Kabimba v Republic (Criminal Appeal 189 of 2017)
[2025] KECA 42 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 42 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 189 OF 2017

PO KIAGE, M NGUGI & JM NGUGI, JJA

JANUARY 17, 2025

BETWEEN

GEOFREY IKAITA KABIMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement of the High Court of Kenya at Kakamega (Sitati, J.) dated 21st September, 2017 in HCCRA No. 136 of 2015)

JUDGMENT

1. The appellant, Geofrey Ikaita Kabimba, was the accused person in the trial before the Chief Magistrate's Court at Kakamega in Criminal Case No. 1721 of 2013. He was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 12th day of August, 2013 in Kakamega South District within Kakamega County, he, jointly with others not before the court, while armed with offensive weapons, namely, pangas and rungus, robbed RL of cash Kshs. 4,000 and at the time of such robbery, threatened to use actual violence on the said RL.

2. The appellant also faced a second count of the offence of gang rape contrary to section 8(1) and 8(4) as read with section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 12th day of August, 2013 in Kakamega South District within Kakamega County, he, in association with others not before the court, intentionally and unlawfully caused his penis to penetrate the vagina of SAM, a girl aged 19 years.

3. The appellant pleaded not guilty to both counts and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant on both counts and sentenced him to death in count 1, whereas he sentenced him to life imprisonment in count 2.

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

5. The High Court (R.N. Sitati, J.) found that the appellant's appeal against both conviction and sentence in count 2 had merit. Thus, it quashed the conviction and set aside the sentence of life imprisonment. As regards count 1, the High Court found that the appellant's appeal on both conviction and sentence lacked merit. Thus, it dismissed the appeal and upheld the sentence in a judgment dated 21st September, 2017.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. In his Memorandum of Appeal dated 25th September 2020, the appellant raised eight (8) grounds of appeal. However, during the virtual hearing of this case, his advocate opted to abandon grounds 6, 7 and 8. As such, we shall only highlight grounds 1 – 5 which were as follows:

    1. The Superior Court erred in law in convicting the appellant with the offence of robbery with violence contrary to section 296(2) when section 210 – 211 of the Criminal Procedure Code Cap 75 was not complied with.

    2. The Superior Court erred in law in convicting the appellant with the offence of robbery with violence contrary to section 296(2) by erroneously relying on a single identifying witness.

    3. The Superior Court erred in law in convicting the appellant with the offence of robbery with violence contrary to section 296(2) when the conditions for identification were insufficient.

    4. The Superior Court erred in law in convicting the appellant with the offence of robbery with violence contrary to section 296(2) by wrongly applying the twin principles of recognition and identification in determining the culpability of the appellant.

    5. The Superior Court erred in law in convicting the appellant with the offence of robbery with violence contrary to section 296(2) without taking into consideration that an identification parade was not done.

7. This being a second appeal, our jurisdiction is limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong vs. R, [1984] KLR 611."

8. A summary of the evidence that emerged at the trial through six (6) prosecution witnesses, and which was subjected to a fresh review and scrutiny by the High Court, is as follows.

9. On 12th August, 2013 GM (G), who testified as PW3, was in his house when he heard the dogs bark near his mother-in-law's house. The mother-in-law is RSB (R) (PW2), with whom he share a compound. It was about 8.00pm. Upon leaving his house to find out what was happening outside, he saw four people and immediately recognized two of them as Ndusi and Polycarp by the use of ac`moonlight, which, he said, was shining at the time. The two were not masked to conceal their identity. It was his testimony that they held him and tied his hands at the back using a rope. They also beat him up and

ordered him to tell PW2 to open the door to her house. When PW2 opened her door, he (PW3) was made to lie at the gate, while one of the four people kept watch over him. The other three went into PW2's house. Later on, his sister-in-law, by the name Khaombi, went to him and cut the ropes that had been used to tie him. It was then that he learnt of the ordeal that took place in PW2's house.

10. R (PW2) told the court that on the fateful night at about 8.30pm, she was with her grandchild, SAM (PW1)(identity concealed to protect her privacy), and daughter, PB (P) (PW5) in her house when she heard a knock on her door; and PW3 called her out and asked her to open it. Upon opening the door, many people forcefully barged in. They started demanding money from her. She had Kshs. 4000 which she gave them. Thereafter, they tied her hands, legs and mouth and threw her on the chair and left. However, she later discovered that the robbers had defiled PW1, whom she heard crying during the time that she was tied up. She also told the court that she was unable to identify the robbers.

11. P's (PW5) testimony was similar to that of PW2, save that she added that PW3 informed them that he had been forced to knock on the door so that they could open it. She also told the court that about five people who had pangas and torches entered the house and they were not satisfied with the Kshs. 4000 that PW2 gave them. Therefore, they forced her (PW5) to take them to her brother's house wherefrom they took some items. At the time, the lantern lamp was on in PW2's house. She did not know the robbers and neither did she identify them. Thereafter, they returned her to PW2's house, where they tied her hands using curtains and locked her in a bedroom. However, she managed to untie herself and climbed up to the ceiling and landed on the corridor. She then started calling out for PW2 and PW1. She found PW2 and untied him. Soon thereafter, she found PW1 who lay in bed and was bleeding from her private parts. She looked unconscious and could hardly speak. She also breathed with difficulty. She had been sexually assaulted.

12. SAM's (PW1) testimony was also similar to that of PW2 and PW5. Additionally, she told the court that while some of the robbers left with PW5, three remained in PW2's house; all of whom tied her mouth, hands and legs and took her to PW2's bedroom whereby they made her lie on the bed, and one of them removed her skirt and underpants. They then defiled her in turns for about one hour. After the ordeal, they left her on the bed. However, one of them returned and ordered her to stand up from the bed and he removed the bedding which had blood stains and also took away her underpants; and left her with her skirt only. It was at this point that PW5 went to her rescue and untied her. Thereafter, PW5 called her brother and other people, including the neighbours, who went to the house in response to their cries for help. The police were also called and they were all questioned. The next morning, she was taken for treatment at Shibwe Hospital and a P3 form was filled by the clinical officer who examined her.

13. Godfrey Wangila, a clinical officer, testified as PW4. He was the one who examined PW1. He observed that PW1's skirt was blood stained; she was unable to walk well; there were blood stains on her pubic hair; her genitalia had a lot of bleeding. her hymen was absent and her clitoris was swollen. He conducted a laboratory test which indicated that the assailants did not use a condom. He concluded that PW1 had been defiled.

14. The last witness was Cpl Ashjoid Murigi (PW6), the investigation officer. He told the court that on the night of the incident, he received a phone call from the assistant chief of Shitoli sub- location who made a report of a robbery that had taken place in Imbwali village. He and other officers went to the homestead of PW2 whereupon they found members of the public gathered. They entered PW2's house and found that it had been vandalized. They also did a search but did not recover any exhibits relating to the gang rape that had been experienced by PW1, who at the time had blood trickling down her feet. PW1 and PW2 explained that the robbers took off with the bedsheets and underpants that contained evidence of the rape. Thereafter, they interviewed PW1, PW2, PW3 and PW5 about what

had happened and filed their report. PW6 added that PW3 told them that he was able to identify two of the robbers as Polycarp and Ndusi. Later, they referred them to hospital for treatment.

15. PW6 further testified that on 21st August, 2013, one of the suspects was taken to the police station by members of the public and administration police officers from Malinya AP camp. The said suspect was said to be Ndusi (appellant). He added that several attempts to arrest Polycarp and the other suspects had been unsuccessful. Lastly, during cross-examination and re- examination, he stated that his investigations showed that there were two lantern lamps which were on and the light was sufficient.

16. When he was placed on his defence, the appellant gave sworn testimony and called two witnesses. He denied the charges and told the court that on 12th August, 2013, he was at his home the whole day with his mother, wife and children. Thereafter, a police officer who was in the company of another man arrested him at his home. He claimed that he was not told why he was arrested. He was then taken to the police station and charged. He further claimed that he did not know Polycarp and that PW3 lied when he testified that he saw him at the scene of crime. During cross examination and re- examination, he said that he worked for his mother the whole day and parted with her at about 9.00pm when he went to his house; and only learnt of the incident three days later when he was arrested.

17. Immaculate Karimba, the appellant's mother, testified as DW2. She told the court that on 12th August, 2013, the appellant assisted her with her work from morning till 6.00pm, where after she made food and they all ate together. Thereafter, at 8.00pm the appellant left for his house. Later on that night, the police arrested him on the claim that he had robbed and defiled a child. During cross examination, she said that she did not know whether the appellant left later that night after 8.00pm. She also said that she did not remember the date of the incident.

18. Maureen Khatambi, the appellant's wife, testified as DW3. She informed the court that it was not true that the appellant committed the offences he had been charged with. She testified that on 12th August, 2013, the appellant came back to the house at 8.00pm after working for his mother. She gave him food and thereafter they went to sleep. However, at 4.00am, there was a knock at the door and when she opened, there was a police officer and a crowd of people who arrested the appellant. She further testified that the appellant never ate at his mother's house before going back home. Similarly, just like DW2, during cross examination, she said that she did not remember the date of the incident.

19. The appeal was argued by way of written submissions by the appellant. During the virtual hearing, learned counsel, Mr. Mshindi, appeared for the appellant, whereas learned counsel, Mr. Okango, appeared for the respondent. Counsel for the appellant relied on his written submissions, with the exclusion of grounds 6, 7 and 8 as already stated herein above. Counsel for the respondent was granted leave of the court to make oral submissions.

20. Mr. Mshindi condensed his remaining grounds of appeal into two: He argued ground 1 on its own and collapsed grounds 2, 3, 4, and 5 into one. He captioned the first one as a procedural ground; and the second one as identification evidence.

21. On ground 1, counsel contended that both the learned magistrate and learned judge erred in not considering the omission to observe the law as provided for by section 210, 211 and 213 of the Criminal Procedure Code (CPC). The appellant's complaint in this regard is that the failure of the magistrate to render a ruling on a case to answer and, thereafter, to comply with section 211 of the CPC in giving the appellant his options on defence, was a fatal omission which entitles the appellant to a vacation of the conviction against him. Counsel submitted that the prosecution closed its case but the trial court never made a ruling on whether there was a case to answer, even though the matter had several mentions before the defence hearing which took place on 27th March, 2015. He further submitted

that the anomaly was overlooked by the High Court. In arguing that the omission was fatal, counsel relied on Bhatt vs. Republic E.A. 332; Republic vs. Amirali [1971] E.A 116; and Wanjiku vs. Republic [2002] KLR 825. He also relied on several secondary authorities including "The Essentials of Criminal Procedure in Kenya by Patrick Kiage, Law Africa Publishing, Nairobi Kenya, 2012 Edn. Pg. 144; and "The Judiciary: Criminal Procedure Bench Book. Pg. 99 – 100, paragraphs 155-158.

22. The respondent conceded that the trial record showed that the learned magistrate did not render a formal ruling on no case to answer. Neither does the record show the learned magistrate giving the appellant his options on defence as required under section 211 of the CPC. However, Mr. Okango submitted that the failure was merely technical since, in fact, the appellant went on to give sworn evidence and called two witnesses on his behalf. It follows, Mr. Okango argued, that the trial court must have rendered a ruling and explained to the appellant his choices but failed to formally record it. In any event, argued Mr. Okango, no prejudice can be claimed to have resulted from the omission. More fundamentally, Mr. Okango argued that the issue presented in this particular ground was not properly before us. This is because, he argued, the matter had never been raised on first appeal before the High Court and, therefore, the appellant was precluded from raising it before us.

23. The respondent is right on this point. The appellant never raised the technical objection related to the failure by the trial court to formally adhere to sections 211 and 213 of the CPC. As such, he is precluded from raising it on this second appeal; and we are bereft of jurisdiction to consider it. The Supreme Court recently reminded this Court that it has no jurisdiction, in second appeals, to hear grounds of appeal which were not raised and considered before the High Court. This was in Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR). We, therefore, need not belabour the point. We are precluded from considering this ground on jurisdictional grounds.

24. On the issue of identification covered in grounds 2, 3, 4 and 5, counsel for the appellant argued that there was only one identifying witness, PW3, who allegedly identified the appellant by the name Ndusi. According to counsel, PW3 did not give evidence on how he knew the appellant and for how long he had known him; where he stayed; or what he did for a living to confirm whether the evidence was truly one of recognition or identification, and neither did the trial court interrogate him on these issues. In this regard, he relied on Maitanyi vs. Republic [1986] KLR and John Muriithi Nyagah vs. Republic [2014] eKLR to argue that the evidence of a single identifying witness must be examined with considerable circumspection and/or greatest care, to ensure that the available conditions during the time of identification enabled the witness to make a true impression and description. In addition, it was also held that the court must warn itself of the danger of relying on the evidence of a single identifying witness.

25. Counsel also relied on Republic vs. Turnbull & Others [1973] ALL ER 549 and Cleophas Otieno Wamunga vs. Republic [1989] eKLR for the argument that the evidence of identification/recognition at night must be absolutely watertight to justify conviction. He submitted that from the evidence adduced by PW1, PW2 and PW5, the conditions for identification were not conducive; and also, PW3 was not interrogated on the extent of light on the night of the incident. Further, PW1 testified that PW2's house was using solar lights which was put off and there was no lamp in the bedroom; whereas PW5 testified that five people went inside the house and they were flashing torches. The appellant argued that in the circumstances of this case an identification parade would have been imperative.

26. On the other hand, counsel for the respondent submitted that there was no need for an identification parade in this case as the appellant was someone who was known to PW3, hence the identification was by way of recognition. He argued that from the time PW3 gave his testimony in court, he stated that he recognized Ndusi and Polycarp; and Ndusi was the appellant before the court. He further argued that

in instances whereby a witness recognized the assailant, the witness ought to immediately relay that information, and this was done when PW3 was interviewed and he mentioned the same to the police as shown in the testimony of PW6. For this reason, he agreed with the High Court that there was no need of an identification parade as the appellant was identified through recognition.

27. On our part, we take note that given that the incident took place at night, care ought to be taken to ensure that the appellant was positively identified as the perpetrator of the offence in accordance with the guidelines set in various cases, among them Kiarie vs. Republic [1984] KLR 739; Charles O. Maitanyi v R [1988-92] 2KAR 75 and Nzaro vs. Republic, 1991 KAR 212. In Wamunga Vs. Republic [1989] eKLR this Court described the circumspection with which a court must treat identification evidence thus:

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

28. Our case law, however, has consistently held that evidence of recognition is more satisfactory and re-assuring that that of mere identification. Hence, in Anjononi & Others v Republic [1980] KLR, this Court stated:

> " This, however, was 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 present case, this is what the identifying witness, PW3, said in testimony:

> " On 12.8.2013 at about 8 p.m. I was in the house when I heard dogs bark near the house of PW2. I went to find out as it is our home. I found that people were already in. There were four people. I recorgnised Ndusi and Polycap. They came and held me then tied my hands at the back using a rope. They beat me up on the back them ordered me to tell my mother (PW2) to open. I called her and she opened. They entered and made me lie at the gate. One kept watch over me as I lay down. They went to the house
>
> .....Those that I identified were this Ndusi (pointing at Accused in the dock) and the other one who escaped.
>
> ..... It is the accused in the dock and Polycap who beat me. I saw him when they were tying me. There was moon light. Accused was arrested as the others escaped. I did not recognize the others. Accused comes from Malinya which is neighbouring our area. We had not differed...."

30. On cross-examination, the witness stated:

> " I know accused's names. He is Kabimbo Ndusi. He was there....I saw the accused well as he tied me."

31. And in re-examination, he said:

> " They had not worn anything on their faces when they tied my hands."

32. What this evidence demonstrates, as the two courts below correctly analysed, is that this was evidence of identification by recognition. Further, contrary to the appellant's submissions, the witness described how he had come to know the appellant: the appellant came from a neighbouring village known as Malinya. Also, contrary to the appellant's submissions, the witness also described the source of light: moonlight. Additionally, the witness explained that he was sure about the recognition because he had ample time to see the appellant as he took some time as he tied his hands with ropes. Finally, what makes this evidence of identification by recognition ironclad is the fact that the witness (PW3) made a first report to the police and named the appellant as one of the assailants. PW6, the investigation officer, confirmed in evidence that PW3 named the appellant as one of the assailants when he first recorded his statement; and that, indeed, this is what led to the arrest of the appellant.

33. In short, we are certain that the circumstances were positive for identification in this case; and the evidence of recognition was error-free.

34. The upshot is that the appeal fails in its entirety. We are satisfied that the conviction of the appellant on Count 1 was safe and we hereby affirm it. There was no appeal against the sentence, so the sentence imposed remains undisturbed.

35. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF JANUARY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR