Shaban & another v Republic (Criminal Appeal 48 of 2020)
[2026] KECA 173 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 173 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 48 OF 2020

DK MUSINGA, PO KIAGE & GV ODUNGA, JJA

JANUARY 30, 2026

BETWEEN

RASHID WANYAMA SHABAN ..... 1ST APPELLANT

HASSAN SHABAN WATILA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Bungoma (H. Omondi, J.) delivered on 10th July 2017 in HCCRA No. 243 of 2015 consolidated with HCCRA No. 242 of 2015)

JUDGMENT

1. The appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. They also faced a separate count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars were that on 16th March 2015 at Nabuyole village in Bungoma East Sub-County, jointly acting with another person not before the court and armed with axes, pangas and knives, the appellants robbed Naomi Sitati of cash amounting to Kshs 500/=, ten plates, ten spoons, six cups, a bag, a lesso, a blanket, a shirt and a petticoat, all valued at Kshs 1,900/=, and used actual violence on her immediately before the robbery.

2. The prosecution's case was based on the testimony of six witnesses. PW1, Naomi Sitati, testified that at about 6 pm on 16th March 2015, she was attacked on her way home via a forest route. She identified the two appellants as the men who stopped her together with a third person. She knew the 2nd appellant from his work as a tout at the stage where she sold food, and she recognized the 1st appellant by appearance. According to PW1, the 2nd appellant slapped her, threatened to kill her, and together with the others they stripped her of her blouse, beat her and stole her bag containing plates, cups, a kikoi and Kshs 500/=. They carried her to the 2nd appellant's house, locked her inside and left. She managed to

send a distress message to her father and was rescued at midnight. During the rescue, the 1st appellant attacked her father with a panga and the group fled. She sustained injuries to the neck, chest and thighs.

3. PW2, Alfred Sitati, who is PW1's father, stated that he received her distress message and mobilized PW3, PW4 and a village elder. They traced PW1 to the 2nd appellant's house, where they found her crying and without her blouse, while the 2nd appellant sat naked holding a panga and a stone. When PW2 suggested going to the police, the 2nd appellant's mother raised an alarm and both appellants, together with a third man, attacked them with sticks and knives. PW2 was cut on the hand and beaten before police later rescued him. PW3, Martin Sumba Sitati, PW1's brother, also confirmed that he was struck by two attackers near the gate when they arrived at the 2nd appellant's homestead. He identified the 1st appellant with the help of a solar lamp before fleeing to the forest where he remained until morning.

4. PW4, Isaac Lubisia Lunani, a neighbour of PW1, supported the accounts of PW2 and PW3. He stated that they were guided by "Nyumba kumi" people (a village security group), to the 2nd appellant's home where they found PW1 without her blouse and the 2nd appellant naked inside the house. When PW2 proposed going to the police, the 2nd appellant's mother screamed and the attackers emerged. PW4 identified the 1st appellant as one of the men who assaulted PW2 and PW3.

5. PW5, PC Charles Atte, the investigating officer, testified that PW1 reported having been attacked by three men armed with an axe and knives, robbed and taken to the 2nd appellant's house. He later organized the arrest of the 1st appellant on 18th March 2015 and the 2nd appellant on 5th May 2015. He stated that all the complainants identified the appellants at the police station. No stolen items or weapons were recovered, and no search was conducted at the appellant's homes.

6. PW6, Brian Ilima, a Medical Officer at the Webuye District Hospital, produced P3 forms confirming the injuries. PW1 had soft tissue injuries to the chest and neck caused by blunt force. PW3 had a stitched forehead wound, bruises, swollen thigh and knee, classified as grievous harm. PW2 had cuts and bruises classified as harm. All injuries were consistent with assault occurring about twelve hours earlier.

7. The 1st appellant gave an unsworn statement and stated that he was arrested while digging at home, taken to the police, and later charged with offences he knew nothing about. He denied knowing the 2nd appellant before the case and denied involvement in the incident.

8. The 2nd appellant on his part stated on oath that he was arrested while returning from the shop and beaten until he lost consciousness. He said he did not know PW1, did not know the nickname "China", and denied participating in any attack.

9. The trial court found that PW1 had been robbed and assaulted and that the evidence clearly placed the appellants at the scene. It held that PW1 had ample opportunity to identify the attackers, given the long period she spent with them and the fact that they were known to her. The court also found that the rescuers positively identified the appellants during the later confrontation at the 2nd appellant's homestead. The court rejected the defences as unbelievable and noted that the appellants did not explain where they were at the material time. The two appellants were sentenced to death in respect of the offence of robbery with violence.

10. On first appeal, the appellants contended that no dangerous weapon had been used during the incident; that there existed a grudge between their family and that of the complainants; that the prosecution evidence was inconsistent and uncorroborated, and that they were held in custody beyond

the constitutional time limit. They also submitted that identification was unreliable because the sources of light were not properly explained, and that the arresting officer was not called as a witness.

11. The High Court, vide judgment delivered on 10th July 2017 held that PW1 gave clear and consistent testimony about how she recognized the appellants during an encounter that began at daylight and lasted several hours. The court noted that the reference to 11.00 pm by the investigating officer related to the later assault at the homestead and did not conflict with Naomi's account of the initial robbery at 6.00 pm. The court found that any discrepancies about the source of light were minor because the witnesses consistently stated they used a solar lamp during the confrontation at the homestead and PW1 had recognized the appellants earlier in daylight. The court rejected the claim that an essential witness was not called, noting that this did not affect the direct evidence given by the victims and eyewitnesses.

12. On the complaint about delay in arraignment, the court observed that the charge sheet showed that the appellants were arrested on 17th March 2015 and taken to court on 18th March 2015. However, and because parts of the original trial record were missing, the court stated it could not draw a firm conclusion on the allegation, but held that even if there had been a delay, it would not vitiate an otherwise safe conviction.

13. In the end, after reviewing the entire record, the High Court held that the trial magistrate properly analysed the evidence and that the conviction was safe. It upheld both the conviction and the sentence.

14. In this second appeal, the appellant contends that the learned judge erred in law and fact by relying on evidence of identification without observing that the prevailing conditions were not suitable for positive identification.

15. At the hearing of this appeal, the appellants were represented by learned counsel Ms. Anuro, while the respondent was represented by Ms. Mwaniki, Assistant Director of Public Prosecutions. Both counsel made brief oral highlights of their respective client's written submissions.

16. For the appellants, it was contended that their conviction was unsafe because it was based almost entirely on visual identification in circumstances they said were not conducive to a positive and error-free identification. It was submitted that the High Court failed to interrogate the quality of the identification evidence, and that this omission was fatal to the prosecution case. According to the appellants, PW1 stated that the attack occurred at around 6 pm, at a forested path, and that it was not completely dark. They argue that this assertion required closer scrutiny, particularly because other witnesses referred to different times and sources of light. The appellants maintained that conditions at the scene did not allow for a positive identification free from the possibility of error. In this regard, it was contended that an identification parade was necessary in order to provide PW1 with ample opportunity to properly identify the assailants with utmost certainty.

17. To support this position, the appellants relied on the decision of Abdalla bin Wendo & Another v R [1953] 20 EACA 166, where this Court held that although a conviction may be based on the testimony of a single witness, such evidence must be tested with the greatest care, especially where conditions for a correct identification were difficult; that when such conditions prevail, there must be other evidence pointing to guilt before a court can safely rely on a single identifying witness.

18. They further cited Nzaro v Republic (1991) KAR 212, wherein this Court held that identification by recognition at night must be absolutely watertight to justify a conviction. The appellants contended that the identification in their case fell far short of this standard because the prevailing conditions were neither clear nor consistent.

19. The appellants also relied on the decision of Daniel Kipyegon Ngeno v Republic [2018] eKLR, where this Court outlined several factors that trial courts must consider when evaluating identification evidence. These include the lighting conditions; the proximity of the witness to the perpetrator; the duration of observation; the state of mind of the witness; whether the witness gave a description of the accused before the arrest; and whether any unique features were noted. It was contended that none of these factors were properly addressed in their case. It was their argument that PW1 did not give a prior description of her attackers, and her references to the second appellant as "Ali" or

> "China" do not appear in the charge sheet. In their view, this raised a real possibility of mistaken identity which the High Court failed to address.

20. It was also contended that the High Court overlooked the fact that no stolen items were recovered from either of the appellants, yet recovery of such items often provides useful corroboration in robbery cases. It was submitted that the absence of such evidence made an identification parade particularly important, but no parade was conducted. It was asserted that the failure to conduct a parade, especially in a case hinging solely on identification significantly weakened the prosecution's case.

21. In the end, the appellants urged this Court to find that the identification evidence was unreliable and unsafe to sustain a conviction and thus allow the appeal, quash the convictions and set aside the sentences.

22. In response, the respondent contended that the convictions were sound and supported by both statutory ingredients and credible evidence. It was submitted that the offence of robbery with violence under section 296(2) of the Penal Code was fully proved because the assailants were armed, were in the company of more than one person, and used actual violence on the complainant and her rescuers.

23. The respondent further contended that the identification evidence was both reliable and strengthened by prior familiarity. In this regard, it was contended as per PW1's testimony, that she knew the appellants before the incident as they frequented the shopping centre where she traded and she recognized the 2nd appellant as a tout at the stage. In addition, PW1 spent several hours with her attackers from around 6 pm until shortly after midnight, thereby giving her ample opportunity to observe them at close range. The respondent relied on R v Turnbull & Others [1976] 3 All ER 549.

24. The respondent also submitted that the element of violence was indisputably proven. PW1, PW2 and PW3 sustained injuries during the attack and during the rescue at the 2nd appellant's house. Treatment notes and P3 forms produced in evidence confirmed the injuries, thus providing corroboration for the complainants' accounts. In addition, it was contended that the use of weapons such as pangas and sticks further supported the conclusion that the attack involved dangerous instruments.

25. On sentence, the respondent argued that the trial court properly exercised its discretion in imposing the death penalty which the High Court upheld. Reliance was placed on the decision of this Court in Bernard Kimani Gacheru v Republic [2002] eKLR, for the argument that an appellate court should not interfere with a sentence unless it is manifestly excessive, based on wrong principles, or arrived at after ignoring relevant factors. The respondent submitted that none of these grounds had been met.

26. In conclusion, the respondent maintained that the prosecution's case was consistent, credible and corroborated, and that the statutory requirements for robbery with violence and assault were satisfied. We were therefore urged to dismiss the appeal and uphold both the conviction and sentence.

27. We have considered the record, the rival submissions and the law. Our mandate in a second appeal is restricted by section 361 of the Criminal Procedure Code to matters of law only. This Court will

therefore not interfere with concurrent findings of fact, unless it is shown that the courts below misdirected themselves, considered irrelevant factors, failed to consider material evidence or reached plainly wrong conclusions. See Michael Ang'ara Paul v Republic [2021] KECA 1004 (KLR).

28. This appeal turns entirely on the question of identification and the claim that the failure to conduct an identification parade rendered the appellants' conviction unsafe. The evidence on record and which the High Court re-evaluated was that PW1 encountered the assailants in broad daylight at around 6pm and was able to recognize them before any violence was visited upon her. She knew the 2nd appellant from the stage where she carried out her trade, and the 1st appellant was equally familiar to her by appearance, which places this case firmly within the category of recognition rather than first-time identification. The law has long held that recognition is more reliable than identification of a stranger. Indeed, this Court in Anjononi vs Republic (1980) KLR 59 held thus:

> " ... This was, however, a case of recognition, not identification, of the assailants; 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..."

29. In the circumstances herein, the robbery did not unfold in haste.

PW1 was held for several hours until midnight during which time she observed the appellants at close range in more than one setting. Her evidence was not limited to a momentary glance. It was reinforced by the circumstances of the rescue, when PW2, PW3 and PW4 arrived at the 2nd appellant's home and again encountered the appellants in conditions illuminated by the solar lamp. PW3 in particular confirmed that he identified the 1st appellant by face with the aid of the solar lamp before he was struck. The testimony on lighting was consistent. Identification was made initially in daylight and later under direct lamplight at the homestead. In our view, the High Court correctly observed that minor variations concerning moonlight or lamplight lighting did not create any material doubt.

30. The argument that an identification parade was required has no substance when weighed against the quality of recognition evidence presented. In our view, a parade is necessary where the suspect is unknown to the identifying witness. In this case, PW1 knew the appellants beforehand, saw them earlier on the same day at the trading centre, and called them by the names she knew them by. The evidence of PW2, PW3 and PW4 further tied the appellants to the rescue incident at the 2nd appellant's home. Their accounts were consistent on the presence of both appellants and on the roles they each played during the confrontation. Therefore, the chain of events from the assault in the forest to the rescue at the homestead forms a continuous narrative in which the identity of the attackers was never in doubt.

31. In the circumstances, we are satisfied that PW1 knew the assailants and interacted with them over an extended period in favourable conditions. There was overwhelming evidence placing the appellants at the scene and linking them to the violence visited on PW1 and her rescuers. Therefore, the findings of both the trial court and the High Court that the identification was safe and free from the probability of error were fully justified.

32. In light of the foregoing, we are satisfied that the prosecution proved the offence of robbery to the required standard and the High Court was therefore right in upholding both conviction and sentence. There is no basis for interfering with the decision of the High Court, and the appeal must therefore fail. Consequently, this appeal is devoid of any merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2026.

D. K. MUSINGA, (PRESIDENT)

..... JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

G. V. ODUNGA

..... JUDGE OF APPEAL

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

DEPUTY REGISTRAR