Kariuki v Republic (Criminal Appeal E144 of 2023)
[2025] KECA 1114 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1114 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E144 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

JUNE 20, 2025

BETWEEN

FRANCIS NDERITU KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Nairobi (D. O. Ogembo, J.) dated 28th March, 2023 in HC.CR.A No. 74 of 2020)

JUDGMENT

1. On 28th April 2011, at around 8pm, Nicholas Wambua Kimeu (PW1), a boda boda rider, was at Kanyama Stage in Nairobi when two men approached him and requested to be taken to Kasarani. One of them two was the appellant who was known to PW1, having worked with him previously in a kiosk for one month. PW1 agreed to transport them to the said Kasarani area. As they proceeded with the journey, one of the men alighted and called a watchman to clear some twigs from the road. The watchman did clear the road and they continued moving. However, along the way, one of them indicated that he had changed his destination and wished to be taken to Kariobangi. While enroute, one of the two claimed that he had dropped his cap and requested that they stop to pick it. At first PW1 hesitated to stop but since the two were known to him and one of the passengers insisted that the cap was expensive, he decided to stop. When the passenger disembarked ostensibly to pick the cap, the appellant, who was left on the bike, suddenly stabbed PW1 in the back with a knife. A struggle ensued and the appellant stabbed PW1 again on the neck. During the trial the court observed that PW1 had four stitched scars on his back and three scars on the neck.

2. When PW1 was stabbed, he became helpless and the assailants stole from him a mobile phone make motorolla c-118, Ksh.700 and the motorcycle which he was riding, registration number KMCQ 701C. Left weak, PW1 spotted some light from a house where he went to seek help. He soon thereafter passed out and only recovered a week later while at the Kenyatta National Hospital. On being discharged

from hospital, he reported the incident at Kasarani Police Station and was issued with a P3 form. He produced in court the P3 form, medical treatment notes and, the log book and purchase receipt of the motorcycle. The motorcycle had not been recovered during trial.

3. Dennis Mutisya Musembi (PW2), the owner of the motorcycle, had lent it to PW1 to use it for boda boda business as he was unwell at the time. He was later informed by a police officer that the motorcycle had been stolen and that PW1 was hospitalised following an attack on him. When PW2 met PW1, he mentioned two persons who had allegedly assailed him namely, Francis Nderitu and one Kimotho. On the same day when PW1 was assaulted, at around 10.20pm, No. 71976 P.C Mwero Mganda Mwero (PW3) was in office when a man by the name Chris reported that he had seen a person who was bleeding lying in a trench. PW3 and his colleague went to the scene and found a man who was bleeding profusely lying on the ground. The man identified himself as PW1, and stated that he was a boda boda operator. He said that he had been attacked by two men who stabbed him. He gave the names of the attackers as, Brown and Kimotho. PW1 also told the police officers that he had been robbed of his motorcycle, cash, a phone and shoes. PW3 notified the OCS and the duty officer of the matter after which the OCS ordered him to escort PW1 to hospital. PW3 and his colleague took PW1 to Neema Hospital where he was given first aid. They were then referred to St. Francis Hospital where they were told that the hospital did not have relevant equipment. Next, they were sent to the Kenyatta National Hospital where the appellant was later examined by a Dr. Kamau.

4. The doctor observed that PW1 had a cut wound on the left ear, the back of the neck and the left of the neck. He also had a wound on the chest, the lower back, the right leg and on the right part of the chest. The doctor noted that the injuries were 12 days old and a blunt object had been used to inflict them. He filled a P3 form which was produced by Dr. Joseph Maundu (PW4), his colleague who was conversant with his handwriting and signature. No. 77479 Sergeant John Wainaina Chege (PW5) was assigned the case to investigate. He recorded a statement from PW1 and issued him with the P3 form which was produced in court. He also recorded a statement from PW2, the owner of the motorcycle, who produced the logbook of the motorcycle, a cash receipt for Kshs.79,800 and the sale agreement for the motorcycle. PW5 established that the appellant and one Kimotho had robbed PW1. The appellant was subsequently arrested in Kariobangi.

5. Those are the facts that were established by the prosecution when the appellant was arrested, charged and tried for the offence of robbery with violence before the Chief Magistrate's Court at Makadara. The trial magistrate found that the appellant had a case to answer and placed him on his defence. The appellant testified on oath but called no witness. He denied committing the offence and stated that on 30th April 2011, he was arrested when he met two APs who said that they were looking for "a brown man". He was taken to Kariobangi Police Station and was later charged.

6. The trial proceeded before three successive Magistrates ending with Kithinji A.R. (SPM), who found the offence proved, convicted the appellant and sentenced him to suffer death. Aggrieved by that decision, the appellant appealed before the High Court at Nairobi. The same was heard by the late Ogembo J., who by a judgment dated 28th March 2023 dismissed it in entirety, provoking the present appeal.

7. In a memorandum of appeal drawn and filed by the appellant in person, the appellant complains that the learned judge erred by;Failing to find that the prosecution did not prove the case beyond reasonable doubt.Failing to find that the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence.Failing to give due consideration to the appellant's plausible defence.Failing to find that the vital ingredients of the offence were not proved.

8. During the hearing before us, learned counsel Ms. Naliaka appeared for the appellant while Mr. O. J. Omondi, Senior Assistant Director of Public Prosecutions, holding brief for Ms. Njoki, Principal Prosecution Counsel, appeared for the respondent. Counsel highlighted submissions which they had filed prior.

9. Ms. Naliaka submitted that the appellant's main issue of contention was identification. She argued that in view of the fact that the only evidence against the appellant was that of PW1, who revealed the names of his attackers but had at some point lost consciousness besides referring to one of them by two different names, an identification parade should have been conducted. Counsel cited Amos Ogwang Dola Vs. Republic [2016] eKLR for the submission that courts ought to test the evidence of a single identifying witness carefully while paying particular attention to whether the prevailing conditions were favourable for identification.

10. Further, Francis Kariuki Njiru & 7 Others Vs. Republic 2001] eKLR was cited for the argument that the evidence relating to identification must be scrutinised carefully and should only be acted upon if the court is satisfied that the identification is positive and free from the possibility of error. Ms. Naliaka prayed that the appeal be allowed and the conviction quashed.

11. We probed counsel whether an identification parade was necessary in this case considering that the complainant recognised the appellant as opposed to seeing him for the first time. In answer, counsel reiterated that in view of PW1's contradiction on the names of his attackers and considering that he was allegedly unconscious when he gave PW3 information about the attack, it was imperative for the identification parade to have been conducted.

12. In opposition to the appeal, Mr. O. J. Omondi contended that the instant case was one of recognition where there was no need for an identification parade to be conducted. He submitted that the victim of the offense recognized the assailants before he was attacked. Further, he spent considerable time with them and thus there was no issue of mistaken identity. It was urged that the death sentence meted out was the most appropriate sentence for the reason that, the appellant was armed with a dangerous weapon namely, a knife; he used actual violence on the victim to the extent of stabbing him on the neck, back, chest and leg, which could easily have turned fatal; the appellant was known to the victim and, at no point did he express remorse for almost killing him. Counsel implored that the appeal be dismissed in its entirety as it was unmerited.

13. We inquired from counsel why it is that PW1 never mentioned in his testimony the name of the person(s) who attacked him; he only said that he knew the two men. Further, we sought to know the connection between Francis Nderitu and Brown, in view of the testimony of PW2 to the effect that PW1 referred to the two assailants as Francis Nderitu and Kimotho, while PW3 testified that the names that PW1 gave him were Brown and Kimotho. Mr. O. J. Omondi answered that whereas that connection was not in evidence, it was never challenged during trial.

14. As this is a second appeal, our jurisdiction is confined to a consideration of questions of law only by dint of section 361(1)(a) of the *Criminal Procedure Code*. This has been restated in many decisions of the Court including David Njoroge Macharia Vs. Republic [2011] eKLR in which the Court stated: -

> "That being so only matters of law fall for consideration–see section 361 of the *Criminal Procedure Code*. As 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 Chemagong Vs. R [1984] KLR 611."

15. The appellant contests his identification as the perpetrator of the offence for the reason that when PW1 allegedly gave information about the identity of his attackers, he was supposed to be unconscious. Further, in revealing the names of the assailants, he gave two unconnected names. The appellant argues that an identification parade should have been conducted to establish the true identity of the perpetrator of the crime. While it is evident from the record that PW2 testified that PW1 had named his attackers to be, one Francis Nderitu and one Kimotho, whereas PW3 stated that he had told him that the attackers were Brown and Kimotho, it is also apparent that the two assailants were known to PW1. He testified that the appellant was particularly known to him having worked with him at a kiosk for a period of about a month, a fact which was not challenged by the appellant. PW1 was also able to see and recognise the appellant and his accomplice before he became unconscious after being stabbed. We concur with the two courts below that PW1 had ample time to interact with the appellant and his accomplice, as they asked him to ferry them to their destination. It was not suggested to PW1 or any of the other witnesses that he did not know the assailants. We are thus persuaded that the person referred to as 'Brown' was the appellant and there was no error in his being recognised as one of the perpetrators of the crime. This being a case of recognition and not identification by a stranger, conducting an identification parade would have been superfluous and unnecessary. We restate this Court's sentiments in Katana & Another Vs. Republic [2022] KECA 1160 (KLR). The Court observed thus;

> 17. It is also notable that an identification parade is not necessary where the witness is positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence, and will only become necessary where the victim of the crime did not know the accused before his acquaintance with him during the commission of the offence, or identification was made under difficult circumstances such that the witness may have made a mistake."

16. The Court was of the same view in Peter Okee Omukaga & Another V Republic [2011] KECA 332 (KLR). It stated;

> "We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen articles did not in any way point to the innocence of the appellants."

17. We are cognisant of the possibility for miscarriage of justice where the prosecution case is based wholly on the evidence of a single identifying witness. In this case, however, we think the two courts below were justified in relying on the cogent evidence of recognition from PW1. We accordingly find the complaint regarding the identification of the appellant as the perpetrator of the offence to be without substance.

18. The evidence on record, on which the two courts below made concurrent findings and a conclusion that the offence of robbery with violence as stipulated in section 296(2) of the *Penal Code* had been proved, clearly established the requisite elements thereof namely;

    i. That the appellant was armed with a dangerous or offensive weapon or instrument;

    ii. He was in the company of one or more persons; or

    iii. At or immediately before or after the time of the robbery, he wounded, beat, struck or used any other violence on the complainant.

19. We note that the appellant did not raise any ground on sentencing through the respondent addressed it. Even had it been raised, we would be precluded from addressing it following the Supreme Court's directions in Muruatetu & Another Vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) [2021] KESC 31 (KLR), to the effect that its decision on the mandatory nature of the death sentence being unconstitutional was not applicable to the offence of robbery with violence.

20. In the result, the appeal before us lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

P. O. KIAGE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR