Ondieki alias Justus Mogondo v Republic (Criminal Appeal 346 of 2019) [2025] KECA 1641 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1641 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 346 OF 2019

MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA

OCTOBER 3, 2025

BETWEEN

EVANS MASOGO ONDIEKI ALIAS JUSTUS MOGONDO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment and sentence of the High Court of Kenya at Nyamira, (Maina, J.) dated 31{{^st}} October 2018 in HCCRA No. 4 of 2016)

JUDGMENT

1. The appellant was charged with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 23rd June, 2012, at Nyaronde village, Borabu District, Nyamira County, jointly with others not before the court, while armed with an AK-47 rifle, crude metal, Somali sword, and a panga, robbed Anne Nyamusi Nyamache of a Toyota Corolla Registration Number. KAX 148B, Sony radio with two speakers, Sony DVD player, two pairs of sports shoes, a Nokia E63 maroon in color, two Nokia 1100 phones, a Sony car stereo radio, car speakers, cash amounting to Kshs.25,000, and a black umbrella, all valued at Kshs.600,000 during or immediately after the robbery, the complainant was wounded.

2. Additionally, the appellant faced two alternative counts of handling stolen property contrary to Section 322(1)(2) of the Penal Code. The first alternative count alleged that on July 2, 2012, at Kisii Township, Kisii County, jointly with another at large, dishonestly handled a Nokia E63 cell phone, knowing or having reason to believe that it was stolen. The second alternative count alleged that on July 3, 2012, at Enamba Centre, Manga District, Nyamira County, he dishonestly handled the cover of a Sony car radio, also belonging to the complainant, knowing or having reason to believe it was stolen.

3. The appellant also faced a charge of possession of public stores contrary to Section 324(3) as read with Section 36 of the Penal Code, for allegedly keeping a pair of police handcuffs, suspected to be stolen.

He was further charged with possession of a firearm contrary to Section 89(1) of the Penal Code, for allegedly having an AK-47 rifle (S/No. UE7534-1998) under circumstances suggesting intent to use it in a manner prejudicial to public order. Another charge of possession of ammunition contrary to Section 89(1) of the Penal Code was brought against him, alleging that on 23rd June, 2012, at Nyaronde village, he was found in possession of two rounds of 7.6mm ammunition, under circumstances raising reasonable presumption that the ammunition was intended to be used in a manner prejudicial to public order.

4. Lastly, the appellant was charged with giving false information to a public officer contrary to Section 129(a) of the Penal Code. The particulars thereof were that on 3rdJuly, 2012, at Kisii Town, he falsely informed Corporal Japheth Ngetich, a police officer, that his real name was Evans Masogo Ondieki, knowing the information to be false and intending to mislead the officer in the preparation of the charge sheet.

5. The prosecution presented eight witnesses to support its case against the appellant. In a nutshell the complainant, PW1 - Anne Nyamusi Nyamache, in the early hours of the evening drove into her compound in her motor vehicle registration number KAX 148B, when she was suddenly ambushed by a group of four robbers who forced her and her workers in to her house whilst armed with various weapons, including an AK-47 rifle. She was able to clearly see the appellant during the robbery, as there was bright security lighting in the compound and inside her house. She was subsequently able to identify him in a police identification parade. PW2 - Douglas Mariarai, an employee of PW1, confirmed that the robbers assaulted them, stole valuables, and tied them up before escaping in the PW1's car. He was unable to identify any of the robbers. PW3 - Lucia Andama, a house help of PW1, recounted the ordeal, stating that she was forced to lie down, assaulted, and robbed but was unable to identify any of the assailants.

6. PW4, Dr. Joel Ongaro, a medical officer, produced medical reports confirming injuries sustained by PW1 and PW3, during the robbery. He classified them as harm. PW5 - Oscar Chrispus Opiyo, a fingerprint expert, confirmed that the appellant's fingerprints matched those of Justus Mogondo Mageto, contradicting the false name he had provided to Cpl. Japheth Ngetich, as Evans Masogo Ondieki. PW6, Emanuel Langat, a firearms examiner, confirmed that the recovered AK-47 rifle and ammunition were functional and had been used in another robbery case. PW7, IP Munyoki, conducted the identification parade in respect of the appellant at which PW1 positively identified the appellant. PW8, Cpl. Japheth Ngetich, the investigating officer, explained how the stolen Nokia E63 phone was traced to the appellant, leading to his arrest and recovery of some stolen items from his residence. He also confirmed that during the interrogation of the appellant, he gave his name as Evans Masogo Ondieki which was later proved to be false.

7. After evaluating the evidence, the trial court found that PW1 had ample opportunity to identify the appellant due to good lighting conditions in the compound and house as well as prolonged interaction with him during the robbery; that the police identification parade in which the appellant was positively identified by PW1 was properly conducted; that PW1's stolen phone was found in the appellant's possession, linking him to the crime; Medical evidence confirmed injuries occasioned to PW1 during the robbery, proving the ingredients of the charge of robbery with violence; that the appellant's defence was devoid of merit as it did not rebut the prosecution's case. Whereafter the trial court convicted the appellant and sentenced him as follows:

   Count 1 (Robbery with violence) – life imprisonment. Count ll (Possession of public stores)-1 year imprisonment. Count lll (Possession of a firearm) – 10 years.

   Count IV (Possession of ammunition) – 3 years and, Count V (Giving false information) -1 year.

The sentences were ordered to run concurrently.

8. Being dissatisfied with the conviction and sentence, the appellant appealed to the High Court of Kenya at Nyamira in Criminal Appeal No.4 of 2016, arguing that witness testimonies were inconsistent and lacked corroboration, the identification parade was flawed, recovered stolen items were not forensically examined, he was not the owner of the house where some stolen items were recovered from, and another suspect, Riro, was acquitted despite similar evidence being laid against both.

9. Upon re-valuation of the evidence as required, the High Court agreed and endorsed all the findings of the trial court and accordingly dismissed the appeal in its entirety.

10. The appellant is now before this Court on second and perhaps last appeal. At the plenary hearing of the appeal, the appellant, through his learned counsel, Mr. Okoth condensed all the grounds of appeal into one, primarily that the High Court erred in law by holding that the circumstances of identification of the appellant were favourable and free from the possibility of error. Counsel submitted that the circumstances obtaining at the scene of crime were not favourable for identification of the appellant nor was it free from possibility of error.

11. To support this claim, the appellant relied on the case of R v Turnbull & Others [1973] 3 ALL ER 549, in which it was held that courts should closely examine identification evidence by considering factors such as the time the witness had taken to observe the suspect, the distance, lighting conditions, any obstruction, familiarity with the suspect, and any discrepancies in descriptions provided to the police by one purporting to identify. Counsel submitted that in his case, the robbers' faces were covered throughout the incident, going by PW1's testimony, meaning that identification was difficult. He further submitted that PW2 and PW3 categorically stated that they never saw the attackers' faces, which calls into question how PW1 alone was able to identify the appellant in the circumstances.

12. Counsel argued that the High Court had doubts regarding the strength of PW1's identification, which was why it looked to the identification parade as corroborating evidence. However, counsel contended that the identification parade itself was not credible, pointing out that PW1 never gave a description of the appellant to the police when first reporting the robbery, so that her subsequent identification of the appellant in court was dock identification which evidence is of the weakest kind. He cited the case of Gabriel Kamau Njoroge v Republic [1982-1988] 1 KAR 1134, to posit that dock identification is generally worthless unless preceded by a properly conducted identification parade.

13. Additionally, the appellant relied on the case of John Mwangi Kamau v Republic [2014] KECA 168 (KLR), where the court acknowledged that while failure to describe a suspect before an identification parade does not automatically invalidate the parade, it nonetheless reduces the weight that should be attached to such identification evidence. The appellant argued that because PW1 had never given a description of the appellant before the identification parade, reliance on that parade evidence as evidence of corroboration was unsafe. In conclusion, counsel submitted that the identification process was riddled with errors, making the appellant's conviction based on the same unsafe. He accordingly urged the court to allow the appeal, quash the conviction and set aside the sentence.

14. In opposition to the appeal, Mr. Sitati, learned counsel submitted that both courts below had thoroughly addressed the issue of identification. He emphasized that security lighting, along with illumination from nearby houses, provided sufficient visibility, allowing for a clear identification of the appellant by PW1.

15. Furthermore, counsel argued that the identification of the appellant was reinforced by the recovery of the stolen goods in the appellant's possession, including a phone and a radio headset so soon after the robbery. Counsel therefore urged this Court to dismiss the entire appeal for want of merit.

16. This Court is now sitting on this appeal, as a second appellate court. As such, we can only deal with and determine issues or matters of law. We are also cautioned against interfering with concurrent findings of fact by the two courts below unless such findings are based on no evidence, are perverse, or are otherwise legally unsound. See the case of Dzombo Mataza v R [2014] eKLR. With the above circumscribed jurisdiction in mind, there is only one issue of law that call for our determination; whether the identification of the appellant was properly interrogated by the trial and the first appellate Court.

17. The appellant was convicted of robbery with violence contrary to Section 296(2) of the Penal Code alongside other several charges already stated. The conviction was primarily based on the identification of the appellant by PW1 during the robbery, and later in a police identification parade. The appellant contends that the identification was flawed and raises doubts about its reliability and or authenticity. On the other hand, the respondent maintains that the prevailing circumstances were such that they made the identification of the appellant positive and free from possibility of error.

18. The trial court found that PW1 had ample time to identify the appellant due to bright security lighting within the compound and inside the house and prolonged interaction between the appellant and the witness during the robbery. The court further noted that the identification parade was properly conducted, and PW1's stolen phone was found in the appellant's possession so soon after the robbery, thereby linking him to the crime. On first appeal, the High Court upheld the trial court's findings, finding that the identification was free from possibility of error. These were concurrent findings of the two courts below and we have every reason to pay homage to those findings.

19. Nonetheless we are aware that in the case of Wamunga v Republic [1989] KLR 424, this Court while discussing the caution to be borne in mind where the only evidence against an accused is one of identification by a single witness succinctly stated: -

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

20. The rationale for such caution is due to the fact that in as much as a witness may be truthful, he/she can be mistaken when it comes to identification of a perpetrator due to a number of reasons. The aforementioned caution was restated by this Court in Hamisi Swaleh Kibuyu v R [2015] eKLR as hereunder:

> " We are alive to the fact that even the most honest of witnesses can be mistaken when it comes to identification (see KAMAU v REPUBLIC (1975) EA 139). In light of this, conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt, and hence possible error. The evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit."

21. How does a court exercise such caution? In Tetu Ole Sepha v R [2011] eKLR, this Court aptly observed that the usefulness of such evidence and the weight to be attached to it is a factual and credibility matter in each case. It follows therefore that the trial court which has the privilege of observing the demeanour

of witnesses as they testify should first determine the credibility or truthfulness of a witness. In the case of Benson Mugo Mwangi v R [2010] eKLR, the court expressed itself on the issue thus:

> "Honesty and integrity of the witness are the matters to be considered first before the circumstances under which identification took place are considered."

This will definitely determine the weight to be attached to his/her evidence.

22. Secondly, the court will consider whether the circumstances that were prevailing at the material time were conducive to ensure positive identification. We note that both courts below cautioned themselves of the need to tread carefully on the evidence of identification of the single witness, PW1. The participation of PW2 and PW3 in the identification parade as demanded by the appellant would have been superfluous as they testified categorically that they were unable to identify any of the robbers during the incident.

23. The appellant faulted the veracity of the police identification parade on the basis that PW1 had not given the description of the appellant to the police as required prior to the identification parade being conducted. We do not think that this submission is correct. The evidence on record is clear that PW1 described to the police that one of the robbers was short and stout, which description fitted perfectly the appellant as the trial court noted during the trial, and confirmed by the first appellate court.

24. In any event, in the case of Nathan Kamau Mugwe v R - Criminal Appeal No. 63 of 2008 (UR), it was observed thus:

> "As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.
>
> In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

25. To our mind therefore, an identification parade remains valid if properly conducted and if the witness is confident in identifying the suspect. The overall circumstances of the identification, including the witness's ability to recall details and the prevailing conditions, determine its reliability. In this case, both the trial court and the High Court found that the identification was conducted fairly and was free from error.

26. Besides, the identification evidence was bolstered by the recovery of the recently stolen goods from PW1 in the possession of the appellant being a phone and a radio headset which were positively identified by PW1 so soon after the robbery. Given an opportunity to explain the possession, the appellant was unable to do so. The essence of the doctrine of recent possession allows courts to infer guilt when a person is found in possession of recently stolen property without a reasonable explanation. This inference suggests that the person either stole the property or received it knowing it was stolen. The burden to explain the possession falls on the accused. See Malingi v Republic [1989] KLR 225 and Athuman Salim Athuman v Republic [2016] eKLR. We are satisfied that the two courts below properly invoked this doctrine as corroborative evidence of identification of the appellant in the commission of the offence.

27. All said and done therefore, the identification of the appellant by PW1 much as it was that of a single witness, cannot to be faulted. The appeal is thus devoid of merit and is accordingly dismissed in its entirety.

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

ASIKE MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.