Gitonga & 2 others v Republic (Criminal Appeal 14, 18 & 26 of 2019 (Consolidated)) [2025] KECA 1536 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1536 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 14, 18 & 26 OF 2019 (CONSOLIDATED)

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 3, 2025

BETWEEN

DAVID GITONGA ..... 1ST APPELLANT

MARTIN KINYUA ..... 2ND APPELLANT

JOSEPHAT KIRAGU ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Meru (Sitati, J.) dated 21st November, 2018 in Criminal Appeal No.s 128, 129 & 130 of 2016)

JUDGMENT

1. A background of this appeal is that the appellants were arraigned before the Senior Resident Magistrate's Court at Nkubu, and charged alongside two others (Anthony Muthaura Kaburu and Geoffrey Muriuki), with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. In count I, the particulars of the offence alleged that on 24th November, 2015, at Mitunguu Town in Imenti South District within Meru County, the appellants, jointly with others not before court, while armed with dangerous weapons namely pangas and clubs, robbed Doreen Mwendwa of her cash Kshs. 20,000, and her mobile phone make Itel, valued at Kshs.5,000, all valued at Kshs.25,000, and at the time of such robbery assaulted the said Doreen Mwendwa.

2. In count II, the particulars of the offence were that the appellants, on the same date and place, while armed with dangerous weapons namely pangas and clubs, robbed Winrose Wanjiku Njue of her mobile phone make Tecno valued at Kshs. 3,800, and cash Kshs. 400, all valued at Kshs. 4,200, and at the time of such robbery assaulted the said Winrose Wanjiku Njue.

3. The appellants faced a third count of the offence of unlawful destruction of building by persons riotously assembled contrary to Section 85 of the Penal Code. The particulars of the offence were that on 24th November, 2015, at Makandune area in Imenti Central District within Meru County, the appellants, jointly with others not before court, and being unlawfully assembled, destroyed a building namely the dwelling house of Dorothy Ciathenke by pulling it down.

4. The appellants denied all the charges. The prosecution called a total of seven (7) witnesses. The brief facts of the case according to the prosecution were as follows: PW2, Doreen Mwendwa, and PW3, Winrose Wanjiku, worked at Monaco bar, Mitunguu which was owned by PW4, Agnes Mwendwa. It was the evidence of PW2 and PW3 that on 24th November, 2015, at about 10.00 a.m., one of the accused persons, Anthony Muthaura, came to the bar accompanied by a mob. He was armed with a panga. He accused PW2 of having stolen his motorcycle. They grabbed PW2 and pulled her out of the bar, placed her on a motorcycle and took her to an area known as Darfur. At Darfur, they undressed her and assaulted her using pangas and sticks. While there, a group of the assailants went back to the bar and picked up PW3 and brought her to Darfur where they also assaulted her. PW2 and PW3 stated that after assaulting them, they placed them on motorcycles and rode in a convoy towards Thingithu River where they had planned to burn them alive.

5. On the way, they met with police officers who stopped the convoy. PW2 got a chance and escaped to a nearby house. She was rescued by police officers and taken to Dr. Kiambi's Clinic where she was admitted for ten days. PW2 stated that she was able to identify the appellants at Darfur as they were attacking her. She stated that the appellants were unknown to her prior to the incident. PW2 stated that while at the bar, the appellants took her phone and Kshs.20,000 from the bar counter.

6. PW3 on her part stated that the appellants were known to her as she used to see them at Mitunguu market. It was her testimony that the 2nd appellant was the one who undressed her while the 3rd appellant ferried her on his motorcycle during the assault. She stated that she was admitted at Mitunguu Medical Clinic for one week, and later at Nkubu Medical Clinic for one month, due to the injuries sustained during the ordeal. She stated that the appellants stole her mobile phone. PW4, who witnessed the incident, testified that the 3rd appellant ferried PW3 on his motorcycle from the bar to the place where they assaulted her.

7. PW1, Saberina Kaimatheri, was a clinical officer at Kanyakine Hospital. She produced P3 forms relating to PW2 and PW3 who were examined at the said hospital on 10th December, 2015. It was her evidence that PW2 was treated at Mitunguu Hospital on 24th November, 2015. She sustained a cut wound on the forehead, bruises, lacerations and tenderness on her upper back, bruises and cuts on the left-hand fingers, right thigh and ankle joint. PW1 assessed the injuries as grievous harm. With respect to PW3, PW1 testified that she sustained a deep cut wound on the face and nose, bruises and swelling on her upper back, left shoulder and hand. She had dislocated her left wrist and had fractures on the left fibula bone.

8. PW5, PC Elias Mwaniki, testified that he was on patrol duty at Mitunguu Nkubu road on 24th November, 2015, when he received a tip that some motorcycle riders had robbed a bar. He laid an ambush with his colleagues near Nyagene Secondary School where they stopped the motorcyclists and managed to rescue a lady who had been captured by the motorcyclists. They also arrested Anthony Muthaura, an accused person who escaped from custody. PW6, Dorothy Cianthaka, was the owner of a house that was destroyed by the motorcyclists as they searched for a motorcycle that was alleged to have been stolen. She stated that the appellants were unknown to her.

9. The investigating officer in this case was PW7, IP Tom Onyancha, attached at Mitunguu Police Station. It was his evidence that on 24th November, 2015, at 11.00 a.m., he was informed that two ladies had been attacked by boda boda operators. When he got to the police station he found that one of the accused persons, Anthony Muthaura, had been arrested, and that the victims, PW2 and PW3, had been taken to the hospital. He stated that he visited the complainants at the hospital and they narrated to him how the appellants accused them of stealing a motorcycle, attacked them and transported them to Darfur where the assault continued. The complainants were also robbed of their mobile phones and money. He testified that Anthony Muthaura was arrested at the scene, the 1st appellant was identified by PW3 as the person who ferried her on his motorcycle, the 2nd appellant was identified at the scene as he was struggling with the police when they arrested Anthony, while the 3rd appellant was identified to the police by the complainants as having been one of the assailants.

10. The trial court determined that the appellants had a case to answer and they were placed on their defence.

11. The 1st appellant (DW4) elected to give a sworn statement. It was his testimony that on 24th November, 2015, he was at his place of work near Monaco bar where he operated his motorcycle. He stated that Anthony Mwaura came in the company of a lady and he transported them to Darfur area. He stated that they paid him Kshs. 50, after which he left to attend to another customer. He later heard that boda boda operators were demonstrating because one of their motorcycles had been stolen. Three days later, one Kennedy Njeru, whom he owed Kshs.2,000 escorted him to the police in relation to the said debt. While at the police station, the said Kennedy told the police that the 1st appellant was part of the gang that attacked the complainants, which led to his arrest.

12. The 2nd appellant (DW1) gave sworn evidence. He testified that on 24th November 2015, he was at his place of work when he learnt that Anthony Muthaura's motorcycle had been reported stolen. He stated that he witnessed motorcyclists riding from Nkubu direction towards Mitunguu area. After about thirty minutes, the motorcyclists came back with a lady and that a crowd gathered at the scene. He stated that the lady was rescued by police officers, and he later learnt that she had been attacked in relation to the stolen motorcycle. The 2nd appellant denied being part of the gang that attacked the complainants. He testified that he was arrested days later on 28th November, 2015, in relation to the said incident. The 2nd appellant availed two witnesses, George Magaju (DW2) and Julius Muteithia (DW3), who corroborated his story that he was just a bystander who witnessed the incident, and that he did not participate in the attack.

13. The third appellant (DW5) told the court that he worked as a broker at a market. It was his testimony that on 24th November 2015, he was at work together with a colleague known as Douglas until 5.00 p.m. When they returned to Mitunguu, they learnt that the complainants had been attacked. He was later arrested on 28th November, 2015, in relation to the attack. He denied being part of the gang that attacked the complainants.

14. The trial court (Irura, SRM), in a judgment delivered on 9th October, 2017, found the appellants guilty as charged in all three counts. The learned magistrate found that the appellants had been positively identified by PW2 and PW3, who were able to explain the role played by each of the appellants during the assault, and further, that the appellants were also well known to PW3 prior to the incident. It was the finding of the court that the prosecution had discharged its burden of proof in all three counts against the three appellants. They were convicted in all three counts and each sentenced to death in the first count. The sentences in count II and III were held in abeyance. The fourth accused person, Geoffrey Muriuki, was acquitted.

15. The appellants, aggrieved by this decision, filed an appeal before the High Court at Meru. The gist of the appellants' appeal was that the learned magistrate erred in law and in fact: by failing to note that the circumstances surrounding the incident were not favourable for a positive identification to be made; by violating the provisions of section 200(3) of the Criminal Procedure Code; by rejecting the appellants' defence statements without giving cogent reasons; and, by awarding a death sentence which is unconstitutional.

16. The learned Judge (Sitati, J.) determined that the appellants were properly convicted by the trial court. The learned Judge found that the evidence of identification by PW2 and PW3 was watertight, as the incident occurred in broad daylight, the complainants described in detail the role played by each of the appellants during the assault, and that the appellants were well known to PW3. The learned Judge set aside the death sentence imposed on the appellants in light of the Supreme Court's decision in Francis Muruatetu v. Republic [2017] eKLR, and substituted the sentence thereof with a custodial sentence of fifty (50) years for each of the appellants.

17. The appellants are now before us on a second appeal. They faulted the learned Judge for affirming their conviction based on identification evidence that was insufficient. They were of the view that prosecution failed to sufficiently establish the ingredients forming the offence of robbery with violence. They were aggrieved that the learned Judge rejected their respective defence statements. They faulted the learned Judge for failing to address the trial court's failure to comply with the provisions of Section 200 of the Criminal Procedure Code. Lastly, the appellants faulted the first appellate court for imposing a sentence that was manifestly excessive in the circumstances.

18. The appeal was canvassed through written submissions. Ms. Ntaragwi appeared for the appellants while Ms. Nandwa was on record for the respondent. It was the appellants' submission that the complainants were alleged to have been attacked by over fifty boda boda operators, and that they were assaulted using sticks and pangas. They submitted that the circumstances of the offence did not favour a positive identification to be made. They urged that PW2 testified that the appellants were unknown to her prior to the incident, yet no evidence was led to show that she was able to give a description of her assailants in her first report made to the police. They maintained that there was no evidence that PW3 gave the names of her assailants to the police since she testified that the appellants were well known to her. It was their submission that they were arrested four days after the incident had occurred. They urged that the evidence of identification was not watertight or free from the possibility of error.

19. Counsel for the appellants further urged that the ingredients forming the offence of robbery with violence were not established by the prosecution. She stated that no evidence was led to prove that any of the complainants had phones, or that the alleged Kshs. 20,000 belonged to PW2, and not her employer PW4. She faulted the first appellate court for failing to address the fact that the appellants' right under Section 200 (3) and (4) of the Criminal Procedure Code was violated when a succeeding magistrate took over conduct over the matter. She urged that the custodial sentence imposed by the first appellate court was manifestly excessive in the circumstances.

20. On her part, learned prosecuting counsel, Ms. Nandwa, submitted that the evidence on record was that the appellants were part of a mob that attacked PW2 and PW3 at their place of work, and stole their mobile phones and cash. She pointed out that the complainants sustained serious injuries from the ordeal, and had to be admitted at the hospital. She asserted that they were able to pick out their attackers during the incident, and that they identified the appellants in the statements made to the police. Counsel urged that the prosecution was only required to prove one of the three elements forming the offence of robbery with violence. Regarding identification, Ms. Nandwa, learned counsel submitted that the learned Judge noted that the incident occurred in broad daylight, and that PW2

and PW3 spent a substantial amount of time with their attackers, and that they described the role played by each of the appellants in the attack. She explained that the complainants gave the names of the appellants in their statements to the police. On sentence, counsel was of the view that the custodial sentence awarded by the first appellate court was deterrent and commensurate to the offence. It was her view that the appellants' appeal lacked merit.

21. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See Karingo v. Republic [1982] KLR 213.

22. In the present appeal, there are two issues that came to the fore for determination by the Court. The first issue is whether the appellants' right to fair trial were breached when the succeeding magistrate did not comply with section 200 (3) of the Criminal Procedure Code. The second issue for determination is whether the prosecution adduced sufficient evidence to secure the conviction of the appellants on the charges brought against them.

23. The record of the trial court shows that the trial of the appellants commenced before Hon. Ocharo SRM, who heard 5 witnesses before he was transferred. The matter was listed for mention on 8th February, 2017 for directions to be given under section 200(3) of the Criminal Procedure Code. However, subsequently thereafter, it was apparent that no such directions were issued. Hon. Irura SRM, took over the proceedings and concluded the trial which resulted in the conviction of the appellants. It was therefore clear from the record that Hon. Irura SRM, did not comply with section 200(3) of the Criminal Procedure Code before she took over the proceedings from the previous Magistrate.

24. In Joanes Oketch Ongoro v. Republic [2014] KECA 63 (KLR), this Court held thus:

> "It is not difficult to see the raison d'etre for the provisions of section 200(3) of the Criminal Procedure Code. A trial court unlike an appellate court, is seized of an opportunity to assess the demeanor of witnesses and come to the conclusion of their trustworthiness or otherwise. A Magistrate who takes over a trial mid-way, has clearly not had the benefit of seeing the witnesses. The law imposes an obligation on the trial court to inform an accused person of his right to recall witnesses in respect of a Magistrate who takes over a trial. That right however, maybe waived by an appellant but unless and until an accused is advised accordingly, the court cannot presume that an accused has waived his right to recall witnesses."

25. It is evident that compliant with section 200(3) of the Criminal Procedure Code is mandatory when the succeeding Magistrate is taking over proceedings that have substantially been heard by the previous Magistrate. Failure to comply, renders the proceedings a nullity. This is because the accused would have been denied the right, if he so wishes, to have the witnesses who had testified before the previous magistrate recalled so that the succeeding magistrate may form an impression of their respective demeanors before making a finding on whether the said prosecution witnesses were credible.

26. The appellants in this appeal complained that their rights to fair trial were infringed by the succeeding magistrate's failure to comply with section 200(3) of the Criminal Procedure Code. We agree. The proceedings against the appellants after the succeeding magistrate took over the proceedings without

complying with section 200(3) of the Criminal Procedure Code were a nullity and cannot be sustained. In Richard Charo Mole v. Republic [2010] KECA 400 (KLR) this Court held as follows:

> " The trial in this case was not a short one as the first trial magistrate had heard ten prosecution witnesses whose credibility and personal demeanor she had observed. Section 200(3) (supra) requires in mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. The duty is reposed on the court and there is no requirement that an application be made by the accused person. The failure to comply with that requirement would in an appreciate case render the trial a nullity. In the case before us, we agree with both Mr. Kanyariri and Mr. Kaigai that the omission to comply with the section was grossly prejudicial to the appellant and the trial was thus vitiated."

27. In the premises therefore, we would not delve into the second issue for determination because the conviction and the sentence of the trial court was reached pursuant to null and void proceedings.

28. Having reached at the above conclusion, the issue that remains for determination is whether or not to order a retrial. Although the appellants and the respondent did not address us on this issue, the principles to be considered by this Court in determining whether or not to order a trial are well settled. In Rwaru Mwangi v. Republic [2007] KECA 338 (KLR) this Court held thus:

> " Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. See Muiruri v. Republic [2003] KLR 552. It is also necessary to consider whether on a prier consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial. See Mwangi v. Republic [1983] KLR 522."

29. The trial against the appellants commenced before the trial magistrate's court on 2nd December, 2015. The appellants were convicted on 9th October, 2017. Since then, they have been in lawful custody. This Court observes that from the evidence adduced before the trial court the possibility that the prosecution witnesses will be available to be recalled exist. However, it cannot be ruled out that due to passage of a period of nearly ten years it may be likely that the witnesses may not be in a position to recall with certitude the events that occurred on that material day. Also looking at the period that the appellants have served in prison, they would be prejudiced if a new trial is ordered. We are of the view that a retrial would not be appropriate in the circumstances.

30. In the result we allow the appeal. We quashed the appellants' conviction and set aside the sentence of death that was imposed on them. Consequently, the appellants are set at liberty unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR