Ekiru v Republic (Criminal Appeal 43 of 2017)
[2025] KECA 1906 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1906 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 43 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 3, 2025

BETWEEN

MAIKO EKUAM EKIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nanyuki (Kasango, J.) dated 7th February, 2017 in Criminal Appeal No. 60 of 2016)

JUDGMENT

1. A background of this appeal is that the appellant was arraigned before the Chief Magistrate's Court at Nanyuki, in Criminal Case No. 1803 of 2009. In Count I, the appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence alleged that on 15th May, 2009, at Ngoti area, in Laikipia East District, within the then Rift Valley Province, the appellant, jointly with others not before court, while armed with rungus and swords, robbed Joseph Amana Langatunya of one mobile phone make Nokia 1600, and cash Kshs.600, and at, or immediately before, or immediately after the time of such robbery, stabbed the said Joseph Amana Langatunya, with a sword.

2. In count II, the appellant was charged with the offence of theft of motor vehicle parts contrary to section 279(c) of the Penal Code. The particulars of the offence alleged that on the same date and place, jointly with others not before court, the appellant stole one car radio, one jack, a wheel spanner, and one tool box, all valued at Kshs.8,700, the property of Francis Mwangi.

3. In count III, the appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence alleged on the same date and place, jointly with others not before court, the appellant, being armed with rungus and swords, robbed Joseph Lomati

of one mobile phone make Nokia 1200, valued at Kshs.2,500, and cash Kshs.3,500, the property of the said Joseph Lomati.

4. The appellant denied the charges. The prosecution called a total of four (4) witnesses. The brief facts of the case according to the prosecution were as follows: On 15th May 2009, at about 2.00 a.m., PW1, Joseph Amana Longatonya, and PW2, Francis Mwangi Ndirangu, were traveling in the same car, which they were using to transport one Robert to Nanyuki Hospital. Along Doldol-Nanyuki Road, the vehicle sustained two tyre punctures. They stopped the vehicle and alighted. As they were changing the tyres, some people started throwing stones at the vehicle. They all fled from the scene and escaped in different directions.

5. PW1 stated that a man carrying a torch was chasing after him.

   The man ordered him to stop. He took PW1's phone and asked him if he had any money, to which PW1 answered in the negative. The man started searching PW1 using the torch. PW1 stated that he was able to recognize the appellant as his assailant, as he was well known to him, for a period of about three years. PW1 stated that he tried to fight off the appellant but the appellant called for reinforcement, which forced PW1 to back down. It was then that the appellant took out a knife and stabbed him on the left ribs near the stomach. He robbed him of his phone make Nokia 1600, and cash Kshs.600. PW1 stated that he reported the incident to the police, and was treated at Nanyuki District Hospital. PW1 was examined by a clinical officer, Daniel Lekii (PW3). PW3 testified that PW1 had a stab wound on the left side of his chest. He was admitted for surgery and discharged three days later.

6. PW2, on his part, stated that he lost sight of the assailant who was chasing after him. When he returned to his vehicle, he found that the sick person they were transporting to the hospital had died, and had been robbed of his belongings including his clothes. PW2 testified that car parts, including a wheel spanner, car radio, and a jack were stolen from his vehicle. Two months after the robbery, PW1 stated that he spotted the appellant outside a bar. He immediately called the police and the appellant was arrested. PW2 stated that the appellant was boasting at a bar of how he had stabbed PW1.

7. The investigating officer, Cpl. Daniel Wamuta (PW4), based at Ngarengiro Police Station, stated that he received a report of a robbery on 16th May 2009, from PW2. PW2 informed him that he had been hired to transport a sick person to the hospital on the night of 15th May, 2009. That on the way, they got a puncture, and shortly after, they were attacked by assailants who were carrying rungus and pangas. That the occupants fled the scene leaving the sick man in the car. When PW2 returned to the scene, he found that the sick man had died, and that the robbers had made away with various car parts. Police were called to the scene. It was PW4's testimony that PW1 told him that he was able to recognize one of the assailants. Two months later, PW1 came to the station and informed him that he had seen one of the assailants. PW4 accompanied him to Ngarengiro Bar where the appellant was arrested.

8. The appellant was placed on his defence. He elected to give unsworn evidence. It was the appellant's testimony that he was at a bar on the night of 20th July 2009, when PW1 entered the said bar and asked him to buy him a beer. PW1 accused him of stabbing him. The appellant denied the allegations and stated that PW1 was unknown to him.

9. The trial court (Hon. Ndung'u, SPM), in a judgment delivered on 17th September, 2010, found the appellant guilty as charged in counts I and II. The learned magistrate held that the appellant was positively identified by PW1, and that the prosecution had sufficiently discharged its burden of proof in the two counts. The learned magistrate sentenced the appellant to death in the first count. His sentence with respect to the second count was held in abeyance.

10. The appellant, aggrieved by this decision, filed an appeal before the High Court at Nanyuki. The gist of the appellant's appeal was that the learned magistrate erred in law and in fact: by failing to acknowledge that he was not placed at the scene of crime, and that crucial witnesses were never summoned to testify; by failing to find that the complainants failed to make a prompt first report to the police; by failing to find that the evidence of PW1 as to the injuries he sustained was inconsistent with the medical evidence adduced; by failing to consider the fact that he was detained in police custody for a long period of time, in violation of his constitutional rights; and, by failing to consider his defence.

11. The learned Judge (Kasango, J.) determined that the appellant was properly convicted by the trial court. The learned Judge found that the evidence of identification by PW1 was watertight, as the appellant was well known to PW1, and that PW1 used the light from the torch to identify him. The learned Judge determined that the prosecution reserved the right to call its witnesses, and that the evidence of PW1 was corroborated by the medical evidence of PW3. The learned Judge found that the appellant was arrested in 2009, prior to the promulgation of the 2010 Constitution, and that under the old Constitution, the police were allowed to hold a suspect, with respect to capital offences, for a period upto fourteen days. The learned Judge determined that the appellant's rights were not violated as he was held in police custody for eight days, prior to his arraignment in Court. For these reasons, the learned Judge affirmed the appellant's conviction and sentence by the trial court.

12. The appellant is now before us on a second appeal. He faulted the learned Judge for affirming his conviction based on PW1's evidence of identification by recognition, without considering that PW1 did not identify him in his first report made to the police. The appellant was aggrieved that the first appellate court failed to warn itself of the dangers of relying on the evidence of a single identifying witness, considering that the alleged robbery took place at night. He took issue with the fact that the learned Judge failed to take into account the fact that PW2 fled the scene and did not identify his assailants. He was of the view that the learned Judge rejected his defence without giving cogent reasons. He was aggrieved that the first appellate court failed to re-evaluate the evidence adduced before the trial court and arrive at its own decision. He urged that the learned Judge misapprehended the evidence adduced before the trial court and arrived at the wrong conclusion.

13. The appeal was canvassed through written submissions, duly filed by both parties. Mr. Muchiri, learned counsel for the appellant submitted that though PW1 claimed to have recognized the appellant as one of the assailants, he failed to mention this fact to the police in the first report that was made of the robbery incident. It was his submission that PW1's identification of the appellant two months after the robbery incident created doubt as to the veracity of his evidence. He was of the view that if PW1 really identified the appellant, he would have mentioned his name to the police in the first report. Counsel submitted that PW2 did not identify any assailant during the robbery. He urged that if the first appellate court critically analyzed the evidence of identification, it would have arrived at a different conclusion.

14. In rebuttal, learned state counsel, Mr. Naulikha, urged that the first appellate court properly discharged its mandate of re- evaluating the evidence adduced before the trial court. It was his submission that the two courts below extensively analyzed the evidence of identification and determined that the same was watertight. He explained that the appellant's defence was properly considered, and that his grounds of appeal lacked merit.

15. This is a second appeal. The mandate of this court on a second appeal was aptly stated in the case of Dzombo Mataza v Republic [2014] eKLR, where this Court expressed itself in the following terms;

> "As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters

> of fact are for the trial court and the first appellate court.... By dint of the provisions of section 361(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

16. In the present appeal, the issue that comes to the fore for determination is whether the two courts below were correct in holding that PW1 had positively identified the appellant during the course of the robbery. Our mandate as a second appellate Court is to consider matters of law. It was clear from the appellant's grounds of appeal that he was aggrieved that the 1st appellate Court failed in its duty of re-evaluating the evidence of identification that was adduced by the prosecution witnesses upon which the appellant was convicted. Does his grievance have any basis in law?

17. The following facts are not in dispute. It is not in dispute that the robbery took place and that the complainants were robbed of a mobile phone, Kshs. 600 cash and assorted motor vehicle parts, including a car radio. It is also not contested that the robbery took place at night. It is not clear from the evidence of the prosecution witnesses whether there was moonlight or not. It is further common ground that the robbery took place in an isolated place along the road from Doldol to Nanyuki when the vehicle the complainants were travelling in sustained tyre punctures and had been parked on the roadside.

18. According to PW1 and PW2, they were accosted by a gang of robbers who robbed them of their belongings. When PW1 and PW2 realized that they were about to be attacked, they took flight. PW2 managed to make good his escape from the scene where the motor vehicle had stopped. He did not identify any of the assailants. PW1 testified that he was chased by one of the robbers whom he later identified as the appellant and robbed of his mobile phone make Nokia 1600 and Kshs.600. He was also stabbed on the left side of his chest with a knife. PW1 however, testified that he was able to identify the appellant as one of the assailants as he knew him prior to the robbery. He told the court that he was able to identify the appellant by the torch light that the appellant had in his possession. PW1 did not give this information to the police in the first report. Rather, it was PW2 who made the report and said PW1 had told him that he was able to identify one of the assailants.

    However, the name or the description of the assailant was not given to the police in the said first report.

19. It was instructive that the PW1 did not tell the court how he was able to be certain that it was the appellant who had robbed him. He did not give the description or the name of the assailant in the first report that was made to the police by PW2. The investigating officer who testified before court told the court that the PW1 had told him that he had identified his assailant but it was noteworthy that PW1 did not tell the police how he was able to identify the appellant as the assailant.

20. In Anjononi v. Republic [1980] KLR 59 at page 60 this Court held thus:

> " The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in the case were not favourable."

21. In Baraza v. Republic (Criminal Appeal 378 of 2019) [2023] KECA349 (KLR). This Court, differently constituted, cited the case of Cleophas Otieno Wamunga v. Republic [1998] eKLR which warned of the dangers of visual identification in the following words:

> "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 one or more identifications 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. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well- known case of R. V. Turnbull [1976] 3 ALL E.R. 549 at page 552 where he said:
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> > "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."
> >
> > This need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of Abdallah Bin Wendo v. R. 20 EACA 166 at page 168 thus:
> >
> > > "Subject to certain 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 of evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what it needed is other evidence, where it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

22. In the present appeal, PW1 did not tell the court of the circumstances of his past interactions with the appellant that made him to be certain that he had recognized him as his assailant noting that the appellant in his defence denied knowing of the complainant. Was he a neighbor? An acquaintance? Someone he usually met with at the local shopping centre? Was he a work mate? A village mate? The information PW1 gave in relation to how he previously interacted with the appellant to make him certain that he had recognized him on the night of the robbery was scanty that it raises reasonable doubt in the mind of this Court that he had indeed identified or recognized the appellant during the night of the robbery. The fact that he did not give the name of the appellant to the police through PW2, or his description in the first report he made to the police lends credence to our finding that there was likelihood that he had not identified his assailants on the night of the robbery.

23. It was apparent to us, on re-evaluation of the evidence adduced and the applicable law, that the evidence of PW1, a single identifying witness made at night, which is difficult circumstance, negates positive identification and promotes the possibility of an error or mistaken identity, that the said evidence raises reasonable doubt that indeed the appellant had been positively identified at the scene of crime. The appellant was not found in possession of any of the items which were robbed from the complainant. It appears to us that the only reason why the appellant was arrested two months after the robbery incident was the assertion by PW2 that the appellant boasted in a drinking den that he had stabbed someone

with a knife. This evidence regarding the boast was not corroborated by someone who allegedly heard the appellant utter the words. The allegations were at best hearsay evidence.

24. Although the two courts below stated that they had warned themselves of the danger of convicting the appellant based on the evidence of a single identifying witness, it is clear to us that they did not properly evaluate the evidence of identification adduced by PW1 in order to satisfy themselves that the possibility or error of mistaken identity did not exist in the circumstances. The appellant is said to have been positively identified at night which was doubtful in the circumstances of this appeal. The two courts below did not consider this possibility, therefore, making their failure a matter of law which attracts intervention by this Court.

25. For the above reason, we find merit in the appellant's appeal, we allow the same and set aside both conviction and the death sentence meted upon him. He is ordered to be set at liberty forthwith unless otherwise lawfully held.

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

W. KARANJA

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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