



**Ngige alias Samuel Kamau Nyambura v Republic (Criminal Appeal
E015 of 2022) [2024] KEHC 16647 (KLR) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E015 OF 2022
JL TAMAR, J
NOVEMBER 4, 2024**

BETWEEN

**SAMWEL NGANGA NGIGE ALIAS SAMUEL KAMAU
NYAMBURA APPELLANT**

AND

REPUBLIC RESPONDENT

*(From Original conviction and sentence in criminal case
no E0114 of 2021 at Loitokitok principal magistrate court)*

JUDGMENT

1. The appellant herein was charged, convicted and sentence to 20 years imprisonment by the lower court for the offence of Robbery with Violence Contrary to Section 296 (2) of the penal code. The particulars were that on 3rd day of February 2019 at Emkuton Area along Emali- Loitokitok road within Loitokitok sub-County, jointly with another not before the court, while armed with offensive weapons, namely a rope, a blue knife and a rungu robbed Joseph Ndungu Njoroge of his motor vehicle make Isuzu Dmax Reg No KBN 093V Valued at ksh. 1,805,000, one mobile phone makes Tecno Cannon C- 11 valued at ksh. 15, 000, cash 1,500 and a watch the properties of the said Joseph Ndungu Njoroge and immediately after the said robbery used actual violence.
2. Dissatisfied with the Conviction and Sentence, the appellant preferred the present petition of appeal filed on 3rd of November 2022 and Amended Grounds of appeal as follows;
 - I. That the learned trial magistrate erred in law and in fact when she relied on the evidence of purported visual identification to convict the appellant and failed to note that PW5 was a single identifying witness and the perpetrator was a stranger. that the magistrate erred in law and in fact by accepting Dock Identification which was worthless.



- II. That the learned magistrate erred in law in failing to find that the identification parade conducted by PW1 had glaring irregularities and procedural technicalities were flawed and contrary to section 46 of the police standing orders.
 - III. That the learned magistrate erred in both matters of law and in fact in connecting the appellant with the robbery committed against one Joseph Ndungu Njoroge along Loitokitok email highway.
 - IV. That the learned trial magistrate erred in both matters of law and fact in shifting the burden of proof to the appellant and failed to evaluate conclusively the appellant defence of alibi alongside the prosecution case.
3. I am required as a first appellate court to revisit and re-evaluate the evidence afresh, assess the same independently and make my own conclusions bearing in mind the limitations inherent in the appellate process that I neither saw nor heard the witnesses testify, and cannot therefore comment on their demeanour an important aspect in a criminal trial. See *Okeno vs Republic* [1972] E.A 32. And further the Court of Appeal case of *Mark Oiruri Mose vs. Republic* (2013) eKLR

The Prosecution Case:

4. PW1 NO 233832 PC John Atidi, attached to Loitokitok police station as the deputy OCS testified and told the court that he conducted the identification parade on request from the investigating officer Inspector Macharia for a person suspected to have been involved in robbery with violence. He told the court that the suspect was at the police station at Loitokitok police station. He got eight people and placed them behind the police station and ensured that the witness was away at the police canteen where he could not see the members of the parade or the suspect. He then called the suspect and explained to him what he was about to do to which the accused is said to have consented to. He also asked him if he had a friend or an advocate whom he wanted to be present to which he reported none. The suspect was asked if he had any objection in relation to the members of the parade to which responded in the negative. The suspect stood between 4 and 5 and the witness was then called who positively identified the accused by touching. In cross examination the witness stated that the parade members were as far as possible similar to the suspect.
5. Joseph Ndungu Njoroge PW5, testified and told the court he was in Mai Maiu area on 1st February 2019 at around 6:00 pm when a man approached called and requested if he could transport some French beans from Loitokitok in Kajiado County to JKIA in Nairobi. The witness told the caller who initially communicated using cell phone no 0701 688276 that it would be preferable that they meet in person so as to discuss the matter. The witness, a driver and together with his father (PW7) Peter Njoroge Ndungu deals in transportation business. The caller instead sent somebody else to him and stated that he had been sent by the client who had been in touch with the witness. Indeed, the client called to confirm sending the other person to the witness. They agreed on the amount which was 16,000 and that they meet the following day on 2nd February to start the journey. The person who was sent to the witness was to accompany him to Loitokitok.
6. The following day the witness stated that they proceeded with the journey and on reaching Gitaru area, the witness picked another person the accused in this case and the supposed client and now the three of them proceeded and drove towards Loitokitok. The client sat on the left side of the front seat and the other between them. They reached Emali around 7:00pm and the accused asked the witness to stop so as they buy a few things. The accused bought cigarette, water and aia juice which was shared with the witness. They continued with the journey and on reaching Simba Cement area the witness was asked to stop and make a right turn where it was alleged the Maasai was selling the French beans.



About 80 meters from the turn he was told to wait for the Maasai to come. They waited for about five (5) minutes and the man who sat next to him grabbed him by the neck and the accused herein who was seated next to the left door went out and approached the witness from the driver's side holding a knife. He stabbed him as he struggled to free himself from the other one who was strangling him. He struggled with the attackers for a while until he was overwhelmed. He was hit in the head with a club his mouth stuffed with a sweater and tied to a tree and his head covered until the following morning when he was rescued by PW7 Kutata Ole Panya who was going home after a night shift working at Simba Cement. He found a man tied to a tree and when he asked him what the matter was, the victim shouted saying "Niokoe Nakufa" ... translated, "please save me I am dying". PW6 then informed the area chief Joseph Ndalamia PW2 who in turn visited the scene confirmed the incident and called the police. PW4 NO 21316506 Chief Inspector Mwenda Mbaabu of Kalama police station and PW6 P.C Mutie Nichodemus of sabasaba patrol base were in their respective offices when PW 4 received a call from PW2 the area assistant chief and told of the incident. The two proceeded to the scene and found a man who had been blindfolded and tied to a tree while bleeding from the stab wounds. He was also bleeding and swollen on the eyes. Next to him was a club and a wallet. He was certainly shaken and looked confused. The victim was taken to the hospital in Loitokitok and his father whom he had given his cell phone contact to the police came and took him to Nakuru for further treatment.

7. Later he was called at the police station and asked to take part in an ID Parade. He told the court that he picked the man who joined them at Gitaru from the members of the parade. In cross examination by the accused the witness stated that he had given the police the description of a person as a brown and fairly tall. It is instructive to note that the witness had also given the description of the other person with whom he had interacted a little longer and who is alleged to have been sent by the one he met at Gitaru. The victim described him as of chocolate complexion, in his late 20s and of medium height.
8. The injuries sustained by the victim were confirmed by the clinical officer PW 3 Tabitha Wanjugu who established that the victim had a cut wound and was swollen on the forehead and also cuts on the thighs. She produced the p3 form as exhibit in the case.
9. PW8 NO 735228 PC Quinto Odeke of DCI HQS crime research and intelligence section and currently attached to Safaricom testified and told the court that he had received a request from the DCIO Kajaido to provide information in respect of the IMEA numbers supplied by the police and paired to the imea requests and also the call data records for numbers 0740754310 and 0726 942880 from 1/2/19 to 13/2/19. Further requests were placed for other cell phone numbers which he generated as per the request.
10. As for subscriber 07267173328, Samuel Ngigi, he told the court that on 2//2/2019, between 16:12hrs and 1807 hrs the subscriber was within Mai Maiu area. And on 4/2/2019 the subscriber was within Illasit area in Loitokitok.
11. The investigating officer Inspector of Police no 234496 PW9 testified and told the court that on 3rd February 2019 at 1200hrs he received a call from the then DCIO Simon Waitthaka of a robbery incident in Simba Cement area where one person had been attacked and robbed of a motor vehicle reg number KBN 093V and other valuables. He acted and established that the victim's father had been notified and that he had picked him for treatment. The matter was reported at Loitokitok police station and p3 issued to the victim of the crime. On 15th February 2019, the victim and his father were called to record statement at loitokitok police station. The officer established that Joseph Njoroge was called through his number 0726942880 on 1st February 2019 by an individual who used cell phone number 0701688276 seeking transportation of beans from Loitokitok. After the parties agreed the journey to Loitokitok commenced. One person, the accused herein was picked from Gitaru area and off they left



for kajiado County. What then followed was aptly contained in the evidence of PW5, the victim of the crime.

12. On 4th April 2019, the witness was called by the DCIO and informed that there was someone who had been arrested allegedly on a motor vehicle theft charge and held at Loitokitok police station. He proceeded to the station met the suspect Samwel Ngigi who was being interrogated by other police officers. The officers had found from the suspect a Tecno mobile phone with three sim cards whose data showed that the accused had called severally by number 0701688276 which number was the same that was used to call PW5 the victim. However, the said number was not registered with Safaricom. The victim was called to identify the suspect in a parade that was conducted by Inspector Anindi.

Defence

13. After the close of the prosecution case, the learned trial magistrate found that the prosecution had made out a case against the appellant sufficient enough to require his defence.
14. The appellant gave sworn testimony and told the court that he lives in Limuru and does transport business from Nairobi, Tanzania and Sudan. He told the court that on 3rd April 20219 he was in Thika when he received a call from his Boss, James Chege who told to offload the onions he had ferried using KBR 601 K Isuzu NPR as he wanted to send him to Tanzania. He started the journey on 3/4/2019 at around 5:00pm arriving at sultan Hamud at 11:00 pm where he spent the night. The following morning, he left for Loitokitok but was arrested at Mbirikani road block allegedly for over speeding and taken to loitokitok police station where he was placed in cell his phone and ID were taken.
15. The appellant told the court that on 5th April 2019, he was taken to court and charged with the offence of robbery with violence after the court he was taken back to the police station for an ID parade. According to the proceedings, the appellant seems to have been released on bond on the strength of a security whose surety details the appellant could not remember, absconded and re-arrested one year later.
16. The appellant in cross-examination admitted that the phone number 0726717328 was his and that indeed it was true that on 3rd day of February 2019 he was along Email Loitokitok road.
17. This then in brief is the case of the prosecution and the defence before the trial court and this court. The issue for determination broadly is;

Whether the prosecution proved the offence beyond reasonable doubt:

The offence of robbery with violence is a creation of Sections 295 and the sentence prescribed in 296(2) of the Penal Code which provides;

295. 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.

296(2). 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”



18. From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the violence .
19. The offence termed Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. The ingredients for the offence of robbery with violence is, Theft and the use of or threat to use actual violence.
20. On the other hand, the offence termed robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
 - (a) The offender is armed with any dangerous or offensive weapon or instrument, or
 - (b) The offender is in the company of one or more other person or persons, or
 - (c) The offender at or immediately before or immediately after the time of the robbery wounds, beats, strikes or uses any other personal violence to any person.
21. In the instant case there is no doubt from the evidence of witnesses, that the complainant was violently robbed, the vehicle he was driving stolen, his watch, phone and money stolen. At the time of such robbery the complainant was seriously attacked, clobbered in the head and stabbed on the thigh and the forehead. Indeed, it was a savage attack and a terrifying experience where he was tied to a tree for the better part of the night, his mouth stuffed so that he could not scream and his face covered. He was left the whole night in wild at the mercy of the vagaries of nature and the ever-present wild animals that patrol that particular area at night. The case is a typical, book meaning of robbery with violence. But who was the assailant?
22. According to the victim of crime PW5, Joseph Ndungu Njoroge, it was the appellant herein. He told the court that he had ample time from Gitaru in Limuru where he picked the appellant all the way to email to identify him as the attacker together with another who was not traced. The appellant was seated on the left side next to the passenger door and the other was seated in between them. It is also stated that the complainant had given physical description of the appellant as he did of the other attacker whom he described as being of chocolate complexion, in his late 20s, and of medium height. The victim was driving throughout the journey and only stopped briefly at Emali on the occupants request to do some shopping. It is possible that the victim was in constant communication with the attackers and perhaps could occasionally through glances at them. But most of the time he would be concentrating on the road. Was the interaction and contact with the attacker long enough and free of possibility of error as to give confidence that the complainant had a clear vision of the attacker beyond occasional glances and considering that it was getting dark?
23. The Court of Appeal in the case of *Wamunga vs Republic* (1989) KLR 426 stated as under; -

It is trite law that 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 conviction.”
24. It was also held in *Nzaro vs Republic* (1991) KAR 212 and *Kiarie vs Republic* (1984) KLR 739 by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction. In *R –vs- Turnbull & Others* (1973) 3 ALL ER 549 , which decision has been



generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

... 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.”

25. In my considered view, the circumstances obtaining in this case were not favourably sufficient for a positive identification of the attackers even though the description somewhat fits that of the appellant as it does also describe the other attacker with whom the victim spent slightly more time.

26. More fundamentally, when was the appellant arrested by whom and under what circumstances was he arrested? According to the investigating officer, the he learnt of the appellant arrest on 4th April 2019 from the DCIO and he proceeded to the police station and found him being interrogated by sgt Mary and ogutu. It is curious that the two officers who are said to have arrested the appellant were not called as witnesses. The two witnesses in my view are crucial witnesses for the prosecution. They would have informed the court the circumstances in which the appellant was arrested two months after the alleged robbery. How was he identified and who identified him to the officers? Was he arrested for the traffic related offence as contended by the appellant or for the offence with which he is charged? Who pointed him to the officers? What was the content of the investigation diary which again was not produced? These are important questions that could only be answered by the two officers who arrested the appellant.

27. in *Edwin Wafula Keya Vs. Republic*, [2005] eKLR at Eldoret where the Court, dealing with a similar situation, stated thus: -

----- . None of the officers who arrested the appellant was brought to testify and explain why they had arrested the appellant some two months after the robbery. Was the appellant arrested because the officers had been given the description ‘light-skinned and tall’----- . True, the appellant was identified at an identification parade conducted by Chief Inspector Alfred Etyang on 22nd February, 2001 but we note that this was nearly two months after the robbery and the prosecution totally failed to explain what it was that led police officers to arrest the appellant. In the circumstances of this case we think that at least one of the arresting officers ought to have been called to testify and that was the stand the Court took in the case of *James Muchene Kambo Vs. Republic*, Criminal Appeal No. 68 of 2003 (unreported) where the robbery took place on 15th April, 1995, and Kambo was arrested on 16th May, 1995; there was nothing to show how the officer who arrested him had been able to connect him with the offence of 15th April, 1995 and the arresting officer failed to come and testify. ----”

28. This is precisely the situation obtaining in this case, that is how the two arresting officers were able to connect the appellant with the offence as the witnesses did not know him by name.



29. It is not however in every case that an arresting officer should come and testify. It all depend on the circumstances of each case. In this particular case the evidence of the arresting officer(s) was crucial more so when the appellant evidence stated that he was arrested for a traffic infraction while driving a specific motor vehicle reg no KBR 601 K Isuzu NPR. It was incumbent upon the prosecution to avail the investigation diary which is a summary of the events the basis upon which the appellant was charged.
30. Although the call data analysis identifies and places the appellant at certain locations at particular time, such evidence is not sufficient by itself without more to found a conviction against the appellant.
31. Consequently, and for the above reasons, i allow the appeal, quash the conviction, set aside the sentence of 20 years and order that the appellant be released from prison unless otherwise lawfully held. Those shall be the orders of the Court.

DATED AND DELIVERED AT KAJIADO THIS 4TH DAY OF NOVEMBER 2024

JOHN T LOLWATAN

JUDGE

