



REPUBLIC OF KENYA



**Mwita v Republic (Criminal Appeal E034 of 2023)
[2024] KEHC 17020 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 17020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E034 OF 2023
RPV WENDOH, J
JULY 5, 2024**

BETWEEN

LAIZA MWITA ALIAS ELIJAH ALIAS RASTA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment, conviction and sentence of Hon.
A. N. Karimi Senior Resident Magistrate in Kehancha Senior Principal
Magistrates Court Criminal Case No. E132 of 2023 delivered on 12/6/2023)*

JUDGMENT

1. Laiza Mwita alias Elijah alias Rasta the Appellant herein has filed this appeal against the judgment of the Senior Resident Magistrate, Kehancha, in which he was convicted for the offence of Robbery with violence contrary to Section 295 as read with 296 (2) of the Penal Code in Count I, Going armed in public contrary to section 88 of the Penal Code in Count II and resisting arrest contrary to section 103 (a) of the NPSC in Count III and sentenced to serve 30 years in Count I, 5 years in Count II and years 3 years in Count III

The particulars of the three Counts are as follows: -

2. On the 8th July, 2021 at Nyankore Police Post in Kuria West Sub- County within Migori County, jointly with another not before court, while armed with offensive weapons namely; Pangas and rungunus robbed Ambrose Epat of his cash Kshs. 30,000/-, two mobile phones make Techno Spark 7, one Itel Phone and smart television set make Sony all items valued at Kshs. 53,000/- and immediately before the said robbery wounded the said Ambrose Epat.
3. That on 3rd February, 2023 at Nyankore Area in Kuria West Sub- County within Migori County, without lawful excuse went armed with an Axe in a public place namely Getamas Bar and on the same



- day unlawfully resisted arrest by No. 69xxx PC Joseph Njuguna and No. 10xxx PC Eddy Diribo who at the time of the said resistance was acting in due execution of their duties.
4. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of four witnesses in support of their case namely PW1 PC Ambrose Epat No. 23xxx, the Complainant; PW2 PC Joseph Gichuhi No. 69xxx, PW3 Edwin Omahe and lastly PW4 Corporal Ahmed Bishar No. 92xxx the investigating officer attached to Isebania Police Station.
 5. When placed on his defence, the appellant chose to remain quiet and await the judgment of the court.
 6. Upon conviction, the appellant was sentenced to serve thirty (30) years' imprisonment in Count I, five (5) years in Count II and three (3) years in Count III all the sentences to run concurrently. Dissatisfied with the convictions and sentences, the appellants timeously lodged the instant appeal. The Grounds of appeal and the Supplementary grounds are as follows: -
 - a. The trial court erred in both law and facts by failing to comply with Article 50 (2) (g) (h) of *the Constitution*;
 - b. The trial court erred in both law and facts by failing to consider that the ingredients of the offence herein were not proved to the required standard in law;
 - c. The trial court erred in both law and facts by refusing to order the sentences to run concurrently;
 - d. All the prosecution witnesses adduced non corroborative evidence;
 - e. That the mode of light intensity could not aid visibility hence his identification is doubtful, no forensic report or any exhibit was produced in court.
 - f. That he was not furnished by all the documentary evidence like investigation diary and exhibit memo which the law requires thus jeopardizing his right to fair trial under Article 50 (2) of *the Constitution*.
 7. The appellant therefore prays that the Appeal be allowed, conviction quashed, sentence be set aside and he be set at liberty and/or in the alternative retrial order or probation be issued.
 8. Directions were taken and the appeal be disposed of by way of written submissions. The appellant filed his written submissions while the Prosecution filed their submissions dated 22.02.2024.

Appellant's Submissions

9. The appellant urged the court to reanalyze the evidence of recognition and identification to ascertain whether the evidence was reliable and free from error to secure a conviction. He emphasized the need for proper identification especially where the case depends wholly or to a great extent on the correctness of the identification. He relied on the case of R v Turnbull [1976] 3 ALL E.R. 549 at page 522 where Lord Widgery stated that 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.
10. It was also his submission that the robbery in the present case was alleged to have been committed at midnight in total darkness. There was no source of light or touch, that PW1 did not explain to the court whether the police post had a gate or not, on page 8 of the record PW1 further stated that "when the assailants attacked me, I had switched off the lights. There were no security lights when they entered my house". He submitted that the small torches at 12.00am midnight cannot aid identification.



11. It was further his submission that suspicion however strong cannot form a basis of conviction. That PW1 was posted in the police post about 3 months prior to the alleged incident. In his testimony he said that he was suspicious of the appellant since he and the appellant had some reports at the police station and had seen him 5 times, that he was suspected without any single proof. He thus concluded that there was no proper identification.
12. On compliance with the statutory provisions, it was his submission that the trial court failed to comply with section 214 of the Criminal Procedure Code which was espoused in the case of Josephat Karanja Muna v R [2009] eKLR. He submitted that all the ingredients of the offence of robbery with violence were not proved as provided and that he was not arrested in possession of any of the stolen property.

Prosecution's Submission

13. On the first ground of appeal, it was his submission that Articles 50 (2) (g) and (h) of the Constitution were fully complied with. From the record, it is very clear that on the 8/2/2023 when the appellant was arraigned in court to take plea, before the charges were read to him, the court informed him of his rights under Article 50 (2) (g) and was encouraged to exercise the said right and the appellant's response was that "naelewa". Therefore, the trial court cannot be faulted for the appellant choosing to represent himself during the trial.
14. On the second ground it was his submission that proved all the ingredients needed to sustain the charges beyond reasonable doubt. That the evidence of PW1 proved that the appellant was armed with dangerous and offensive weapon; when he stated that the three men who robbed him of his items were armed with pangas, rungas and another had a bow.
15. Counsel submitted that the prosecution adduced evidence through the testimony of PW1 that the appellant was in the company of two other individuals. Further, the evidence of PW1 and PW3 proves that PW1 was attacked by the appellant and his accomplices and his testimony was corroborated by that of PW3, who produced medical evidence as PEXNO 1-5.
16. On identification, he stated that the appellant was positively identified by PW1; that before the incident, PW1 had on more than one occasion interacted with the appellant while he was performing his duties as a police officer; that the appellant and accomplices had torches which enabled him to identify him. He urged the court to dismiss the appeal.
17. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of Okeno v Republic [1977] EALR 32 and further in the Court of Appeal case of Mark Oiruri Mose v Republic [2013] eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
18. The prosecution called 4 witnesses to prove their case. PW1 stated that on 8/7/2021 he was at his house, which is located at the Police Post, sleeping. At around 12.00am, he heard his door opened, 3 men entered his house, they were all armed with pangas, rungas, bow and one had a panga. That they all hit him at the same time, the one with the panga cut him on the mid arm of the left hand. That the suspects took his Sony TV 32 inch valued at Kshs. 20,000/-, 2 mobile phones, one Techno Spark 7 valued at Kshs. 9,900/-, Itel phone valued at Kshs. 1,200/- and cash worth Kshs. 30,000/-. He was later taken to Migori Hospital where he was admitted for a whole month undergoing treatment since he sustained serious injuries on his hand, he was referred to Eldoret for further treatment.



19. It was his testimony that when he was attacked, he had switched off the lights, there was no security lights when they entered his house but he was able to see the assailants very clearly since all of them had small torches and the light was sufficient to illuminate the whole room. He recognized the face of the appellant as someone he had seen from Nyankore Station, he used to go to the station following many reports made against him by members of the public, which occurred 5 times on different occasions and was therefore not new to him; since he had been summoned to the station to explain the allegations and he had interviewed him. That the Appellant was carrying a panga and a rungu and he had a torch which was lit and he is the one who cut him with the panga. He however stated that he could not tell who grabbed what but his items were yet to be recovered.
20. That after the appellant had been arrested, he positively identified him at the cells among the other suspects at the cells. On cross-examination, he conceded that he could not identify the other 2 accomplices who were with the appellant during the robbery.
21. PW2 attached at Isebania Polce Station at the Crimes Department stated that on 3/2/2023 at around 11:30pm he received a report that the appellant had been seen at Nyankore Gatemus Bar. He proceeded to the place together with Corporal Bishar, Diribo and another; on arrival at the bar, the appellant was identified and when they tried to handcuff him, he started shouting and protesting the arrest. They searched him and recovered a hand axe in the inside pocket of the left side pocket of his jacket. He was escorted to Isebania Police Station and booked and was positively identified the following day by the complainant. He produced the hand axe recovered from the appellant as Pexh. 4. On cross-examination he stated that he was the arresting officer and that none of the stolen items were recovered on him on the day of the arrest.
22. PW3 the Clinical Officer stated that the complainant had sustained injury on the left forearm; he had a fracture of the radius and ulna. An open reduction of the internal fixation was done and after some time an operation was performed for bone grafting to unite the bones. The P3 Form was filled on 5.2.2023, the degree of injury was classified as grievous harm, the type of weapon used to inflict the injury was a sharp object. They relied on the treatment notes and the Discharge Summary to fill the P3 Form. He produced the P3 Form and the Discharge Summary from Migori Hospital as Pexh. 3 and 5 respectively.
23. PW4 the Investigating Officer stated that on 3/2/2023 they received information that the accused had been seen at Gatemus Bar, they proceeded and made the arrest. He had a small axe in his jacket, they introduced themselves and told them the reason for the arrest, the appellant tried to resist arrest but they overpowered him. He was thereafter charged with the offence herein. The appellant was positively identified by the complainant. He further stated that he relied on the complainant's evidence and information.
24. As regards allegations that the appellant was not supplied with the evidence of the prosecution in advance, the court record at page 5 clearly records the documents handed over to the appellant by the prosecutor on 15/3/2023 which were witnesses statements and exhibits. The ground is baseless.
25. Whether Article 50(2)(g) and (h) of *the Constitution* were contravened as alleged by the appellant. The said section provides as follows: -

50(2) Every accused person has the right to a fair trial, which includes the right-

- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;



- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

I have looked at the record of appeal, particularly the proceedings of 8.2.2023 when the appellant was arraigned in court to take plea; the court duly informed him of his rights under Article 50 (2) (g) and his response was that “naelewa”. The record clearly demonstrates compliance with the said section. The accused was informed of his right to representation and was given an option and discretion to choose an advocate to represent him and he opted not to choose any.

26. Further with regards to Article 50 (2) (h); the right is not absolute it has to be demonstrated that there has to be demonstrated that substantial injustice will result to warrant counsel to be assigned by the State at the State’s expense to represent the appellant.

27. In Petition No. 5 of 2015 Karisa Chango and others v Republic the Supreme Court dealt with the said provision and at paragraph 94, listed some of the factors that would result in substantial loss to be suffered. The Court ought to consider the following:-

“.....in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

- i. The seriousness of the offence;
- ii. The severity of the sentence;
- iii. The ability of the accused person to pay for his own legal representation;
- iv. Whether the accused is a minor;
- v. The literacy of the accused;
- vi. The complexity of the charge against the accused.”

28. None of the factors outlined above was demonstrated and/or established to the court to warrant being accorded representation at the State’s expense. I therefore find that ground 1 of the appeal is without merit.

29. I will now deal with ground 5 of appeal on identification. It is the appellant’s contention that the mode of light or intensity could not aid visibility and that there was no forensic report or exhibit produced in court to support the findings by the prosecution. He thus maintained that his identification was doubtful and urged the court to reanalyze the evidence by the prosecution to ascertain whether the same was reliable and free from error. The prosecution on the other hand relied on the evidence of PW1 who stated that before the incident, he had on more than one occasion interacted with the appellant while performing his duties as a police officer and further that all the assailants had small torches and the light was sufficient to enabled him to identify him.

30. This court cannot overstate the importance of proper and positive identification. Positive identification of a person is what connects them to an offence and the same must therefore be free from any possibility of error; particularly when the only evidence of identification is by a single witness. It is important for the court to take into account the circumstances in which the same was made. In the celebrated case



of *R. v Turnbull & Others* [1976] 3 ALL ER 549, the Court outlined the factors that ought to be considered when the only evidence on identification is by a single witness and held as follows:-

“... 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.”

31. Guided by the above decision, I have carefully considered the testimony of PW1. It was his testimony that all the here assailants who attacked him had small torches and the light from the same was sufficient to light the entire room. He further stated that he recognized the appellant whom he had met on 5 different occasions at the police station while performing his duties as a police officer; he had even interrogated him from the complaints made by the members of the public against him. He further stated that it was the appellant who cut his left arm with a panga and he had his torch during the attack and he was therefore able to recognize him.

32. The complainant’s testimony is one recognition. In the case of *Reuben Taabu Anjononi & 2 others v Republic* the Court of Appeal in Nairobi while discussing the issue of recognition held that:-

“.....recognition not identification of assailants 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. See also the case of *Julius Waititu Muthutite v Republic*. On the issue of recognition I find that the complainant positively identified the appellant as the perpetrator.”

33. From the said testimony, it is clear almost all the factors that need to be considered were positively proved by the prosecution. There was sufficient light from the small torches that each of the three assailants were carrying PW1 said the torches lit the whole room, he saw the appellant’s face and it is the appellant who cut him and therefore the distance was relatively close to enable him see him clearly. Further, PW1 had seen the appellant before on five different occasions. Thus, even though the identification was by a single witness, I find his testimony truthful given the circumstances of the case. The Court of Appeal in the case of *Maitiany v Republic* [1986]KLR held that:-

“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification..”

34. From the testimony of PW2 and PW4, the complainant had named the appellant as the robber and they were searching for him. In the case of *Terekali and Another v Republic* [1952] EA 259:- evidence of a first report is important. The court said:-

“Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may



be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”

35. I therefore find that there was sufficient and positive identification of the appellant as one of the perpetrators of the offence before the court. The circumstances were favourable and free from possibility of any error. This evidence was not controverted by the appellant in his defense since he chose to remain silent.
36. I will now proceed to determine grounds 2,4 and 6 to ascertain whether the ingredients of the offence of robbery with violence were properly proved. The Court of Appeal in the case of *Oluoch v Republic*[1985] KLR outlined the ingredients of robbery with violence as follows: -
- “Robbery with violence is committed in any of the following circumstances:
- a. The offender is armed with any dangerous and offensive weapon or instrument; or
 - b. The offender is in company with one or more person or persons; or
 - c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person
.....”
37. Whether the prosecution proved the said ingredients to the required standard? The prosecution’s case is primarily hinged on the testimony of PW1 the complainant, who was a single identified witness to the offence of robbery with violence. It was his testimony that on 8/7/2021 the appellant in the company of 2 others not before the court, entered his house, they were all armed with pangas, rungu and a bow; that the appellant who had a panga cut his mid-arm of the left hand, he outlined the items that were stolen and the value. PW3, a clinical officer confirmed that PW1 sustained a fracture of the radius and ulna; the nature of injury was classified as grievous harm the injury was a sharp object. He produced the P3 Form and Discharge Summary as Pexh. 3 and 5 respectively. The evidence of PW1 was corroborated by that of PW3. The appellant on his part did not rebut the said evidence since he remained silent when put on his defence. Not only one of the ingredients of the offence was proved but all the three were satisfactorily proved to the required standard.
38. On Count II; the appellant was charged with the offence of going armed in public contrary to section 88 of the *Penal Code*. It was the testimony of PW2, one of the Arresting Officers that when they got to Gatemus Bar, the appellant was identified, when he searched him, he recovered a hand axe in the inside pocket of the left side pocket of his jacket. He produced the hand axe as Pexh. 4. This testimony was corroborated by PW 4 who was also one of the Arresting Officers alongside PW2. When placed on his defense, the appellant did not give any explanation of why he had a hand axe in a Bar which is considered a public place. In the absence of any evidence on the contrary or any plausible explanation by the appellant, I find that the prosecution satisfactorily proved Count II to the required standard.
39. Count III was on resisting arrest contrary to section 103 (a) of the *National Police Service Act*. PW2 and 4 testified that on the 3/2/2023 they went to Gatemus Bar, following a tip-off that the appellant had been spotted there. When they got to the place, the appellant was identified by one Corporal Chacha and when they tried to handcuff him, he resisted arrest and started shouting. The other officers who had accompanied them assisted the and they were able to overpower the appellant. Again, no rebuttal was offered by the appellant when put on his defense.



40. On ground 3 of appeal, the appellant stated that the magistrate erred in failing to order that the sentences do run concurrently. The appellant was sentenced to 30 years imprisonment in Count I, 5 years in Count II and 3 years in Count III, all sentences were to run consecutively. A trial court exercises its discretion in ordering whether a sentence should run concurrently or consecutively; this discretion must however be exercised judiciously taking into account the circumstances of each case.
41. The Court of Appeal in *Peter Mbugua Kabui v Republic* [2016] eKLR in considering the issue of consecutive and concurrent sentences stated as follows: -
42. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.
43. This position has been reiterated in the Sentencing Guidelines which emphasizes on the need for sentences to run concurrently where the offences emanate from a single transaction. From the record of appeal, I do note that Count I on robbery with violence occurred sometimes on 8/7/2021 while Count II and III occurred on the 3/2/2023. Guided by the above decision and the sentencing guidelines, it is my considered opinion that while Count I occurred as a separate transaction, Count II and III were as a result of the same transaction given the proximity and therefore the sentences meted in each count should run concurrently.
44. The upshot of the above is that the prosecution proved their case to the required standard of beyond reasonable doubt in each charge and the conviction and sentence is therefore sound and safe.
45. As for the sentence of 30 years imprisonment the same was deserving, I find that the circumstances of the offence were aggravated with the complainant receiving very serious injuries i.e. grievous harm. The court will not interfere. I hereby direct that all the sentences do run concurrently for the reasons aforementioned. The Appeal lacks merit and is dismissed.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 5TH DAY OF JULY, 2024.

R. WENDOH

JUDGE

Delivered in the presence of:

Ms Kogos for the State.

Appellant present .

Court Assistants – Emma/ Phelix

