Mburu v Republic (Criminal Appeal Nak 34 of 2017)
[2025] KECA 421 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 421 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL NAK 34 OF 2017

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 28, 2025

BETWEEN

JAMES GATHUNGA MBURU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (M. Odero, J.) dated 28th April 2017in CRA No.141 of 2015)

JUDGMENT

1. James Gathunga Mburu,(the appellant), was charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* at the Chief Magistrates' Court at Nakuru in Criminal Case No. 2150 of 2013. It was alleged that on 10th June 2013, at Heshima Area in Nakuru County, jointly with others not before the court, while armed with dangerous weapons, namely AK 47 rifle, he robbed Eliud Wanjohi Guandaru Kshs.76,000.00 and at or immediately before the time of such robbery, he threatened to use actual iolence on the said Eliud Wanjohi Guandaru.

2. The appellant faced a second count of Trafficking in Narcotics Drugs and Psychotropic Substances contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances Control Act*. The particulars were that on 11th June 2013 at the aforesaid place, he trafficked in narcotic drugs, namely, 27 rolls of cannabis satia with a street alue of Kshs.540 by storing the said drugs in contraention of the said Act.

3. The appellant pleaded not guilty to both charges and in the ensuing trial, the prosecution witnesses included the complainant (PW1), his wife, (PW2), Jedidah Wangari (PW3), a neighbor who was at the house at the material time, and the complainant's two minor children and the inestigating officer. The appellant's defence stood on his unsworn testimony. He did not call any witness. The trial court, in its judgment deliered on 21st May 2015 dismissed the second count under Section 215 of the *Criminal*

Procedure Code. Howeer, the trial magistrate was persuaded that the prosecution had proed count one to the required standard and sentenced the appellant to suffer death.

4. In his quest for justice, the appellant appealed to the High Court at Nakuru in HCCRA No.141 of 2015 challenging both his coniction and sentence. After hearing the appeal, Odero J., upheld the coniction and confirmed the sentence. Undeterred, the appellant appealed to this Court seeking to oerturn both the coniction and sentence contending that:

   (a) his coniction was based on inconsistent and contradictory eidence;

   (b) his coniction was based on dock identification;

   (c) his defence was dismissed without adancing any cogent reasons; and

   (d) his coniction was premised on exhibits which did not point directly or indirectly to the robbery incident.

5. When this appeal came up for irtual hearing before us on 22nd January 2025, the appellant was represented by learned counsel Ms. Wangari while learned counsel Mr. Omutelema appeared for the respondent. Both parties relied on their written submissions dated 24th June 2024 and 14th May 2024 respectiely.

6. In her submissions, Ms Wangari addressed one ground, namely, whether the appellant was positiely identified. Counsel submitted that the trial magistrate did not consider the element of lighting bearing in mind that 8.00pm is usually dark. She maintained that none of the witnesses described in detail the nature and intensity of the light at the material time. To buttress her submissions, counsel cited *Said Bakari Ali and Two Others v. Republic*, CRA No. 900 of 2003 CA to underscore the importance of witnesses detailing the lighting conditions under which a suspect was identified.

7. M/s Wangari argued that een though PW3 allegedly knew the appellant before the incident, she did not mention his identity and any other description to the releant authorities at the earliest opportunity possible and that her claims only crop up at the witness stand which amounts to dock identification which is of little alue to sustain a secure coniction. In support of this submission, she cited this Court's holding in *Francis Kariuki Njiru and 7 Others v. Republic* [2001] eKLR which stressed the need for identification eidence to be carefully scrutinized and to be only accepted and acted upon if the court is satisfied that the accused was positiely identified and that the identification is free from the possibility of error.

8. Lastly, counsel contended that all identifying witnesses stated that they were able to identify the appellant because he was unhooded. Howeer, it beats logic why all the other assailants would be hooded and not the appellant.

9. The respondent's counsel Mr. Omutelema submitted that the prosecution proed the elements of the offence of robbery with iolence to the required standard. He maintained that both courts below properly considered the principles set out in *Maitanyi v. Republic* [1986] eKLR while accepting the identification eidence.

10. Counsel also submitted that PW1 Eliud Wanjohi Guandaru was ordered to get out of his ehicle at gunpoint, he complied and handed Kshs.48,000.00 and his two phones as demanded by one of the robbers. He was subsequently led into his house where there was light and moonlight outside, and it was at that point that PW1 was able to identify the appellant correctly since the appellant was not wearing a mask. PW3 who was slapped across the face by the appellant and ordered to lie down when

she told him she did not hae a phone was adamant that there was light inside the house and that she recognized the appellant who she preiously knew.

11. It was also his submission that the appellant who ordered PW1 to transfer to him Kshs.28,000.00 ia M-pesa, gae him back his phone after which he escorted them to his gate. It was further submitted that on his way to the police station to report the incident, PW1 recognized the appellant who had just been arrested and he immediately alerted the police. PW 6 PC Paul Mutinda confirmed that when PW1 saw the appellant, he was agitated and he identified him as one of the robbers who had attacked him.

12. Mr. Omutelema admitted that no identification parade was conducted, but added that this was because PW1 identified the appellant as he was entering the police station and as a result an identification parade would hae been superfluous. In support of his submission Mr. Omutelema cited the case of *R v. Karioki s/o Rushashio and Anor* [1948] 23 KLR (1) 21 in support of the holding that failure to conduct an identification parade is not necessarily fatal to the prosecution case.

13. Regarding corroboration, Mr. Omutelema maintained that PW2, PW3 and PW5 corroborated PW1's eidence that there was ample lighting in the house, that the appellant was not wearing a mask, and that the appellant talked to them. Mr. Omutelema relied on *Karanja & Another v. Republic* [1990] KLR where the court held that it is not necessary to hae confirmation of all the circumstances of the crime.

14. As to whether the appellant's defence was considered, Mr. Omutelema submitted that the appellant gae unsworn statement and his defence did not in any way challenge the eidence tendered by the prosecution and that both the trial court and the 1st appellate court correctly found that the appellant's defence did not dislodge the prosecution eidence. Consequently, Mr. Omutelema urged this Court not to interfere with the concurrent findings of fact by the trial court.

15. Regarding the sentence, Mr. Omutelema cited the Supreme Court decision in *Republic v. Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (deliered on 12th July, 2024), where the Supreme Court held that mandatory minimum sentences are not unconstitutional.

16. This is a second appeal, therefore, our jurisdiction is limited to consideration of matters of law as stipulated by Section 361 of the *Criminal Procedure Code*. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arried by the two courts below unless such findings are based on no eidence. (See this Court's decisions in *Daid Njoroge Macharia v. Republic* [2011] eKLR), *Chemogong v. R* [1984] KLR 611 and *Ogeto v. R* [2004] KLR 14).

17. This Court in *Johana Ndungu v. Republic* [1996] eKLR determined the three sets of circumstances, which any one of them if proed, will constitute the offence of robbery with iolence under section 296 (2) of the *Penal Code*as follows:

> "(i) if the offender is armed with any dangerous or offensie weapon or instrument; or
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> (ii) if he is in company of one or more other person or persons; or
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> (iii) if at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other iolence to any person." (See also *Oluoch v. Republic* [1985] KLR).

18. Similarly, this Court in *Dima Denge & Others v. Republic* [2013] eKLR stated as follows:

> " the elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctiely, but disjunctiely. One element is sufficient to sustain an offence of robbery with violence."

19. Een though the appellant had 4 grounds of appeal as highlighted at paragraph 4of this judgment, in her submissions, the appellant's counsel only addressed the issue whether the appellant was positiely identified. To determine whether the eidence on the appellant's identification was truthful, we must ealuate the belieability of the witness(es) who identified the appellant as the attacker. As was held by this Court in *Francis Kariuki Njiru & Others v. R*. [2001] eKLR:

> " The law on identification is well settled, and this Court has from time to time said that the eidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positie and free from the possibility of error. The surrounding circumstances must be considered (see *R. v. Turnbull* [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gae a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in *Mohamed Elibite Hibuya & Another v. R*. Criminal Appeal No. 22 of 1996 (unreported), held that:
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> > " ... it is for the prosecution to elicit during eidence as to whether the witness had obsered the features of the culprit and if so, the conspicuous details regarding his features gien to anyone and particularly to the police at the first opportunity. Both the inestigating officer and the prosecutor hae to ensure that such information is recorded during inestigations and elicited in court during eidence. Omission of eidence of this nature at inestigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proed fatal – this being a proen reliable way of testing the power of obseration, and accuracy of memory of a witness and the degree of consistency in his eidence."

20. The trial court, addressing the issue whether the appellant was properly identified, had this to say:

> " ...That there was light in the house. He said the accused person had not coered his face. That accused was the person armed with a gun and who was issuing instructions. That he did engage him in a conersation and that accused was talking to him freely. That it was the accused person who handed him a piece of paper with contact details and asked him to transfer some money and which he did.
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> On her part PW3 also said she did not know the accused before the incident. She said it was the accused who demanded a phone from her. That it was accused who gae complainant a piece of paper with contact and ordered him to transfer some money ia M-pesa. She said there was light in the house and that the incident took about 30 minutes...
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> All the three witnesses did gie in detail accused actual particulars at the scene. All said the accused person neer had his face concealed and that he was the one who gae the complainant a piece of paper on which was contact details and ordered him to transfer money.

The cumulatie effect of the eidence of the three witnesses is that their identification of the accused person at the scene was without blemish. Their identification of the accused was positie."

21. Confronted with the same issue, the first Appellate Court (Odero, J.) after re-ealuating the eidence on identification concluded as follows:

> " From the eidence the identification of the appellant was water tight. There was eidence placing him squarely at the scene. His inolement in the robbery was detailed to the court. The circumstances faored a clear and positie identification
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> ...the appellant was not pointed out to the complainant by the police or by any other person. The complainant on his own olition spotted the appellant and identified the appellant as the man who robbed him. The complainant did not waer in his identification of the appellant. This shows that he was sure of whom he had seen
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> From the eidence on record, I am satisfied that there has been a clear positie and reliable identification of the appellant as one of the men who robbed the complainant. His coniction was sound and I do uphold that coniction."

22. From the aboe excerpts, it is clear there are concurrent findings of fact by the two courts below in respect to the appellant's identification. The 1st appellate court found PW1 and PW3 to be reliable witnesses. We also see no inconsistency in their narration of the eents that occurred at the material time. More importantly, these two witnesses had ample time and opportunity to see the appellant well since he spent almost 30 minutes in PW1's house. The is eidence that the appellant ordered PW1 to send money to a M-pesa number and therefore PW1 and PW3 could identify him since there was ample light in the house. There is uncontested eidence that the appellant was the only robber who was not wearing a mask. Properly obtained, presered and presented, eyewitness testimony directly linking an accused to the commission of an offence, is likely the most significant eidence of the prosecution. It is our finding that the two courts below correctly found that the incident took place in PW1's house which was well lit, and that PW1 and PW3 positiely identified the appellant. We find no reason to suggest that the said findings were not supported by eidence. Conersely, we are satisfied that there is ample eidence placing the appellant at the scene of the crime and identifying him as the offender.

23. The other ground of appeal cited by the appellant is that the learned appellate judge erred in upholding his coniction based on exhibits which did not point directly or indirectly to the robbery incident. Before the High Court, in his amended grounds of appeal dated 22nd February 2016, the appellant maintained that his coniction was based on alleged recoery of a club which was the robbery weapon yet the prosecution did not show the nexus between the said club and the one used in the alleged robbery.

24. We note that the said issue was neer addressed by the learned judge in the impugned judgment. Neertheless, eidence is not to be considered in isolation. Apart from the said club which was found in the appellant's house, PW1 and PW3 testified that the appellant was armed with a gun. Een though the gun was neer recoered, the appellant neer controerted the said eidence. The fact that the gun was neer recoered did not weaken the eidence against him. This was *Karani v. R* [2010] 1 KLR 73 the holding of this Court in thus:

> " The offence as charged could hae been proed een if the dangerous weapon was not produced as exhibit as indeed happens in seeral cases where the weapon is not recoered. So long as the court beliees, on eidence before it, that such a weapon existed at the time of the offence, the

court may still enter and has been entering coniction without the weapon being produced as exhibit."

25. Similarly, In the case of *Ahamad Abolfathi Mohammed & Another v. Republic* [2018] eKLR, this Court stated:

> " Howeer, it is a truism that the guilt of an Accused person can be proed by either direct or circumstantial eidence. Circumstantial eidence is eidence which enables a court to deduce a particular fact from circumstances or facts that hae been proed. Such eidence can form a strong basis for proing the guilt of an Accused person just as direct eidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial eidence in *R v Taylor, Weaer and Donoan* [1928] Cr. App. R 21: -
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> > " It has been said that the eidence against the Applicant is circumstantial. So, it is, but circumstantial eidence is ery often the best eidence. It is eidence of surrounding circumstances which, by intensified examination is capable of proing a proposition with the accuracy of mathematics. It is no derogation from eidence to say that it is circumstantial."

26. In any eent, the appellant's defence is to be weighed against the prosecution eidence. The appellant's defence was that there was an illicit relationship between his wife and the complainant. This defence was dismissed for want of proof. We are persuaded that his defence did not dislodge the prosecution eidence.

27. The other ground cited by the appellant though not addressed in his submissions is that the prosecution eidence was marred by contradictions/inconsistencies. As was held by the Court of Appeal of Nigeria in *Daid Ojeabuo v. Federal Republic of Nigeria* [2014] LPELR-22555(CA):

> " Now, contradiction means lack of agreement between two related facts. Eidence contradicts another piece of eidence when it says the opposite of what the other piece of eidence has stated and not where there are mere discrepancies in details between them. Two pieces of eidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of eidence stops short of, or contains a little more than what the other piece of eidence says or contains."

28. The Court's duty is to determine whether there were contradictions and inconsistencies in the eidence to the extent that a reasonable tribunal would be left in doubt as to whether the charges were proed to the required standard, or whether the contradictions (if any), are so material that the trial Magistrate ought to hae rejected the eidence. Contradictions in eidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or triial contradictions do not affect the credibility of a witness and cannot itiate a trial. We find no contradictions in the prosecution's eidence.

29. In conclusion, we are satisfied that the ingredients of the offence of robbery with violence were proed beyond reasonable doubt against the appellant. Accordingly, we find that the conviction was supported by eidence. We also find that the sentence imposed upon the appellant is the penalty proided by the law for the offence of robbery with iolence. (See the Supreme Court decision in *Republic v. Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (deliered on 12th July, 2024). Consequently, we find no merit in this appeal. It is dismissed in its entirety.

DATED AND DELIERED AT NAKURU THIS 28TH DAY OF FEBRUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

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JUDGE OF APPEAL

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

signed.

DEPUTY REGISTRAR.