Mitheru v Republic (Criminal Appeal 16 of 2017)
[2026] KECA 540 (KLR) (13 March 2026) (Judgment)

Neutral citation: [2026] KECA 540 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 16 OF 2017

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

MARCH 13, 2026

BETWEEN

JOSHUA KIMATHI MITHERU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Meru (Kiarie, J.) dated 19th December, 2016 in HCCRA. No. 18 of 2014)

JUDGMENT

1. A background of this appeal is that the appellant was arraigned before the Chief Magistrate's Court at Meru, in Criminal Case No. 850 of 2012. He 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 6th April, 2011, at Kianjai Location in Tigania West District, within Meru County, the appellant, while armed with a dangerous weapon, namely a dagger, robbed Anthony Mwenda of his bicycle make Phoenix, and mobile phone make Nokia 2100, all valued at Kshs.8,000, and cash Kshs.70, the property of the said Anthony Mwenda, and immediately before the time of such robbery used actual violence to the said Anthony Mwenda, by stabbing him on his left hand and shoulder twice.

2. The brief facts of the case according to the prosecution were as follows: The complainant, Anthony Mwenda (PW1), told the trial court that on 6th April, 2011, at about 2.00 p.m., he was on his way from Machaku, accompanied by PW3, Peter Mutabari, when he met with the appellant. He stated that the appellant was well known to him as he was his neighbour. The appellant demanded money from him. He told him that he did not have any. The appellant proceeded to punch him. He fell off his bicycle. The appellant drew a knife from his belt and stabbed him twice on his left shoulder, and on his right forearm. PW1 stated that PW3 ran away and informed members of the public who gathered at the scene. It was his evidence that the appellant stole his bicycle and ran away with it, as members of the public threw stones at him. The appellant also stole his phone and Kshs.70 which he removed from

his pocket. PW3 corroborated the complainant's evidence. It was his evidence that he had known the appellant since they were young children.

3. PW6, Lucy Kaburu, was at her home, which was 100 metres away from the scene, when she heard someone screaming. She rushed to the scene and found PW1 lying on the ground bleeding. The appellant was being chased by members of the public who were throwing stones at him. It was her evidence that they took PW1 to Tigania Police Station to report the incident, and afterwards to Tigania Hospital for medical attention. She stated that she had known the appellant since childhood.

4. PW2, Joshua Morua Alaya, the area Assistant Chief, informed PW5, Sgt. Kiencha Fred of Kianjai AP Camp of the incident. PW5 arrested the appellant at his house, where he also recovered a dagger. PW4, Geoffrey Muthomi, a clinical officer at Miathene District Hospital, produced the complainant's P3 form. It was his testimony that PW1 was brought to the hospital on 6th April, 2011. He stated that PW1's clothes were soaked in blood. He sustained stab wounds on his left shoulder and right hand, inflicted by a sharp object.

5. The investigating officer, PC Mark Kipkoech (PW7), told the court that he was at Tigania Police Station on 6th April, 2011, when the complainant was brought by members of the public. He reported that he has been attacked by the appellant while on his way from Machaku. The appellant robbed him of his bicycle, mobile phone, and Kshs.70. He also stabbed him twice on the left hand. PW7 stated that he escorted the complainant to Tigania Mission Hospital where he was admitted. He visited the scene of crime and recorded witnesses' statements. It was his evidence that the appellant was arrested in possession of a knife.

6. The appellant was placed on his defence. He elected to give sworn evidence and called one witness. In his alibi defence, the appellant testified that he was not at the scene of crime on the material date, but that he was at Mikinduri, where he had been contracted to work on a road that was under construction, together with DW2. It was his evidence that he was at the site at Mikinduri from 4th to 9th April, 2011, when he went back home to Kianjai. He stated that he was arrested the following day, on 10th April, 2011, while on his way home, and that the police officers were in the company of his cousin, George Mwiti, who identified him to the police.

7. It was the appellant's evidence that he was arrested due to a debt of Kshs.2,000/= which he owed his cousin. He testified that he knew nothing about the robbery with violence charge against him, and that PW1 had framed him. It was his evidence that he had earlier testified against PW1, in a court case before Maua Law Court, where PW1 had been charged of murder of the appellant's uncle. He stated that the complainant was convicted in that case. It was his testimony that this was his way of getting back at the appellant. He stated that the prosecution witnesses had been coached by the complainant, and that PW3 was the complainant's employee, while PW5 sired a child with the complainant. In essence he was saying that the prosecution witnesses were related.

8. The appellant's witness, David Mwiti (DW2), testified that he worked with the appellant at the construction site at Mikinduri from 4th to 9th November, 2011, when the appellant left for Kianjai. It was his evidence that he never worked with the appellant in April 2011, and that they only worked together in the month of November, 2011.

9. The trial court (Mburu, PM), in a Judgment delivered on 18th February, 2014, found the appellant guilty as charged. The learned magistrate held that the appellant was positively identified by PW1, whose evidence was corroborated by that of PW3 and PW6. His alibi defence was displaced by the evidence of his witness, DW2, who gave contradictory evidence. The appellant was consequently convicted of the charge and sentenced to death.

10. The appellant, aggrieved by this decision, filed an appeal before the High Court of Kenya at Meru. The gist of the appellant's appeal was that the learned magistrate erred in law and in fact, by violating the provisions of section 150 of the Criminal Procedure Code, and Articles 26(1) and 49(1)(f) and (g) of *the Constitution*. The appellant complained that his alleged identification or recognition was not free from error, and faulted the learned magistrate for relying on conflicting and contradictory evidence.

11. The learned Judge (Kiarie J.), in a Judgment dated 19th December, 2016, determined that the appellant was properly convicted by the trial court. The learned Judge found that the evidence of identification by PW1 and PW3 was watertight, as the appellant was well known to the two witnesses, and that conditions for identification were favourable, as the incident occurred at 2.00p.m. The learned Judge determined that the appellant's alibi defence was properly dismissed by the trial court. The learned Judge dismissed the appeal and affirmed the appellant's conviction and sentence by the trial court.

12. The appellant filed a second appeal before this Court. He advanced three grounds in his supplementary memorandum of appeal. The appellant faulted the learned Judge for failing to reappraise the evidence tendered before the trial court, hence arriving at the wrong conclusion. He was aggrieved that the learned Judge relied on the evidence by prosecution witnesses, which was marred by contradictions. He was of the view that the sentence awarded by the trial court was harsh and excessive.

13. The appeal was canvassed through written submissions, duly filed by both parties. Ms. Nelima, counsel for the appellant, submitted that the prosecution failed to establish the elements of the offence of robbery with violence. It was her submission that the element of theft was not proved, as none of the items allegedly stolen from the complainant were recovered from the appellant at the time of his arrest. She stated that the complainant did not adduce any evidence to prove ownership of the alleged stolen items. It was her submission that although the complainant testified that the appellant asked him for money before stabbing him, PW3 told the court that the appellant never spoke to the complainant before the attack. She pointed out that another discrepancy was that the complainant claimed to have been treated at Tigania Mission Hospital, yet PW4, who filled the P3 form, told the court that the appellant was treated at Miathene Hospital. She submitted that the complainant did not produce any treatment notes from Tigania Mission Hospital.

14. Counsel for the appellant was of the view that the inconsistencies in the evidence by the prosecution witnesses ought to have been resolved in the appellant's favour. On sentence, counsel urged that the death sentence awarded to the appellant was harsh and excessive, and failed to accord the appellant a fair trial as envisaged under Article 25 of *the Constitution*, as the appellant's mitigating circumstances were not taken into consideration.

15. In rebuttal, learned Prosecuting counsel, Ms. Nandwa, urged that the elements of the offence of robbery with violence were sufficiently established by the prosecution. She submitted that the evidence of PW1 established that the appellant was armed with a knife, which he used to inflict injuries on the complainant in the course of robbing him of his belongings. It was her submission that the medical evidence adduced corroborated the evidence by PW1. She maintained that the appellant was properly identified by PW1, PW3 and PW6, who all knew him, and further, that the robbery occurred in broad daylight. She asserted that the inconsistencies pointed out by the appellant did not go to the root of the prosecution's case against him, and that his alibi defence was properly dismissed by the two courts below. On sentence, Ms. Nandwa submitted that the death sentence is a lawful sentence, and may be imposed where circumstances so deserve. In the premises, she urged us to dismiss the appellant's appeal in its entirety.

16. 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."

17. We have carefully considered the evidence that was adduced before the trial court and considered by the first appellate court. We have also considered the submission by the appellant and the response made thereto by the prosecution. The issues that emerged for determination are the following:

i. Whether the appellant was properly identified as the perpetrator of the crime.

ii. Whether the appellant's defence was considered.

iii. Whether the charge of robber with violence was established to the required standard.

iv. Whether the sentence meted on the appellant is legal.

18. In regard to the first issue, it is the appellant's appeal that he was not identified at the scene of crime. It was his evidence that he was elsewhere when the robbery is said to have taken place. It was his further submission that the prosecution's witnesses' testimony with regard to identification was tainted with malice as the said witnesses had a grudge with him on account that he had testified against the complainant in a criminal case that resulted in the complainant's conviction. The respondent countered this claim by the appellant by insisting that the appellant was known to the complainant and the prosecution witnesses prior to the robbery. The robbery incident took place in broad daylight. The said witnesses had the opportunity to see and recognize the appellant when he robbed the complainant.

19. The Complainant (PW1) testified that he was accosted by the appellant when he was on his way home while in the company of PW3. The appellant demanded money from him. When the complainant told the appellant that he did not have any, the appellant punched him before drawing a knife and stabbing him on his shoulder and arm. The appellant then took off with the complainant's bicycle, mobile phone and Kshs.70 which he had forcefully removed from the complainant's pocket. PW3 saw the entire robbery take place. PW6, who was at a home about 100 metres away, rushed to the scene upon hearing the screams by the complainant. She found the complainant on the ground bleeding. The complainant was taken to Tigania Police Station where the report of the robbery incident was made. He was later taken to hospital for treatment.

20. It was this evidence of identification that the appellant is contesting. The two courts below found this evidence to be water tight. It was the evidence of recognition rather than that of identification of a stranger. The appellant was known to the complainant and PW3 prior to the robbery incident. They were neighbours. The robbery incident occurred at 2.00pm. This was in broad daylight. As was held by this in Anjononi & 2 Others v Republic [1980] KECA 23 (KLR):

> " ....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 personal knowledge of the assailant in some form or other."

21. We cannot disagree with the concurrent finding made by the two courts below on this issue. We hold, just like the two courts below held, that the evidence adduced by the complainant and PW3 was that of recognition and not mere identification. The appellant was known to the said witnesses prior to the robbery incident. They identified him by name in the first report they made to the police. Indeed, the appellant was arrested a day after the robbery incident in his home. A dagger which was used to stab the appellant during the robbery was recovered in his possession. We find no merit in the appellant's appeal that he was not identified at the scene of crime. That ground of appeal is dismissed.

22. As regard whether the appellant's alibi defence was considered by the two courts below before the appellant's conviction was upheld, we agree with this Court's holding in Kamau V Republic [2024] KECA 314 (KLR) where the Court held that burden of disproving an alibi lies with the prosecution once it is raised by the defence. The prosecution must investigate or rebut an alibi in order to establish the guilt of the accused beyond reasonable doubt.

23. In the present appeal, the appellant gave an inconsistent defence. On the one hand, he stated that he was working at a construction site away from the scene of crime. He called DW2 to corroborate his testimony. DW2 however testified that he worked with the appellant at the construction site in November 2011 and not in the month of April 2011, when the crime took place. The appellant further attributed the adverse evidence adduced by the complainant to the existence of a grudge between them. The appellant testified that the complainant was on a revenge mission due to the fact that he had adduced evidence against him in a criminal case that resulted in his conviction.

24. Just like the two courts below, we have considered the appellant's alibi defence in light of the prosecution's evidence of recognition and are unable to find substance in the said defence. It was evident that the said defence was raised by the appellant in a desperate but ultimately futile bid to displace the strong, cogent, consistent and credible evidence adduced against him by the prosecution witnesses. We hold, just like the two courts below, that the appellant's alibi defence was properly discounted as not worthy of credit.

25. As regard to whether the prosecution proved the charge of robbery with violence contrary to section 296 (2) of the Penal Code, this Court in Oluoch & Another V. Republic [1985] KLR 549 at p.556 held thus:

> " Under section 296 (2) of the Penal Code robbery with violence is committed in any of the following circumstances:
>
> > The offender is armed with a dangerous or offensive weapon or instrument, or the offender is in company of one or more person or persons or at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses the personal violence to any person."

26. In the present appeal, the prosecution established, to the required standard of proof beyond any reasonable doubt that the appellant robbed the complainant of his bicycle, Mobile phone and Kshs.70. In the course of the said robbery, the appellant stabbed the complainant with a knife as result of which the complainant suffered injuries that required hospitalization. The P3 form produced in evidence established the injuries that the complainant sustained in the robbery incident. The knife used by the appellant to attack the complainant is obviously a dangerous and offensive weapon. The prosecution was therefore able to establish the essential ingredients of robbery with violence as required under

section 296 (2) of the Penal Code. We find no reasons to depart from the concurrent findings made by the two courts below in that respect.

27. The last issue for determination is whether the sentence meted on the appellant is legal. According to the appellant, the sentence of death that was imposed upon him contravened his right to fair trial. What the appellant is saying is that the trial court ought not to have imposed the sentence that it did. On the other hand, the prosecution is of the firm view that the sentence imposed on the appellant was legal and ought not to be disturbed.

28. Section 296(2) of the Penal Code provides that any person convicted of the offence of robbery with violence is liable to a sentence of death. There is no other sentence provided under the said section of the Penal Code. The sentence was legal. We uphold it. We cannot interfere with it.

29. In the premises therefore, the appellant's appeal against conviction and sentence lacks merit and is hereby dismissed.

DATED AND DELIVERED AT NYERI THIS 13TH DAY OF MARCH, 2026.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR