Igeria v Republic (Criminal Appeal 53 of 2019)
[2025] KECA 370 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 370 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 53 OF 2019

JW LESSIT, S OLE KANTAI & A ALI-ARONI, JJA

FEBRUARY 28, 2025

BETWEEN

PETER NJIRU IGERIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kerugoya (L. Gitari, J.) dated 2nd November 2017 in Criminal Appeal No. 12 of 2015)

JUDGMENT

1. This appeal arises from the judgment of the High Court of Kenya at Kerugoya, (Gitari, J.) dated 2nd November 2017 in Criminal Appeal No. 12 of 2015. The appellant was initially charged before the Principal Magistrate's Court at Baricho in Criminal Case No. 826 of 2013 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 11th day of September 2013 at Kandongu Trading Centre, in Mwea West District within Kirinyaga County, jointly with others not before the court robbed Raphael Thome Solomon (Raphael) of Kshs.6,000/- and one mobile phone make Nokia 220 all to a total value of Kshs.13,000/- and or immediately before or after the time of such robbery injured the said Raphael Thome Solomon."

2. The appellant entered plea of not guilty. The hearing proceeded with the prosecution calling six (6) witnesses. On the 10th February 2015, the appellant gave a sworn defence. He called a witness Charles Mwangi who said he could not testify that day as he was unwell.

3. In summary, the prosecution case was as follows: PW1, John Mwangi, a Clinical Officer at Kerugoya County Hospital produced the P3 forms of Boniface Mutisya Mwanza (Boniface) and Raphael Thome Solomon (Raphael), who alleged to have been robbed on 11th September 2013. His evidence was that

at the time of examination: Boniface had blood-stained clothes and a deep cut wound on the left side of the head. Raphael had bruises on his face, and his left lower leg was swollen and tender. The approximate age of the injuries was a few hours. The probable type of weapon that caused the injuries was a sharp and blunt object respectively. The injuries sustained by both were classified as harm.

4. Raphael was PW2. He testified that on 11th September 2013 at around 9.15 p.m. he left his bar at Kandongu and proceeded home. When he arrived at the gate of his house, he hooted, and his worker, PW3, Boniface came and opened the door. Suddenly, a group of around five men armed with rungus and pangas emerged from the fence and started confronting him demanding that he gives them money while breaking the windows of his car. He gave them Kshs.6,000/- and they also took his mobile phone, make Nokia 220 valued at Kshs.7,000/-

   The assailants tried to get him off his car, but he clung to it. The assailants hit him with a rungu, and he started screaming, calling out for help. He testified that the assailants took PW3 to the house, cut him, and thereafter left the compound. He testified further, that he was able to recognize the appellant as one of his attackers because as the appellant demanded money, he noticed that he was his regular customer at the bar. The security lights were on at the time. When the assailants left, he reported the matter at Kiamaciri Police Post and thereafter went to hospital. This evidence was corroborated by the evidence of Boniface PW3 and one PW4, Lilian Nyambura Muthoni, Raphael's daughter who was at home at the time of the incident. PW4 said that she identified one of the young men who attacked them that night as the appellant. She said she knew him because he frequented her father's bar. She said he stood next to the security lights, where she saw him from the house before she switched off the lights.

5. PW5 was PC Joseph Soita, the investigating office attached to Sagana Police Station. He confirmed that they received was a report of robbery on the material day where five men who were armed attacked and injured the complainant before stealing from him Kshs.6000/= and a phone, and broke two doors valued at Kshs.8,000/=. He rushed to the scene but found the culprits had already escaped. He further testified that he received information that PW2 had identified the appellant to the AP officers from Kandongu who effected arrest and took him to Kiamaciri Police Post, and thereafter to Sagana Police Station where he rearrested him. The witnesses were interrogated and they identified the appellant as one of the assailants; that they knew him before as he used to drink at Breeze View bar and restaurant which belonged to PW2.

6. PW6, Administration Police Officer APC Ferdinand Makokha attached to Mwea West Sub-County, testified that in company with his colleagues, they apprehended the appellant after PW2, identified him to them as one of those who robbed him at his house.

7. At the close of the prosecution's case, the trial court found that the appellant had a case to answer and placed him on his defence. The appellant testified that on 13th September 2013 he had planned to go to Mwea to buy rice. He got a driver to transport the rice. When they reached Makutano the vehicle experienced mechanical problems and he decided to board another vehicle and proceeded to Sagana. He then got another vehicle that took to Kagio town. They entered a hotel and he called Phyllis Waruguru (Phyllis) the lady who was to sell him the rice and thereafter they went to Kioria village. The driver received a call from someone and he left promising to return. The appellant testified that he spent the night at Phyllis house and the next morning the police went to Phyllis house and demanded for his Identification Card and then arrested him and took him to AP camp and thereafter to Sagana Police Station. At the AP Camp the appellant claimed to have seen a police officer with whom they had a grudge and who had threatened him with unspecified consequences.

8. In the judgment of the trial court dated 17th April 2015, Hon. Jalang'o, Senior Resident Magistrate, found that the prosecution was able to place the appellant at the scene of the crime. That PW2, PW3

and PW4 were able to identify the appellant, as they recognized him and knew him very well before the incident. The learned magistrate noted that since the three witnesses knew the accused, there was no need for an identification parade to be conducted. Further, that PW2 led the police to the location where the appellant was arrested. He noted that at that point, it would have been absurd for the police to conduct an identification parade and yet the complainant had identified the appellant. The trial magistrate thus found that the prosecution had proved its case beyond reasonable doubt and, therefore, convicted the appellant for the offence of robbery with violence under section 215 of the *Criminal Procedure Code* and sentenced him to death.

9. Aggrieved and dissatisfied with the said judgment, the appellant preferred a first appeal to the High Court, to wit, Criminal Appeal No. 12 of 2015. The appellant faulted the trial Magistrate for relying on identification, yet no identification parade was conducted; that he did not notice that the first report the complainant made to the police did not include the name of his assailants; and, that he failed to take into consideration the various contradictions in the prosecution evidence.

10. The learned Judge considered the issues raised by the appellant in his appeal. She was satisfied that the evidence adduced by the prosecution proved the charge against the appellant beyond any reasonable doubt. She agreed with the learned trial magistrate's finding of fact. She found the conviction, safe and upheld it and confirmed the sentence.

11. The appellant was dissatisfied by the judgment and preferred his second appeal to this Court. The appellant filed supplementary grounds of appeal, raising three grounds as follows:

    1. "That the two courts below erred in law in failing to come to the conclusion that the evidence of identification relied on by the prosecution was not cohesive enough to sustain a conviction.

    2. That the learned judge erred in law in confirming the conviction of the appellant based solely on the evidence of identification without considering that the lower court did not warn itself of the danger of convicting based solely on the evidence of identification.

    3. That the learned judge erred in law in failing to make a finding that the death sentence was harsh and excessive."

    The appellant therefore, prays that his appeal be allowed, the conviction quashed and sentence set aside.

12. The appeal was heard through this Court's virtual platform on the 13th November 2024. The appellant was present virtually from the Nyeri Maximum Prison. He had an advocate, learned counsel Mr. S.K. Njuguna, while learned Prosecution Counsel Mr. Naulikha represented the State. Both counsel adopted their respective submissions, and did not wish to highlight. Mr. Njuguna submitted that due to recent developments in the law of precedent, he was abandoning his appeal against sentence and was only challenging the conviction.

13. This being a second appeal, we are mindful that this Court's remit is confined to points of law. The Court will not interfere with concurrent findings of fact by the two courts below, unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others vs. Republic [1982] KLR.

14. The issues of law that we discern for our consideration are whether the learned Judge properly discharged her duty as a first appellate court of re-considering and re-analyzing the evidence that was adduced before the trial court, whether the evidence on the appellant's identification was safe to rely on, and whether there was sufficient evidence to support the finding that the charge against the appellant was proved to the required standard.

15. The appellant has taken issue with the evidence of identification where the three witnesses, PW2, PW3 and PW4, all said they knew him very well even by name. He said he expected them to give his name to the police. However, counsel submitted that there was confirmation in evidence by PW2 that no name was given to the police at the point of the first report. Further, it was submitted that the record of appeal bears the appellant witness that he made requests for the first report five times. However, it was not availed. Counsel relied on the case of Terekali w/o Korongozi & 4 Others vs. Republic [1982] 19 EACA 259 for the proposition that a first report is important as it provides a test by which the truth and accuracy of future statements may be gauged.

16. Counsel relied on the old case of Republic vs. Turnbull [1976] 3 ALL ER 583 for the proposition that even where the identification is that of recognition, the court must bear in mind that mistakes are made even of recognition of relatives so there is no need to test the identification.

17. Mr. Naulikha opposed the appeal and urged that the circumstances were optimal for a positive identification, and that recognition of a person well known was better than identification of a stranger because identification of a known person depends upon the identifying witnesses' personal knowledge of the assailant in some form or other. He urged that the identification of the appellant was water-tight.

18. That, more importantly the appellant was a person who was not a stranger to PW, PW3 and PW4. He relied on the case of Anjononi & Others vs. Republic [1980] eKLR for the proposition that the evidence of recognition was more satisfactory, more assuring, and more reliable. Counsel urged further that the conviction was not purely on the evidence of identification, but also on basis the ingredients of the offence of robbery with violence were established. He relied on the decision of the Court of Appeal in the case of Oluoch vs. Republic [1985] eKLR that sets out clearly the ingredients of the offence of robbery with violence.

19. On the issue of identification, the learned Judge observed that from the testimony of PW2, it was clear that circumstances favoured a positive identification. She believed that P.W 2 was able to positively recognize the appellant as one of the assailants. The learned Judge also found that PW3 and PW4 corroborated the evidence of PW2 and, in particular, that of identification as they also recognized the appellant at the scene of the incident. The Judge observed that PW4 was able to give time frame of how long she observed the appellant, which she gave as 5 minutes, before she put off the security lights. The learned Judge found the time of five minutes was long enough for a positive identification. The Judge found that an identification parade was not necessary as the witnesses knew the appellant before the incident.

20. The incident took place at 9 p.m. The witnesses were not at the same place at the time of incident. PW2 was in his car trying to drive in when he was attacked. PW3 opened the gate for him and was attacked immediately he opened the gate. He said he was taken to the house and hit on the head He lost consciousness and woke up long after the incident. PW4 was in the house and claims to have seen the attackers, whose number she gave as five. She said out of the five, she recognized one of them as a constant customer at the PW2's (father's) bar. PW2 and PW3 also said that the appellant was a customer at the bar.

21. The principles applicable when dealing with evidence of visual identification are now well established. It is important to properly test the evidence of identification with utmost care and caution in order to ensure that the identification is free of error or mistake. In the case of Charles Maitanyi vs. Republic [1985] 2 KAR 25 the Court of Appeal held:

> " It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would

have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into.

There is a second line of inquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify the accused, the recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters."

22. The witnesses relied on some light to identify the appellant. The best way to test that evidence was to address the principles as enunciated in the above case of Maitanyi vs. Republic (supra These are:

i. the strength of the light,

ii. the nature of the light available;

iii. what sort of light, its size, and its position relative to the suspect.

23. The learned Judge dealt with the challenge on identification and observed:

> " The witnesses in this case gave the circumstances of the case. That is to say, there were bright security lights at the gate and in the compound. The appellant was a frequent customer at the complainant's bar. The witnesses P.W.2, 3 and 4 saw the appellant under those circumstances. I find that there was no possibility of mistaken identity...
>
> The trial magistrate who had the benefit of seeing the witnesses when they testified and assess their demeanor, found that they (P.W. 2, 3 and 4) were able to place the appellant at the scene of crime, they recognized him and they knew him very well...
>
> This was also confirmed by P.W. VI who also went to the scene the same night and was told that one attacker was identified and his description given and the clothes he was wearing."

24. We note that the two courts below did not test the evidence of identification with the required care and caution. The fact that the lights were bright was not sufficient in itself unless it is related to, for instance, the position the assailant was from the light and the distance from him to the identifying witness. The distances of the assailant from the identifying witness were not disclosed. Further, the description of 'bright light' is relative, and unless well defined, it may not aid much. The other important factor is where the assailant stood in relation to the light when he was identified. One should also state what part of the assailant body the identifying witness saw, at what angle he was when he saw him etc. The analyses by the two courts below were too general, and devoid of the necessary detail.

25. The other point we note is that the witnesses gave a description of the appellant. However, the description given by PW3 and PW4 is not disclosed. The one given by PW2 was that the person he recognized was short and brown and wore a green shirt. It was even claimed that the description aided in arresting the appellant. However, there was no mention of the description PW2 gave matching the

appellant, nor was the description of his clothes a basis of his arrest. PW2 and PW6 say it was PW2 who identified the appellant and caused his apprehension.

26. Considering the seriousness of the offence and the sentence one stands to face upon conviction for the offence, it was imperative that the evidence of identification was carefully and cautiously considered, and as we have said in this judgment, the court needed to be certain that the evidence of identification was positive and safe.

27. We have come to the conclusion that the basis of the appellant's conviction was not safe, sure and firm to the required standard of proof beyond any reasonable doubt. We find that the conviction was not safe. Accordingly, we quash the conviction and set aside the sentence. The appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

ALI – ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR