court stated: “with regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”
36. The inconsistency in this case was on the layout of the complainant’s house. The complainant went to the extent of disowning it . Though the inconsistency was just one, it was a material one . It was only a clear representation of the lay out of the house that would have provided the certainty as to whether the complainant positively identified the Appellant. It therefore affected the substance of the prosecution’s case. The Appellant has referred to other contradictions , as reflected in the complainant’s first testimony, and upon being recalled. However the case started afresh after the cases were consolidation, and the previous record ceased to have any bearing on the final decision of the court.

Whether the case was proved

37. In view of the doubts raised in respect to positive identification of the Appellant as well as the material inconsistency as aforesaid ,it is my finding that the charge was not proved beyond reasonable doubt.
38. It is the duty of the prosecution to prove its case beyond reasonable doubt and where doubts arise ,as in this particular case the doubts must always be resolved in favour of the Accused.The conviction of the Appellant was unsafe.

Whether the sentence was excessive

39. The Appellant was sentenced to 30 years. The offence of robbery with violence carries death sentence. In view of the statutorily prescribed, mandatory and minimum sentence for the offence , I would not have found the sentence to be excessive.
40. In conclusion, the Appeal succeeds. The conviction of the Appellant is hereby quashed and sentence set aside. He shall be set free forthwith, unless otherwise, lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO THIS 17TH DAY OF JULY 2025



S. CHIRCHIR

JUDGE.

In the presence of:

Godwin Luyundi- Court Assistant

Mr . Biketi for the Appellant

