Kirimi v Republic (Criminal Appeal 105 of 2016)
[2025] KECA 410 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 410 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 105 OF 2016

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 21, 2025

BETWEEN

KENNETH KIRIMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nanyuki (M. Kasango, J.) dated 29th November 2016 in HCCRA NO. 60 OF 2016)

JUDGMENT

1. The appellant, Kenneth Kirimi (Kirimi), was jointly charged with five others before the Senior Resident Magistrate's Court at Nanyuki, with two counts of robbery with violence contrary to section 296(2) of the *Penal Code*. Upon hearing the evidence of the prosecution and the defence, the trial magistrate found the charges against the appellant's three co-accused not proved, and acquitted them, but found the appellant, John Nderitu and Peter Kimathi, who were 1st, 4th and 5th accused, each guilty, and convicted them on the two counts. Consequently, the three were sentenced to death on the two counts, one of the death sentences being held in abeyance.

2. They were aggrieved by the conviction and sentence and each filed an appeal to the High Court, which appeals were consolidated and heard together. In the appeals, they each challenged their conviction on three main grounds. First, that the evidence of identification was uncorroborated and unreliable. Second, that the charges against them were not proved to the required standard, and thirdly, that their defences were improperly rejected.

3. Upon hearing the appeal, the High Court (Kasango, J.), dismissed it, finding that Nderitu was arrested at the scene of the robbery; that both Nderitu and Kimathi were properly identified by two of the prosecution witnesses; that Kirimi was actually spotted trying to escape from the scene of the robbery riding a motorcycle, and was followed by two prosecution witnesses who were able to see him clearly

when the motorcycle stalled and they spoke to him; and that there was circumstantial evidence that linked Kirimi to the crime. The learned Judge was satisfied that the prosecution had established its case against Nderitu, Kirimi and Kimathi to the required standard; and that their defences were properly rejected because the identification evidence by the prosecution witnesses confirmed that they were at the scene of the robbery.

4. Kirimi did not give up, but filed an appeal to this Court challenging the judgment of the High Court. His grounds of appeal were, inter alia, that the High Court failed to critically analyse the evidence that was adduced against them and thereby arrived at a wrong conclusion; that the appellate court failed to consider evidence that was in the appellant's favour which they ought to have considered hence arriving at a wrong decision; that looking at the evidence as a whole both the trial court and the High Court erred in law by arriving at a plainly wrong decision; that the findings of both the trial court and High Court were based on no evidence at all; that both courts erred by relying on inconsistent and incredible evidence to convict and affirm the conviction of the appellant respectively and that both courts erred in drawing adverse inference against the appellant thus shifting the burden of proof contrary to the law of evidence.

5. In a nutshell, the evidence adduced before the trial court was that on the night of 13th October 2014, at about 9.45 pm, Salome, who runs a bar and restaurant business within Nanyuki town, was in the bar with three customers who included Daniel. Ten people armed with swords and pangas entered the bar from the back door, and proceeded to the counter. One of the men who Salome perceived was the leader of the group ordered everyone in the bar to lie down. Salome did not know this man before but was able to identify him later by appearance as Kimathi. The assailants demanded money and Salome directed one of the men whom she later identified by appearance as Nderitu, to where the money was. Nderitu took cash Kshs.13,000.00 and Salome's Samsung mobile phone. Nderitu then proceeded to rob Daniel of some documents and a total of Kshs.5,000 which he removed from Daniel's pocket. Both Salome and Daniel testified that they were able see and later identify the robbers because there was electric light both inside and outside the bar.

6. The robbers were apparently interrupted by Njoroge, a son to Salome, who had driven to the bar to pick up his mother. Njoroge who was in the company of his friend, Murimi, realizing that there was something amiss in the bar, drove off hooting, at the same time contacting the police. In the meantime, the robbers who were alarmed by the hooting, ran out of the bar. Njoroge and Murimi who were now driving back to the bar, saw a motorcycle being driven away with lights off and they followed the motorcycle until it stalled. They interrogated the rider who they later identified as Kirimi. The rider could not produce any identification. Though suspicious they had to leave the rider alone when other motorcycle riders came to the scene as they feared for their security. They, however, managed to take a picture of the motorcycle.

7. When put to his defence, Kirimi gave unsworn defence. He said that he was a boda-boda operator within Nanyuki. He said that he took possession of the motorcycle registration number KMDH xxxN from Martin Mwangi on 3rd October 2014. He had been given the motorcycle to carry out the boda boda business. On the night in question at 10.00 p.m. he said he received a call from his customer in Likii and the customer informed him that he wanted Kirimi to pick him up. Kirimi said he was on the way to pick that customer when he went past a motor vehicle which was being driven in high speed and was hooting. He stopped to pick up his customer and it is then that a vehicle stopped in front of him and its occupants demanded to see his national identify card which he did not have. He was escorted to the police station.

8. Both the appellant and the respondent filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel Mr. Munene appeared for the appellant while learned

prosecution counsel Ms. Nandwa appeared for the State. Both counsel sought to rely on the written submissions in their entirety.

9. Counsel for the appellant submitted that the trial court in convicting the appellant relied on the evidence of PW3 and PW4 to make a finding that the trail and chase leading to the apprehension of the appellant was without interruption by any other motorcycle. Counsel urged that there was interruption and as such that there were many motorcycles on the way and the possibility of getting the wrong motorcycle was extremely high.

10. Further, that the two courts below ought to have cautioned themselves of the distance between the actual scene of crime and the place PW3 and PW4 caught up with the alleged motorcycle and the terrain between the two places. It was also stated that the two courts below failed to address themselves on the inability of PW1 to identify the appellant in court. It was submitted that the reason why PW1 could not identify the appellant was because he was not at the scene of crime and was not among the ten persons who committed the offence.

11. It was submitted that the appellant was only convicted on the basis of circumstantial evidence that was far-fetched as he was also not identified by PW2 who was at the scene of crime.

12. The respondent submitted that the ingredients of robbery with violence were proved by the prosecution. Further, that both PW1 and PW2 testified that there was a lot of light in the bar and they saw John Nderitu robbing them. Also, that PW4 stated that they had apprehended the appellant at Likii as he had fled from the scene of crime using a motorcycle which they chased and arrested.

13. As regards to the appellant's defence, it was submitted that the evidence clearly does put the appellant at the scene of crime through the evidence of PW3 and PW4 who gave chase and apprehended him after PW4 took a photograph of his motorcycle. According to counsel, there was no mistaken identity and that the defence by the appellant was a mere denial.

14. In regard to the sentence it was submitted that the death sentence which was meted was a lawful sentence and we were urged to uphold both the conviction and the sentence.

15. This is a second appeal against the appellant's conviction and sentence. As such, we are alive to the fact that by dint of section 361 (1) (a) of the *Criminal Procedure Code*, our jurisdiction is confined to consideration of matters of law only. Furthermore, we remind ourselves that we need not 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 two courts below are shown demonstrably, to have acted on wrong principles in arriving at their findings. This much was restated by this Court in the case of *Alvan Gitonga Mwosa v Republic* [2015] eKLR.

16. The evidence against the appellant was to a large extent circumstantial evidence as to what actually transpired immediately before, during and after the incident. Circumstantial evidence must be examined with circumspection before it can be relied upon to support a conviction.

17. In the case of *Sylvester Mwacharo Mwakeduo & another v Republic* [2019] eKLR this Court observed:

> "Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of

Judith Achieng' Ochieng' v Republic, Criminal Appeal 128 of 2006, this Court stated the law as follows:-

> It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy four tests:-
>
> i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;
>
> ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
>
> iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;
>
> iv. In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt."

18. The High Court while dealing with the issue stated thus:

> " Firstly Kirimi confirmed that on 13th October 2014 when the robbery occurred he was the one in possession of the subject motorcycle. The motorcycle was photographed by PW 4 when it stalled after the chase. PW 3 and 4 interrogated Kirimi and were close enough to identify him. Indeed, they would have apprehended Kirimi were it not that they feared for their well-being due to the boda boda operators who congregated around him. Further, Martin Mwangi Kirimi's co-accused confirmed in his defence that he had given the subject motorcycle to Kirimi to ran the business of boda boda. All the above circumstantial evidence in my view cogently and firmly established the guilty of Kirimi. Indeed, cumulatively they form a chain so complete which can only lead to one conclusion that Kirimi was the person who was part of the group that robbed people from the bar and was the person chased and caught by PW 3 and 4."

19. Considering the principles set out in the cases above and the record before us, we do not agree with the above conclusions by the High Court.It is clear from the evidence that PW3 and PW4 gave chase to a random boda boda that they saw in the vicinity of the crime and it cannot be explained how they were able to tell that the appellant who was riding the same was at the scene of crime as they had neither seen him leave the scene nor could they tell whether he had been at the pub or not. Further, having failed to connect the appellant to the offence through the evidence of PW1 and PW2 who were at the scene of crime and who in evidence stated they did not recognise the appellant raises doubt as to whether the appellant was actually at the scene of crime.

20. From the analysis above, it is clear that there was no nexus established between the appellant and the crime that was committed. The circumstantial evidence relied on failed to unerringly point to the appellant as one of the robbers, and that he was actually fleeing from the scene when his motor cycle stalled. In our view, there existed some possibility that another motor cycle could have been involved, and that the appellant just happened to be at the wrong place at the wrong time.

21. Given the above, we are of the view that the charge of robbery against violence was not proved to the required standard and our finding is that the conviction of the appellant was not safe.

22. In the premises, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF FEBRURY 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR