Imbwaga & another v Republic (Criminal Appeal 191 of 2013) [2025] KEHC 12538 (KLR) (9 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12538 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 191 OF 2013

RN NYAKUNDI, J

SEPTEMBER 9, 2025

BETWEEN

NICHOLAS IMBWAGA .... 1ST APPELLANT

GILBERT KAMINJA .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

Representation:

M/s Sidi for the State

1. The two appellants herein were on 7th November 2014 arraigned before the Chief Magistrate's Court at Eldoret and charged with the offence of robbery with violence contrary to section 296[2] of the *penal code*. Each of the appellants pleaded not guilty placing the burden of proof upon the prosecution to disapprove their innocence as stated in Article 50[2] [a] of the *Constitution*. The prosecution was led by Mr. Mark Mugun while the applicants were unrepresented.

Background of the prosecution case

2. The particulars of the offence are that on the 2/10/2011 at Huruma estate in Uasin Gishu district within Rift Valley province jointly while armed with offensive weapons namely pangas and rungus robbed Wycliffe Shikuku of his mobile phone make G-tide and cash Kshs. 3,800/= all valued Kshs. 7,800/= and immediately after the time of such robbery wounded the said Wycliffe Shikuku.

3. The appellants were tried, found guilty, convicted of the offence and sentenced to suffer death which was later commuted to life imprisonment by the Executive powers exercisable by the President of the Republic of Kenya.

4. The trial court placed reliance on the strength of the following witnesses to make a finding of guilty, conviction and verdict for the offence of robbery with violence contrary to section 296[2] of the *penal code*.

5. In the first instance Wycliffe Shikuku [PW1] the star witness for the State told the court that on 22nd October 2011 he went to his brother's place where he met two people who introduced themselves as police officers. In PW1's testimony he was able to recognize the first and second accused whom he referred as Kamunya and Musyomi respectively but before the discussion could be taken any further he was hit with a panga by the second accused which occasioned him harm. According to PW1 he not only suffered physical injuries but was also robbed of his phone G.tide and Kshs. 3,800/=. He produced before that trial court some blood stained shirt and stripped grey trouser as physical items in support of his case. The report was later made to the police and subsequently PW1 sought medical treatment at Huruma sub district hospital.

6. The next witness was PW2 who told the court that PW1 is his own brother whom he acknowledges that he went to visit him on 2nd of October 2011. That when they were done with the family visitation PW2 escorted his brother to get back to his own house. It did not take long before he could here scream of distress from PW1 necessitating them to rush to the scene only to find that he had been attacked by two robbers who were later arrested and charged before the CM's court.

7. Next line was PW3 Joseph Chesanai who is a criminal officer attached to Huruma sub district hospital. The witness treated the complainant PW1 who had suffered injuries in the left limb and right hand. He assessed the degree of injury to be harm and he produced the P3 as exhibit in support of the case.

8. Lastly it was the investigating officer PC Njuguna who was attached to Baharini police station when this incident had take place involving PW1. According to PW4, the investigation and statement recorded linked the accused persons to the commission of the offence and duly recommended them to be charged with offence of robbery with violence contrary section 296 [2] of the *Penal Code*.

9. With this background, the learned Trial Magistrate placed the appellants on their defence which they highlighted as follows:

10. The first appellant Gilbert Kamunya gave unsworn evidence denying that he committed the offence of robbery with violence in which PW1 was the victim. He explained to the court that on 6th October 2011 he went into a near pub where he also met the second accused who requested him to call his wife, one Emily Nasimiyu. In a short while the complainant came to where they were and enquired where they had taken Emily. He had to inform that Emily was wanted by his husband, the second accused. According to the first appellant, PW1 telephoned the police and that is how PC NJuguna came to the scene, effected an arrest and subsequently charged them with the offence of robbery with violence which they did not commit.

11. The second appellant in his rebuttal to the prosecution case denied ever committing the offence as alleged by the prosecution witnesses. In his highlights, he told the court that on 6th October 2011, he went to the police station and that is how PC Njuguna arrested him and soon thereafter placed him in police custody which ultimately led to his indictment of robbing the complainant. It was the defence by the second appellant that on the material day he came into contact with the first accused whom he enquired if he had seen his wife. In answer to the question PW2 told the court that he informed him that his wife was in the pub. However, before he could speak to his wife the complainant came out and started touching her breasts and buttocks. The members who disapproved of his conduct descended on him and inflicted physical injuries. That is how the complainant ran to the police station that he

had been assaulted during the robbery on the 2nd of October 2011 and PC Njuguna effected an arrest on false allegations.

12. The appellants aggrieved with the conviction and sentence filed this appeal for consideration by this court based on the following grounds:

    a. That the learned trial magistrate erred both in law and facts by convicting me while relying on the alleged recognition evidence of PW1 and PW2 without considering that the circumstances under which the alleged recognition came to be made were not free from possibility of error or mistake.

    b. That the learned trial magistrate erred both law and facts by holding that the evidence of the prosecution witnesses had been corroborated while convicting without considering that the evidence adapted was remote and farfetched evidence thus unreliable evidence.

    c. That the learned trial magistrate erred both in law and facts by holding that the prosecution had proved their case against me beyond reasonable doubt, without considering that the case was poorly investigated.

    d. That the learned magistrate erred in both law and facts by not testing my defense instead she came obliged to reject my defense furthermore the ground of objection given by her had no merit.

    e. That my lords, as I cannot recall all what transpired in court during the judgement, I humble urge the honorable court to furnish me with a copy of the trial proceedings so as to enable me prepare more reasonable grounds during the hearing of this appeal.

13. In support of their appeal, the appellants filed written submissions urging this court to make a finding that the evidence on identification was mistaken in view of the circumstances that the robbery happened at night and there was no evidence on the type and source of light used to identify the assailants. The appellants on this issue invited the court to rely on the principles in the case of *Wamunga v R* [1989]4 eKLR. It was further argued by the appellants that PW2 claimed to have escorted the complainant from the house but during the night, they were awakened by a distress screams from PW1 and responding to the scene, he was found to have suffered serious injuries which compelled him to make arrangements to been seen by a doctor at Huruma hospital. In the foresaid submissions, they fault the learned trial magistrate in relying on the evidence of PW2 which was contradictory and inconsistence. The appellants further submitted that the prosecution evidence and its witnesses was not corroborated by any independent material evidence as to the attacked, the nature of weapon used and the injuries suffered by the complainant. Lastly the appellants contended that during the trial they presented a credible defence which was never taken into account by the learned trial magistrate.

14. It is with this background in mind that I proceed to determine this appeal.

Analysis and determination

15. This courts' jurisdiction is one exercisable under the guidelines outlined in the case of *Njuguna Wairimu v Republic* [2010] where the court of held:

> " 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 appellant 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 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."

16. The root of the offence of robbery with violence ought to be understood in the background of this provisions, that is section 295 of the *penal code* which states:

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

17. The court of appeal in *Oluoch v R* [1985] KLR articulated the essential ingredients of the offence of robbery with violence as follows:

    a. The offender is armed with any dangerous and offensive weapon or instrument;

    b. The offender is in company with one or more persons;

    c. At or immediately before or immediately after the robbery, the offender uses actual violence on the victim.

18. In addition in *Dima Denge Dima & Others v Republic*, Criminal Appeal No. 300 of 2007 the Court stressed this point when it stated as follows:"...The elements of the offence under Section 296 [2] are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

19. In the instant case, from the evidence of PW1, he alleged that the incident occurred on 2nd October 2011 at around 9:00 p.m. and the only source of light was described as a "bright night." However, PW1 did not clarify whether this light was from the moon or merely a clear sky. It is also on record that PW1, who came into contact with the assailants, stated that he was struck by a panga which was in the possession of the second appellant. At that moment, he raised a distress call to his brother to come to his rescue, after which the OCS was alerted of the incident. On the same issue, PW2, who is the brother of PW1, testified that PW1 had earlier visited his house and was later escorted back to his own residence. Suddenly, while inside their house, they heard screams from PW1. They rushed back and came into contact with the two appellants. During cross-examination, PW2 stated as follows: "I know you very well. PW1 left my house at 8:30 p.m. on the fateful night. I was not at the scene when you attacked my brother, but from his distress call and your affirmation that you would beat him, my brother cried out your names and questioned why the two of you had attacked him."

20. In examining the record, the chain of events alluded to by the appellants are indicative of matter of 6th October 2011 for the second appellant and 6th November 2011. Here they are addressing the issues

attaching to the second appellant wife Emily Nasimiyu which has no connection to the events of 2nd October 2011 when the complainant was attacked, robbed of his valuable assets.

21. In my view, the incident reported to the police by the complainant, PW1, took place on 2nd October 2011 at or around 9:00 p.m. The assailants were two in number, and both PW1 and PW2 testified that they relied entirely on the bright light available on the material night.

22. This appeal can only be maintained or dismissed depending on the inferences that may be drawn by this Court regarding the circumstances of recognition. I must therefore first invoke the settled principles on this element, namely whether the appellants were indeed positively identified by PW1 and PW2 respectively. In answer to this question I reiterate the principles laid down in *Abdula Nabulure & 2 others v Uganda*, Supreme Court Criminal Appeal No. 009 of 1978 where the Court held as follows;

> "A conviction based solely on visual identification evidence invariably causes a degree of uneasiness because such evidence can give rise to miscarriages of justice. There is always the possibility that a witness though honest may be mistaken. Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.
>
> In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support to identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered. When, however, in the judgment of the trial court, the quality of identification is poor, as for example, when it depends solely on a fleeting glance or on a long observation made in difficult conditions; if for instance the witness did not know the second accused before and saw him for the first time in the dark or badly lit room, the situation is very different. In such a case the court should look for 'other evidence' which goes to support the correctness of identification before convicting on that evidence alone. The 'other evidence' required may be corroboration in the legal sense; but it need not be so if the effect of the other evidence available is to make the trial court sure that there is no mistaken identification."

23. The courts in Kenya have spoken to this issue very strongly as can be deduced from the following cases: *Wamunga v Republic* [1989] KLR 424 at 426 stated as follows:

> "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

24. In *Mailanyi v Republic* [1986] KLR 198, the court held:

    a. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.

    b. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

    c. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

    d. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

25. Similarly, in *R v Turnbull & Others* [1973] 3 ALL ER 549, the Court stated thus:

> "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? 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 relatives and friends are sometimes made."

26. In reviewing this evidence, I am guided by case law that has been tested over time in safeguarding the fair trial rights guaranteed under Article 50 of the *Constitution* in the administration of the criminal justice system. On the question of visual identification, recognition, or positive identification even where identification parade evidence is involved courts have consistently emphasized the importance of adequate lighting to support any positive finding as to admissibility, reliability, and credibility of identification evidence in each specific case. Where the lighting is poor during the attack or commission of the crime or where the prevailing conditions are not conducive to error-free identification, the reliability of such evidence becomes doubtful and cannot form the basis of a safe conviction. In the present case of robbery with violence, neither PW1 nor PW2 clearly explained to the Court the adequacy of the "bright night" they referred to, nor how sufficient it was to enable them to positively identify the appellants. To make matters worse, certain names were casually introduced in the trial court, yet it remains unclear whether this alleged recognition was founded upon a long-standing acquaintance with the appellants prior to the commission of the offence. Recognition, though generally considered more reliable than identification of strangers, can only be so if it occurs under favourable and reliable conditions. Indeed, the risk of mistaken identity among friends and relatives is not foreign to ordinary human experience, and it requires a clear and positive affirmation of the identity of the person in question.

27. The testimonies one at a point of critical significance relates with the testimonies of the star witnesses PW3 and PW4. There are certain inconsistencies and contradictions which the trial court had a duty to address and resolve in its judgment, but apparently this was not done. Take, for instance, the issue of the time when the offence was alleged to have taken place. The complainant stated on oath that at around 9:00 p.m. he was at Huruma King'ng'o at his brother's house, and upon leaving, he met two people who introduced themselves as police officers. He further explained to the trial court that it was a bright night, and that he was able to recognize the first appellant as "Kamunya" and the second appellant as "Musyomi." However, there is no evidence to corroborate that these alias names refer to the same individuals who were charged before the trial court. According to the record, the first appellant is named Nicholas Imbwaga, while the second appellant is identified as Gilbert Kaminja. It is also important to take judicial notice that, before an accused person is charged in a court of law, and for the elements of the offence to be properly reduced into a formal information, it is mandatory to provide identification documents with full particulars as required by law. At this stage, I am not satisfied that the references to the names "Kamunya" and "Musyomi," without any other corroborative information, relate to the same persons now before this Court. The complainant, PW1, did not stop there; he went on to state that the two appellants also encountered his brother, PW2. This is the differential minimum of PW2 testimony which is in contradiction with that of his brother PW1. "On 2nd October 2011 my brother came to visit me we thereafter escorted him with my wife. With them lefty him and went back home. All of a sudden we had a distress call. We recognized it was my brother's voice. We rushed to the scene. We found him on the ground bleeding profusely. We carried him and took him to his house. We woke his wife and calling the name of the assailants there are these two accused persons. In cross examination he said that I was not at the scene when you attacked my brother.

28. The question that remains unanswered is whether "Kamunya" and "Musyomi" are legal names associated with the appellants or merely aliases. That evidence was neither properly adduced nor admitted as credible to positively identify the appellants before this Court. Furthermore, the evidence referred to by PW2 cannot even qualify as a dying declaration. I am of the considered view that the circumstances of this case justify the inference that the contradictions and inconsistencies in the prosecution witnesses' testimonies were not adequately addressed by the trial court and they significantly affect the credibility of the complainant, PW1, who stood as the single identifying witness for the State.

29. In the landmark case of *Miller v Ministry of Pensions* [1947] 2 AII ER 372, Denning J 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 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."

30. Applying the test enunciated in *Miller v Ministry of Pensions* [supra], the evidence against the appellants in this case falls short of carrying a high degree of probability required for conviction. The evidence presented by the prosecution is with contradictions, and gaps that create doubt about their guilt. The identification evidence, being the cornerstone of the prosecution's case, was so unreliable in nature that it cannot sustain the heavy burden of proof beyond reasonable doubt. The trial court erred in law by convicting the appellants on evidence that created more questions than answers, and which fell far below the standard required for a safe conviction in our criminal justice system.

31. As an appellate court, I have carefully re-evaluated and analyzed the evidence that was before the trial court, examined the trial proceedings in their entirety, and applied the principles of law governing identification evidence as articulated in the authorities cited above. Having undertaken this re-evaluation, I find that the identification evidence relied upon by the trial magistrate did not meet the requisite threshold to sustain a conviction for robbery with violence. The quality of identification fell far short of the standards required by law. The lighting conditions described merely as a "bright night" were inadequately explained and insufficient to eliminate the possibility of mistaken identity. The use of unverified aliases "Kamunya" and "Musyomi" without proper corroboration linking these names to the appellants before this court creates a significant gap in the prosecution's case. The material contradictions and inconsistencies in the testimonies of PW1 and PW2, particularly regarding the crucial sequence of events, were neither addressed nor resolved by the trial court. The absence of corroborative material evidence further undermines the reliability of the identification. In these circumstances, I am satisfied that the prosecution failed to discharge the burden of proof beyond reasonable doubt as required by Article 50[2][a] of the *Constitution*. Consequently, I hereby allow this appeal, quash the conviction, and set aside the sentence of life imprisonment. The appellants Nicholas Imbwaga and Gilbert Kaminja are hereby acquitted and discharged. They should be released from custody immediately if not otherwise lawfully detained. I say unto them: arise, take up your freedom, return to your homes and families, and sin no more.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 9TH DAY OF SEPTEMBER, 2025.

....

R. NYAKUNDI

JUDGE

In the Presence of:

Ms. Sidi Kirenge for the state

The accused persons