Abdalla v Republic (Criminal Appeal E019 of 2025)
[2025] KEHC 17081 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17081 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E019 OF 2025

JN NJAGI, J

NOVEMBER 21, 2025

BETWEEN

JAMAL SALIM ABDALLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon.P. E Nabwana, SRM, in Mpeketoni Senior Principal Magistrate's Court Criminal Case No. E023 of 2023 delivered on 9/4/2024)

JUDGMENT

1. The Appellant was convicted of the offence of robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the offence were that on the 10th day of February, 2023 at Diwani la Wiyu Township Lamu West sub-county within Lamu County jointly with others not before court while armed with a dangerous weapons namely, a knife, panga and walking stick robbed Stephen Njoroge (herein referred to as the complainant) of a mobile phone make itel valued at Ksh.2,000/= and cash of Ksh.1,500/-totaling to Ksh.3,500/= and immediately before or immediately after the time of such robbery used actual violence to the said complainant.
2. The Appellant was sentenced to twelve years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal.
3. The grounds of appeal are that:
    1. The learned trial magistrate erred in both law and fact when she misdirected herself.
    2. The learned trial magistrate erred in both law and facts when she shifted the burden of proof from prosecution to the appellant.

3. The learned trial magistrate erred in both law when she failed to find that the evidence adduced by prosecution was full of contradictions.

4. The learned trial magistrate erred in both law and fact in convicting the appellant on poor investigation adduced by prosecution.

5. The learned trial court erred in both law and fact in finding the appellant guilty of the offence without considering his defence.

6. The learned trial magistrate erred in both law and fact by sentencing the appellant to 12 years imprisonment which sentence was harsh and excessive.

4. The case for the prosecution was that the complainant is a businessman at Witu township where he runs a grocery stall. The appellant was living a short distance away from his residential house.

5. That on the material day at about 8.30 pm, the complainant was on his way home from his stall. That on reaching the gate to his house, he found some 4 - 5 young men who were armed with pangas, knives and sticks. One of them threw a stick at him and he blocked it with his right hand. Another of them cut him with a panga on the back of the head and on the left elbow. He was then stabbed with a knife on the left and right collar bones. That as he struggled with three of them the others ransacked his pockets and stole his itel mobile phone and Ksh.1,500/=. They then ran away. He walked to Witu health centre where He was stitched. He had met the OCS on the way and informed him of the incident. He was referred to Mpeketoni sub county hospital where x-rays were taken. He was issued with a P3 form at Witu police station.

6. It was the evidence of the complainant that he was well known to the people who attacked him as they lived within his village. That they had lived there for about a month. That he saw them clearly as there was security light at the gate. That the appellant is the one who cut him on the head and on the elbow.

7. A daughter to the complainant PW2 told the trial court that she received a phone call from her brother who informed her that their father had ben injured and was in hospital. She rushed to Witu health centre where she found her father being stitched of wounds. He said that he was injured by some young men whom he could identify.

8. The wife to the complainant PW4 testified that she on the material day returned home in the evening from work and found blood stains on the floor and on the door to her house. There were other blood stains outside her gate. She received a phone call from her son who told her that his father had been injured. She went to Witu health centre where she found her husband (the complainant) with cuts. He told her that he had been attacked by some young men who were known to him.

9. A clinical officer at Witu health centre, PW3, testified that the complainant was attended to at their medical facility by a colleague clinical officer on the 10/2/2023. He was found with multiple cut wounds on the head, left elbow, right thumb, back and both collar bones (clavicles). He was stitched. PW4 thereafter completed the complainant`s P3 form on 14/2/2023.

10. The case was investigated by the OCS Witu police station, CI John Wabuke PW5. It was his evidence that on the material day at 8pm he was walking within Witu township when he was approached by the complainant who had cuts on several parts of his body. He advised him to seek medical attention at the nearby health centre. The complainant did so. He followed him there and found him being stitched. On 11/2/2023 the complainant went to the police station and made a report. He stated that he was attacked by 5 people who were armed with machetes, rungus and knives. That they beat him up and robbed him of Ksh.1,500/= and a mobile phone itel. He investigated the case. The gang members

moved out of Witu. That on 17/2/2023 he arrested the appellant through the assistance of informers. He was charged with the offence.

11. During the hearing of the case in court, the clinical officer PW3 produced the complainant`s treatment notes and P3 form as exhibits, P.Exh.2 and 3 respectively.

12. When placed to his defence the appellant stated in a sworn statement that he was a part time tout at the stage. That the complainant was a person well known to him from his childhood and had rented a premises from his family for 5 years. That on the evening of the material day he was watching a game of football after which he went to the home of a friend at 7pm. Thereafter he went to the shops to look for change. While there he heard people who were about 50 meters away saying that mzee had been beaten. He saw a nyumba kumi elder there. He heard the people mention his name. On the following day he was at the stage when he was told by his colleagues that he was being suspected to have been in the group that beat up the complainant. He was arrested 7 days later after the incident on the complainant. He denied that he robbed the complainant.

Submissions

13. The appeal was canvassed by way of written submissions. The appellant submitted that knives, pangas and walking sticks are not dangerous weapons since they are used as domestic items in every home.

14. He submitted that the complainant never gave the names or description of his assailants when he made a report at the police station. That as the complainant knew him very well there is no reason why he would have failed to mention his name to the police. He wondered why it took the police 7 days to arrest him. That the investigating officer PW5 in his evidence never stated that the complainant told him that he saw the appellant in the gang that robbed him.

15. The appellant submitted that the trial court did not warn itself of the danger of convicting on the evidence of a single identifying witness. He submitted that the charges are a fabrication.

16. The respondent on the other hand submitted that the ingredients of the offence of robbery with violence are proof that: the offender is armed with any dangerous or offensive weapon or instrument; that the offender is in the company of one or more other person or persons; or 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.

17. It was submitted that the prosecution proved that the complainant was robbed by 5 young men who injured him in the course of the robbery. That it was proved that the appellant was armed with a panga. That the injuries inflicted on the complainant were corroborated by the clinical officer.

18. The respondent submitted that it was proved that there was sufficient security light at the scene and that the complainant positively identified the appellant who was a person well known to him.

19. On the defence of the appellant, it was submitted that the appellant did not call any witness to support his defence that he was watching football at the subject time. That the defence was a mere sham that ought to be dismissed.

20. It was submitted that the appellant was sentenced before the Supreme Court made a clarification on the Muruatetu case and therefore that he is lucky to have escaped with a light sentence. That his sentence is fair in the circumstances of the case.

Analysis and determination

21. This being a first appeal, this court is expected to review and analyze the evidence afresh in order to form an independent opinion and draw its own conclusions while bearing in mind that it did not have the benefit of seeing and observing the demeanor of witnesses -see Okeno v Republic [1972] E.A. 32 and Kiilu & Another v Republic [2005] 1 KLR, 174.

22. I have considered the grounds of appeal, the record of the trial court and the submissions of the appellant and those of the respondent.

23. The appellants were facing a criminal prosecution. It was the duty of the prosecution to prove the case beyond all reasonable doubt. Denning J explained what reasonable doubt is in the case of Miller – V-Minister of Pensions [1947] as follows:

> " It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is as strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the lease probable." the case is proved beyond reasonable doubt, but nothing short of that will suffice."

24. The offence of robbery with violence is defined in Sections 295 and 296(2) of the Penal Code as follows:

> " 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."

25. The elements of the offence were set out by the Court of Appeal in the case of Oluoch v Republic [1985] KLR thus:

> " Robbery with violence is committed in any of the following circumstances:
>
> i. The offender is armed with any dangerous and offensive weapon or instrument; or
>
> ii. The offender is in the company of one or more person or persons; or iii.At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.....

26. It is in this respect the duty of this court to interrogate the evidence adduced before the trial court and determine whether the elements of the offence of robbery with violence were proved beyond reasonable doubt.

27. The complainant in his evidence before the trial court said that he was attacked by a group of about 5 people who were armed with pangas, knives and rungus. That they injured him with the said weapons and robbed him of Ksh.1,500/= and a mobile phone.

28. The complainant was treated of the injuries at Witu health centre and examined at Mpeketoni sub county hospital. He was found with cut wounds on the head, left elbow, right thumb, back and both collar bones. The P3 form filled by PW3 indicates that the cuts were occasioned by a sharp object. This corroborates the evidence of the complainant that the people who attacked him were armed with the afore mentioned weapons – pangas and knives. Though pangas and knives are ordinary items, they became dangerous or offensive weapons the moment they were used for purposes other than those they are ordinarily meant for. In Mwaura & others v Republic (1073) EA, the court held "dangerous or offensive weapons" mean any article intended for use in causing injury. In this case the weapons were used to injure the complainant. They were thus intended to be used to inflict injury in the course of committing a robbery. They fitted the description of dangerous or offensive weapons. It was therefore proved that the people who attacked the complaint were armed with dangerous or offensive weapons.

29. It was the evidence of the complainant that he was attacked and robbed by a gang of 4 -5 persons. He told his daughter PW2 and his wife PW4 while at the hospital that he was attacked by a group of young men. It was thereby proved that the complainant was attacked and robbed of the stated items by a gang of 4 or 5 people. The question is whether the appellant was a member of the gang that robbed the complainant.

30. The trial court in convicting the appellant for the offence said that the complainant managed to identify the appellant during the robbery as he was a person well known to him and there was security light at the gate where he was robbed.

31. The law on identification is well settled. The court before basing a conviction on such evidence is required to examine the evidence carefully and satisfy itself that the circumstances of identification were favourable and free from the possibility of error. The Court of Appeal in the case of Cleopas O. Wamunga v Republic, Criminal Appeal No. 20 of 1989 stated as follows in that respect:

> " ..... 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 minimise this danger. Whenever the case against a defendant depends wholly or to a great extent, on correctness of one, or more identification of an accused, which he (accused) alleges to be mistaken; the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification...."

32. In Kariuki Njiru and 7 others v. Republic CR. Appeal No. 6 of 2001 it was held by the Court of Appeal that;

> The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

33. In addition, even where identification is by recognition at night, the evidence must be absolutely watertight to justify conviction, see Nzaro v. Republic (1991) KAR 212.

34. The complainant in his evidence before the trial court stated that he was attacked at his gate. That there was security light at the gate and he positively identified the 5 people who attacked him. That they were

people well known to him as they lived a short distance away from his house. That they had lived there for two months before the day they assaulted him and robbed him.

35. In view of the fact that the offence in this case was committed at night, it was the duty of the trial magistrate to interrogate the evidence on identification carefully so as to satisfy himself that the identification of the appellant was free from the possibility of error.

36. In Maitanyi v Republic [1986] KLR 198 at page 201 the Court of Appeal made the following observation on identification at night:-

> " It is at least essential to ascertain the nature of light available, its size and its position relative to the suspect which are important matters helping to test the evidence with the greatest care.."

37. The court further added that the trial court ought to consider the intensity of such light; the distance the witness was from the accused; whether there was any obstruction between the witness and the accused, and such like matters.

38. In this case the complainant said that there was security shining at the gate. He however did not indicate the kind of light it was, such as whether it was electric light, solar light etc. Nor did he say whether it was from a bulb, fluorescent tube etc. This is because sources of light are of various capacities. They could be dim or bright depending on the capacity. It was therefore important to know the source of light and how bright it was. It was not sufficient to say that there was security light at the gave without giving evidence on the intensity of the light.

39. Further to this, the complainant did not describe where the security light was in relation to where the people were when they attacked him. Though the complainant said that he was attacked at his gate he did not explain whether it was right at the gate or a distance away from the gate. It is the experience of this court that a witness might say that he was attacked at the gate and when he is questioned it is found that he meant not exactly at the gate but a distance away from the gate. Such evidence ought to have come out clearly from the evidence of the complainant.

40. In addition, the complainant did not say how he identified the appellant – was it by seeing a part of his body, by his clothes, etc. It was not sufficient for the trial court to say that the complainant identified the appellant without giving specifics of identification. It was thus not careful consideration of evidence of identification at night for the trial court to have failed to consider the factors on identification as set out above.

41. The complainant was the only single identifying witness in the case. Though a conviction may be based on the evidence of a single witness, it is trite law that the court before convicting on the evidence of a single witness on identification that took place in difficult circumstances the court should warn itself of danger of convicting on such evidence and only convict where it is satisfied that the evidence is free from the possibility of error. The Court of Appeal for Eastern Africa in Abdalla Wendo v Republic [1953] 20 E.A.C.A 166 held the following on the issue:

> " Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether 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."

42. The same court in Roria v Republic [1967] EA 573, also held that:

> " A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."

43. In this case there was no independent evidence to support the evidence of the complainant that the appellant was in the gang that attacked him. Though the trial court did recognize that the evidence on identification was from a single witness, he did not interrogate the evidence carefully so as to satisfy himself that it was safe to act on it. Had he considered the factors on identification I have pointed out above, I doubt whether he would have arrived at the conclusion that the complainant identified the appellant.

44. The Officer in Charge of Witu police station confirmed that he met with the complainant when he was on the way to hospital. He noted that he had cut marks all over his body. He advised him to go for treatment. He followed him to the dispensary and found him being attended to medical personnel. It was his evidence that he investigated the case with the assistance of members of the public. That he later arrested one suspect, the appellant with assistance of members of public.

45. It was further evidence of the OCS that during cross-examination that they made several arrests in the course of investigations but the people were released for lack of evidence.

46. The complainant claims to have known the appellant very well because he was from his village. Nowhere in his evidence did he say that he gave the name of the appellant to the OCS when he met him. Nor did the OCS himself say that the complainant gave him the name of the appellant as one of the people who attacked him. Not even when the complainant went and recorded his statement with the police on 11/2/2023 did he give the name of the appellant to the police. The OCS himself did not visit the scene to see whether there could have been sufficient light for positive identification.

47. The complainant met the OCS shortly after the attack. Since the people were within the locality, it would have been expected that he would give the names of his attackers to the OCS immediately he met him who would have been expected as a senior police officer to swing into action to apprehend the people. That the complainant failed to give the name of the Appellant to such a senior officer on the first opportunity shortly after the attack creates doubt on whether he identified the appellant during the robbery.

48. The OCS said in his evidence that they arrested several people who were released for lack of evidence. If then the complainant had named his attackers to the police why would the police have arrested other people who were not named by the complainant? Were they acting on guess work? This evidence creates further doubt whether the complainant had identified the appellant.

49. Having carefully scrutinized the evidence adduced before the trial court, I am not satisfied that the identification of the appellant at night was free from the possibility of error. The trial court did not interrogate the evidence carefully to satisfy itself that it was safe to convict on it.

50. In view of the foregoing, I find the appeal to be merited. Consequently, the conviction is quashed and the sentence set aside. I order the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 21ST DAY OF NOVEMBER 2025.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Dulu for Appellant

Ms Mkongo for Respondent

Appellant - Present

Court Assistant - Ms Rahma