

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU JJ.A.)

CRIMINAL APPEAL NO. 93 OF 2020

BETWEEN

DOUGLAS BUTETE KHAMALA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (Tuiyott & Mabeya, JJ.) dated 12th November, 2014

in

HCCRA No. 126 of 2011)

JUDGMENT OF THE

COURT

1. This is a second appeal arising from the conviction and sentence of Douglas Butete Khamala (the appellant), who was charged before the trial court with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. The particulars of the offence were that on the 20th day of November 2010 at Kimilili township location within Bungoma District of the Western province, he, alongside five (5) co-

accused and with others not before court while armed with
dangerous

weapons namely a slasher and iron bars robbed Peter Gabugi Mwangi one Nokia 1680 cell phone and a torch all valued at Ksh. 3,280/= and at immediately before or immediately after such robbery, used actual violence on the said Peter Gabugi Mwangi.

3. The appellant was further charged in Count II with the same offence of robbery with violence, in which it was alleged that on the same day, while armed with dangerous weapons, namely a slasher and iron bars, robbed Christopher Simiyu of Kshs. 4,000/= and at immediately before or immediately after such robbery, used actual violence on the said Christopher Simiyu.
4. The appellant pleaded not guilty to the charges and his trial soon thereafter ensued.
5. The prosecution called five witnesses in support of its case. PW1, Peter Kabugi Mwangi (Peter), the first complainant, testified that on the mentioned date, around 1:00 am, he received a text message from his friend PW2, Simon Mwili (Simon), asking him to come to his aid. When Peter reached the gate, he encountered a group of eight people who attacked him with a metal bar and a slasher. He tried to

escape but fell, and his attackers ordered him to sit down.
Peter recognized one of them by voice and with the

help of a spotlight from his mobile phone. He was cut on the head and robbed of items, including his mobile phone Nokia 1680. As the attackers left, Peter sought help from neighbours, who administered first aid. He later received treatment at Webuye District Hospital. While Peter was being attacked, Simon was at his house. He later came out and saw people walking away from the scene.

6. Earlier on the same night, at about 10.00 p.m., PW3 Christopher Simiyu (Christopher) was walking towards Lutonyi village. After he passed a place known as Mburuwa, he met the appellant. The appellant refused to respond to his greetings. Suddenly, more than 5 people emerged from a bush. He was held from behind and one of the five people cut him on the head and snatched his wallet from his pocket. The wallet had cash of ksh.4000/=. After the robbery, the appellant ordered him to walk away without looking back.
7. PW4 Joakim Millions Lubulia (Joakim) a police officer at Kimilili Police Station was directed by the Officer Commanding the station to proceed to Posta area where a crime had been committed. When he got there, he received information from

members of the public who gave him the names of one Butete and one Vincent as some of the suspects. Led by members of the public to the house of the appellant, he was able to arrest him and the said Vincent. The two led them to six other suspects, whom they also arrested.

8. PW5 Oscar Mukata (Oscar), a Clinical Officer at Kimilili District Hospital, attended to and examined Peter on 21st November 2010. He observed multiple cut wounds on the scalp and face, as well as soft-tissue injuries to the shoulder and posterior forehead region. He concluded that the injuries were most likely inflicted using a sharp object.
9. In his unsworn defence, the appellant denied the charges. He stated that he was arrested on the night of 20th November 2010 while at his residence and was subsequently arraigned in court the following day and charged with the present offence which he denied any involvement in.
10. The trial court found that the prosecution proved its case beyond a reasonable doubt on the first count, convicted the appellant of the offence of robbery with violence, and sentenced him to death;

his co-accused were however acquitted. As regards Count 2, the trial court returned an acquittal for all accused persons.

11. Being aggrieved by the decision of the trial court, the appellant appealed to the High Court, but his appeal was dismissed; and both conviction and sentence were upheld. He is now before this Court on his second and perhaps last appeal faulting the learned judge for relying on the evidence of identification without observing the prevailing circumstances.
12. In support of the appeal, the appellant was represented by learned counsel Ms. Ida Anyango, whilst the respondent was represented by learned prosecution counsel Ms. Kibet. It was submitted for the appellant, that his conviction rested solely on the identification evidence of Peter, who claimed to recognize the appellant by voice and appearance, despite admitting that their last interaction was in 1994, approximately 16 years before the alleged offence; that, he did not testify to any subsequent encounters, and given their young age in 1994, significant changes in appearance due to puberty are reasonably expected.
13. Counsel argued that the incident took place at night between

11:00 p.m. and 1:00 a.m. Peter mentioned some moonlight
but

also stated it was dark when he used his spotlight. It is contended that the quality, intensity, and distance of this light were never determined, and no identification parade was held, despite the circumstances requiring one to verify the accuracy of Peter's identification.

- 14.** It was further argued that the law is clear that while a fact may be proved by the testimony of a single witness, such evidence, particularly on identification, must be examined with the greatest care. Reliance was laid in the case of **Daniel Kipyegon Ng'eno vs. Republic, [2018] eKLR** where the court emphasized the need to consider factors such as lighting, distance, duration of observation, and the witness's ability to recall distinguishing features suspect.
15. Counsel for the appellant maintained that these critical factors were not sufficiently addressed as no corroborative evidence was presented and no stolen items were recovered from the appellant therefore the conviction rested on weak, untested, and unsafe identification evidence.
16. In reply, counsel for the respondent conceded that the appellant's conviction rested solely on the identification

evidence

of Peter who stated that he was attacked at night by several assailants and that although there was moonlight, it was insufficient for clear identification; that he claimed to recognize the appellant by voice and by the light from his mobile phone, yet he did not state how long he used the light before it was taken away from him. It is further pointed out that Peter also gave inconsistent names for the suspects and did not provide any physical description to the police at the earliest opportunity when the first report was made.

17. Relying on the decisions of ***Karani Kirini & Others vs. Republic (CRA E009 of 2024) (UR)***, the respondent contended that the law requires identification evidence to be subjected to the strictest scrutiny, especially where prevailing conditions are difficult and no prior description of the suspect is provided. That in this case, no identification parade was conducted, and none of the witnesses explained how the appellant was linked to the offence. Consequently, counsel for the respondent argued that the identification of the appellant was unsafe, rendering the conviction unsustainable.

18. This is a second appeal, and by dint of section 361(1) of the Criminal Procedure Code, the court's jurisdiction is limited to dealing with matters of law only. In ***Karingo vs. Republic [1982] KLR 213***, the Court held that:

“A second appeal must be confined to points of law and Court of Appeal will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence.”

19. In the present appeal, the issue that comes to the fore for determination is whether the two courts below were correct in holding that Peter had positively identified the appellant during the course of the robbery. 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?

20. In the instant appeal, Peter told the court that he was able to identify the appellant as his primary school classmate and with the help of the light from his torch. He maintained, even under cross-examination, that he was able to see the appellant after shining a spotlight on him. He further stated

that the appellant

was not a stranger to him, as they had previously attended the same school. At the earliest opportunity, PW1 Peter gave the appellant's name to the police as one of his attackers. Although he mentioned different variations of the names Douglas, Leonard Libale, or Bernard Butete, his evidence consistently indicated that he was referring to the appellant.

21. This was therefore a case of recognition rather than identification. In the dictum of this Court (per Madan, JA) in ***Anjononi and Others vs. Republic [1980] eKLR*** it was stated thus:

“...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

22. Similarly, in Peter ***Musau Mwanzia vs. Republic [2008] KECA 92 (KLR)*** it was stated that;

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example that the suspect had been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such

knowledge need not be for a long time

but must be for such time that the witness, in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question.”

23. Considering the Peter’s evidence that the appellant was his classmate and that he recognized him with the help of the light from his mobile phone on that night, there is no doubt that this was a case of recognition rather than identification.

24. This being a case of recognition and not identification by a stranger in difficult circumstances, conducting an identification parade would have been superfluous and unnecessary. This Court in **Katana & Another vs. Republic [2022] KECA 1160 (KLR)** observed thus;

17. It is also notable that an identification parade is not necessary where the witness is positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence, and will only become necessary where the victim of the crime did not know the accused before his acquaintance with him during the commission of the offence, or identification was made under difficult circumstances such that the witness may have made a mistake.”

25. The Court was of the same view in **Peter Okee Omukaga & Another vs. Republic [2011] KECA 332 (KLR)** stating that;

“We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a

case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen articles did not in any way point to the innocence of the appellants.”

26. The Court should always take cognisance of the possibility of miscarriage of justice where the prosecution's case is based wholly on the evidence of a single identifying witness. In this case, the two courts below were justified in relying on the cogent evidence of recognition from Peter. Accordingly, the complaint regarding the identification of the appellant as the perpetrator of the offence is without substance. The appeal lacks merit and is dismissed in its entirety.

Dated and delivered at Kisumu this 30th day of January, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR