



**Achieng v Republic (Criminal Appeal E061 of 2022)
[2023] KEHC 2776 (KLR) (Crim) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E061 OF 2022
JM BWONWONG'A, J
MARCH 14, 2023**

BETWEEN

AGGREY ODHIAMBO ACHIENG APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence delivered by Hon. Andayi
CM on 13th April 2022 in Milimani Chief Magistrate's in Court Criminal
Case No. 1280 of 2014 Republic vs Aggrey Odhiambo Achieng' & Another)*

JUDGMENT

1. This appeal is pursuant to a conviction and sentence of death for the offence of robbery with violence contrary to section 296 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.
2. In his petition of appeal, the appellant raised nine (9) grounds challenging his conviction and sentence.
3. The main grounds raised are follows: In ground 1 to 6, and 8 the appellant challenged the totality of the prosecution's evidence relied on to convict him. In ground 7, the appellant complained that the trial court failed to consider his defence. In ground 9, the appellant argued that his conviction was against the weight of the evidence adduced.
4. In response, the respondent filed grounds of opposition. The grounds raised are as follows: the appeal lacks merit, is misconceived and unsubstantiated. The appeal is an abuse of the court process since the appellant was properly convicted and the prosecution discharged their burden of proof. The appellant has not demonstrated any special circumstances to warrant his appeal to be upheld. The appeal should be dismissed.



5. As this is the appellant's first appeal, the role of this appellate court of is well settled. It was held in the case of *Okeno vs. Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs. R* [2013] e-KLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse 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 demeanour of the witnesses and hearing them give evidence and give allowance for that.
6. Alex Kanyi Kimani (PW 1) told the court that on the 26th August 2014, he was driving slowly along a bad road in Utawala Eastate his motor vehicle registration number KBR 870Y Toyota Avensis. Two men approached him with guns pointed at him. They threatened to shoot him if he failed to comply. They ordered him to move to the back seat, lie facing down and not make any noise. One entered the back seat and the other, the driver's seat. He indicated that he was able to identify the appellant as he was the one at the backseat throughout the ordeal. He robbed him off his wallet, phone, ATM cards, ID card, employment card and kshs. 700.
7. He narrated that they went to Pacific Petrol station but the driver was unable to locate the fuel tank button. They drove off and went to the area around Fahari Hotel. They ordered him to get out and show them the location of the fuel tank button. They then proceeded to a second filling station where there was light and they fuelled the motor vehicle. Thereafter, they led him to an abandoned construction site. They removed his clothes and used them to blindfold him. they also tied his hands and left leaving him there.
8. He told the court that he managed to free himself and left the place. He sought assistance at a nearby house. Police officers were called and arrived. They took him to Kayole Police Station where he reported the incident and recorded a statement. His motor vehicle was recovered in Nakuru after a positive identification.
9. CIP David Maina Machui (PW 2) told the court on the night of 27th August 2014, he was attacked by a young man at around 10.00 pm. The assailant was trying to enter his motor vehicle registration number KAW 479Y BMW which also had a government number GKA 374E. After a struggle 3 other men armed with a pistol and two AK 47 rifles joined in and he surrendered. He was pushed to the back seat and was stepped on. They robbed him his LG Phone and Kshs. 75,000 in cash. They undressed him and abandoned him at around 4.30 am. He sought the assistance at a nearby residence. He reported the incident at Ruai police station and recorded statements. He told the court that he participated in an identification parade but could not identify the appellant.
10. Albert Nyaga Kinyua (PW 3) testified that he was leaving a bar when PW 2 walked in. They did not have a conversation. He was informed the next day that PW 2 had been robbed and his motor vehicle stolen.
11. Alice Atieno Muhando (PW 4) told the court that on the night of 28th August 2014 at around 2.30 pm she heard a knock at her house. On inquiring, it was PW 2 who needed assistance after he had been robbed. Her husband assisted him with clothing and called police who escorted him to the police station.
12. Peter Runo Gakahu (PW 5) testified that he is motor vehicle spare parts dealer along Nairobi Nakuru highway. On 27th August 2014, Nelson Topicho Mulati (the 1st accused), now deceased left the motor vehicle registration number KAW 479Y at his yard after it had stalled. In the evening, he came back with the appellant who was identified as a mechanic. The appellant towed the motor vehicle towards Nakuru and paid the charges for the overnight stay.
13. Hazel Gichigu Murigu (PW 6) an insurance agent at Monarch Insurance told the court that the 1st accused took an insurance for motor vehicle registration number KBT 123D BMW.



14. CPL Isaac Sang (PW 7) of the Flying Squad in Nairobi testified that he led a group of fellow officers who recovered BMW KAW 479Y in Kampala Uganda.
15. CPL Muthoni Erastus (PW 8) of Ruai Police station was the duty officer on 28th August 2014 when PW 2 reported the crime.
16. IP Ephantus Wahome (PW 9) of Kiamunyi Patrol Base in Nakuru told the court that he led the recovery of the Toyota Avensis. It was recovered while being repaired by Fredrick Odhiambo next to the appellant's residence. Fredrick Odhiambo told the court that he was working under the instructions of the appellant. The appellant was arrested at the scene.
17. He told the court that he searched the appellant's home and recovered an metallic toy pistol. However, it was not produced in court as an exhibit.
18. PC Allan Njoka Njuguna (PW 10) testified on behalf his colleague IP Daniel Maruch who had been seconded to the witness protection unit. He produced photographs of the BMW recovered in Uganda belonging to PW 2.
19. Peter Kahiu Kuria (PW 11) a mechanic at Soko Mjinga told the court that on 27th August 2014, the 1st accused engaged him to repair Motor vehicle KBR 870Y Toyota Avensis. He towed the vehicle to a yard owned by PW 5. In the evening, 1st accused came with the appellant and was informed that he was their mechanic. The appellant towed the motor vehicle away towards Nakuru.
20. CIP Joseph Michuki (PW 12) of Flying Squad Nairobi testified that on 6th September 2014, he conducted an identification parade. The appellant did not participate in the parade.
21. CIP Robert Owino (PW 13) the investigating officer told the court that he conducted investigations in the matter and after arrest charged the appellant along with the co-accused persons.
22. After the close of the prosecution's case, the appellant was found to have a case to answer and put on his defence. He gave sworn evidence and did not call any witness. He testified that on 26th August 2014 at 10.00 pm he received a call from Nelson (1st accused), now deceased seeking his services. His vehicle stalled along Nairobi Nakuru Highway. He went to the site the next day. He found the motor vehicle which was a Toyota Avensis. He towed the motor vehicle to Nakuru after payment was made. Police officers came to his garage where he was found repairing the vehicle. He was arrested and charged. He insisted that he was a mechanic and was not involved in the commission of the crime. He told the court that he assisted the police to arrest Nelson, now deceased whom he had been charged alongside.

Analysis and determination

23. In ground 1 to 6, and 8 the appellant challenged the totality of the prosecution's evidence relied on to convict him. He argued that there were material inconsistencies and left by the prosecution in the identification of the appellant. Further, the dock identification relied on was heavily flawed.
24. The appellant submitted that several media house, portrayed the appellant as the perpetrator of the crime. They ran stories from 1st September 2014 to 5th September 2014 portraying the appellant as the mastermind of a syndicate involved in stealing. This in addition to the appellant's conviction relying on single identification of PW 1. Further, the appellant was never placed in any identification parade conducted and yet he was in custody during the entire period. In addition, the alleged dock identification was not sufficient. This is because the conditions that PW 1 was under during the ordeal could not could not aid him in soundly identifying the perpetrator. he cited the case of [*Kariuki Njiru*](#)



§ 7 others vs Republic [2001] e-KLR where it was held that the law of identification is well settled, and this court has from time to time said

“that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error.”

25. The respondent submitted that PW 1 was able to positively identify the appellant who was seated with him during the entirety of the ordeal. Further, the incident took place at 8.30pm and the lights at the petrol station gave the victim an opportunity clearly see him. He also positively identified him while in the dock during the hearing. It was the respondent’s space that although an identification parade was not carried out there was sufficient circumstantial evidence to place the appellant at the scene of crime.
26. We have carefully analysed and re-evaluated the evidence on record. On the first and second grounds the appellant challenges the conviction entered against him on the basis of identification by PW 1 and for the standard of proof applied to the prosecution case. In his written submission the Appellant contended that the evidence of identification by PW1 was mere dock identification and therefore unreliable. That PW 1 was a single identifying witness and his evidence needed to be tested with the greatest care.
27. From the record, the identification by PW 1 was made in difficult circumstances for two reasons. First, he had been subdued by his assailants and his life was threatened. Secondly, he claimed to have been placed in the back seat facing down. During the entirety of the ordeal, other than the time he showing the driver the location of the fuel tank button, he did not get adequate time to clearly see his assailants. Further, the strength of the lights under which the identification was made and the distance of the lights were from the assailants were all not inquired into by the learned trial magistrate, as he ought to have done, and are therefore unknown. The Appellant’s cited authority of *Gabriel Kamau Njoroge vs Republic* [1982 – 1988] 1 KAR 1134 is in tandem with the test to be applied to determine the safety of identification.
28. I agree with the appellant’s submissions that failure to inquire into the circumstances of the identification made under difficult circumstances would justify a finding that the identification was unsafe and free from error. The evidence of identification needed corroboration. There is no corroboration in the prosecution case. PW1 identified the appellant in the dock on 12th October 2015, one (1) year and two (2) months after the incident. In addition, the media had aired stories portraying the appellant as the perpetrator of the offences committed. An identification parade ought to have been held for purposes of identification by PW 1 to conform his ability to identify the appellant before his testimony in court.
29. In addition, the learned trial magistrate rejected the appellant’s defence and questioned his relationship with the 1st accused. He questioned the circumstances under which he came to be in possession of the motor vehicle and why he was the trusted mechanic if he was not involved in the commission of the offence. The trial court found the evidence of the appellant to be inadequate and he could not prove that he was not at the scene of crime when the offence was committed.
30. With due respect to the learned trial magistrate the appellant had no burden of proof. He did not have to prove his innocence or prove his defence. All he needed to do was raise a reasonable doubt to the charge and that was sufficient to secure an acquittal. In the constant case, the entire evidence of the prosecution did not give any nexus between the appellant and the offence. The evidence of PW 1 was merely dock identification which, in trite law, is almost worthless unless there is corroboration.



See Oluoch vs Republic [1985] KLR 349. Further, in the case of *James Tinega Omwenga vs Republic* Criminal Appeal No. 143 of 2011, where the Court expressed itself as follows: -

“The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.”

31. There was no corroboration and therefore the prosecution case was insufficient to sustain a conviction. In the circumstances I find that there was doubt in the prosecution case and that the benefit of doubt should have been given to the appellant. I find that this appeal has merit. I allow it, quash the conviction and set aside the sentence. I order that the appellant should be set at liberty unless he is otherwise lawfully held.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

Mr. Esilaba for the appellant

Mr. Mutuma for the respondent

No appearance for the Appellant

