Onyango v Republic (Criminal Appeal E147 of 2023)
[2025] KECA 1165 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1165 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E147 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

JUNE 20, 2025

BETWEEN

BONIFACE OKONG'O ONYANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mutende, J.) delivered by D. O. Ogembo, J. on 30th November, 2022 in HC.CR.A No. E098 of 2021)

JUDGMENT

1. In Act 3, Scene 3 of Shakespeare's Othello, the eponymous main character suspects that his wife Desdemona, has an adulterous affair. Iago, his trusted but perfidious ensign, warns him, if ironically, that jealousy would torment and torture him out of his wits because "It is the green-eyed monster which doth mock/The meat it feeds on." That same monster, nursed by the appellant Boniface Okong'o Onyango, casts its long dark shadow on this case.

2. The appellant was charged with grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence were that on 27th July 2015, at Soweto area, Kayole estate in Nairobi East District within Nairobi County, he unlawfully caused grievous harm to Douglas Karuga Ndegwa.

3. The appellant denied the charge leading to a trial in which the prosecution called 4 witnesses. Evidence was adduced that on 27th July 2015, at 5.00am, Douglas Karuga Ndegwa (PW1), a milk distributor in Kayole estate, was called by the driver of a milk delivery truck to go and receive milk at his shop. The shop was a walking distance away from his home. He woke up and went to receive the milk. He received several crates of Brookside milk and as he was stacking them together, he saw someone stealthily approaching him from his side with a wrapped jacket around his hand. PW1's shop had security lights and the area also had street lights so he was able to see the person approaching clearly. The person was the appellant who he had known since the year 2011. The appellant operated a banking

agency for various banks including Equity Bank which PW1 used to bank with. The appellant also owned a chemist in the neighbourhood.

4. When PW1 saw the appellant, he did not suspect anything so he continued arranging the crates of milk, only to suddenly feel a liquid being poured on his face and body. He felt a burning sensation all over his body and shortly thereafter, he could not see anything. He realised that the person he had seen, the appellant, had poured acid on him. PW1 started running blindly while raising alarm but he fell into a ditch. He then heard people milling around him. They removed his clothes and poured water on him to wash away the acid. He was rushed to Mama Lucy Hospital where he was treated then referred to Kenyatta National Hospital where he was admitted for 8 months. The trial court observed that PW1 had extensive burns on his head, face, chest and abdomen. The eye sockets were also completely closed. PW1 testified that he cannot see anymore and he has to use a guide to help him walk around. Further, as at the time of trial, he was still on treatment and awaiting several operations. While admitted in hospital, the police visited him and recorded a statement from him. He was also taken to a police doctor who filled a P3 form. PW1 explained that prior to the incident, the appellant had accused him falsely of having a marital affair with his wife and warned him that he would pour acid on him if he did not stop it.

5. Lina Njoki Ngare (PW2), spouse to PW1, confirmed that the appellant was known to PW1 and her, having been their neighbour in Kayole. PW1 also used to frequent the appellant's Mpesa shop. She recalled that on 15th June 2015, PW1 told her that the appellant had threatened to pour acid on him for allegedly having an affair with his wife. PW2 narrated that on the fateful day, at around 5.30am, PW1 went to collect milk that had been delivered when shortly after the delivery truck had driven off, she heard screams. An unknown man called her and told her to get out. When she got out, she found a crowd of people had gathered. She then overheard people saying, 'Boniface hawezi fanyia rafiki yake hivyo' (Boniface shouldn't do that to his friend). PW2 spotted her husband's clothes on the ground. They had been burnt with acid. Soon, PW1 was rushed to Mama Lucy Hospital where he was referred to the Kenyatta National Hospital. Doctor Joseph Maundu (PW3) of Nairobi Police Surgery recalled examining PW1 on 31st January 2017, over an assault that had occurred on 27th July 2015. He observed that PW1 had extensive burns on his head, face, nose and the orbital sockets. His eyes were completely closed and he could not see. His nostrils were also closed and he could only breathe through the mouth. His lips had scars with a deviation of the mouth. The neck and chest had healed burned scars. The abdominal wall and the left hand also had scars. PW3 noted that the injuries were 2 years, 6 months and 2 days old. In his assessment, the injuries were caused by a corrosive liquid, probably an acid. He classified the injuries as "maim" due to loss of vital organs. PW3 produced in court the P3 form that he had filled. No. 220748 CPL Erickson Maganga (PW4) attached to Soweto Police Station, testified on behalf of CPL Macharia, the initial investigator, who had since passed away. His testimony was that from the file, he found an exhibit memo form dated 6th August 2015 and a government chemist report dated 19th April 2016. He produced the two under sections 33 and 77 of the *Evidence Act*. PW4 notified the court that the exhibits themselves had been misplaced when the investigator died.

7. At the close of the prosecution case, the learned Chief Magistrate (H. M. Nyaga), as he then was, found that the prosecution had established a prima facie case against the appellant and placed him on his defence.

8. The appellant (DW1) gave sworn evidence and called 3 witnesses. He denied committing the offence claiming that on the material day and time, he was with his family at home in Kayole. He, however, admitted knowing PW1. He was his friend and they lived in the same plot. The appellant also confirmed that PW1 banked with his Equity banking agency although he denied accusing him of seducing his wife. The appellant's spouse Lilian Njoki (DW2), corroborated his evidence that PW1

was known to them. She denied having a relationship with PW1. David Otieno Shirengo (DW3) and Harrison Magere (DW4) both indicated that they never witnessed the incident.

9. The trial Magistrate evaluated the evidence tendered and found the appellant guilty as charged. He sentenced him to serve 30 years imprisonment.

10. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. Mutende, J. re-evaluated the evidence on the record and wrote judgment on 21st November 2022 where she upheld the conviction of the appellant but reduced the sentence to twenty-five (25) years imprisonment.

11. Still aggrieved, the appellant preferred the instant appeal based on 3 grounds. He complains that the learned Judge erred by failing to find that;

    a. The accused person was not properly identified as the perpetrator of the offence.

    b. The medical evidence adduced in court did not reflect the matter.

    c. Vital witnesses and important exhibits were not produced.

12. During the hearing of the appeal, the appellant was present in person while Mr. O. J. Omondi, the learned Senior Assistant Director of Public Prosecutions, holding brief for Ms. Njoki Kingara, appeared for the State. The appellant relied on his filed written submissions. For the respondent, Mr. O. J. Omondi beseeched us to allow him to make oral submissions for the reason that his colleague who was handling the matter had fallen ill before filing written submissions.

13. In substance, the appellant's submissions are that, he was not positively identified as the perpetrator of the offence since it is not clear who pointed him out to the arresting officers and how he described him. Moreover, a person who has woken up as early as 5am, the time when the incident is alleged to have happened, cannot precisely identify his attacker. Referring to the allegation that since he worked in a chemist, he was likely to access the acid that was used to harm the complainant, the appellant questions how a person who is employed to sell medicine knows about chemicals. Decisions on the question of identification are cited including, R Vs. Turnbull & Others [1976] 3 ALL ER 549, where the court highlighted factors to be considered in evaluating the accuracy of identification; Wamunga vs. R [1989] KLR 424, where courts were cautioned on the need to examine evidence of identification or recognition carefully, and Maitanyi Vs. R [1986] KLR 198 where the Court held that an inquiry as to the intensity of light is essential in testing the accuracy of evidence of identification.

14. The prosecution is faulted for failing to produce exhibits to prove its case, that is, the jerrycan that had the acid and the jacket that the perpetrator had allegedly tied around his hand. It is contended that the prosecution did not call crucial witnesses like the neighbours who rescued the complainant and the doctor who first saw him following the incident. The appellant takes issue with the fact that the P3 form was filled 2 years, 6 months and 3 days later. He argues that it was not known where the exhibit memo and government chemist report came from. In conclusion, it is submitted that the prosecution did not prove their case beyond reasonable doubt and thus the appellant is entitled to the benefit of doubt. We are urged to quash his conviction and set him at liberty.

15. In opposition to the appeal, Mr. O. J. Omondi addressed us on the issue of identification. He submitted that when it comes to visual identification, this Court has made it clear that the same should be approached with great care and caution and that before acting on evidence of visual identification or recognition, the trial court must make inquiries as to the presence and nature of light available, the intensity of such light, the location and source of light in relation to the accused, and the time taken by the witness to observe the accused so as to be able to identify him or her. Counsel asserted that this was, however, a case of recognition and although the victim did not explain the intensity of the light,

it was in his evidence that the place was well lit and his premises had security lights. Mr. O. J. Omondi thus urged that we should dismiss the appeal entirely.

16. This being a second appeal, the Court restricts itself to consideration of questions of law only by dint of Section 361(1)(a) of the *Criminal Procedure Code*. This was affirmed by the holding of this Court in David Njoroge Macharia Vs. Republic [2011] eKLR;

> 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 v. R [1984] KLR 611."

17. From the arguments made before us, we distil that the issues that fall for our determination are, whether the appellant was positively identified as the perpetrator of the offence and, whether the prosecution failed to call vital witnesses and produce important exhibits.

18. The appellant challenges his identification as the offender and questions how he was pointed out for arrest. He argues that the time when the incident occurred, at 5am, was too early for the complainant to have made a correct identification. Counsel for the State, on the other hand, insists that this was a case of recognition and evidence on record shows that the recognition was done in a place that was well lit. In finding that the appellant is the one who caused harm to PW1, the trial court observed that the appellant and PW1 were known to each other since 2011 and therefore, PW1 was in a position to know if it was the appellant that he saw on that fateful morning. Further, despite the fact that the incident happened early in the morning when it was still dark, evidence adduced showed that the scene of crime was well lit with security lights. The learned Judge was equally convinced that this was a case of recognition as both the complainant and appellant were previously known to each other. The learned Judge similarly concurred with the finding that the lighting conditions at the scene of crime were adequate to enable the complainant to see clearly despite it being early in the morning. She stated;

> 32. It is admitted by the appellant as stated by the complainant that there were electricity lights at the place of the incident. The lighting condition must, therefore, have enabled the complainant to see despite being early in the morning. The complainant vividly remembered his attacker. He carried a jerrycan and he had wrapped a jacket around his other hand."

19. On perusing the record, we note that PW1, PW2, DW1 and DW2, all admitted that the appellant and the complainant had been friends and neighbours since the year 2011. The complainant was also a client of the appellant where he banked with the appellant's Equity banking agency. We think that the appellant was too familiar to PW1 for him to have made a wrong identification, in the circumstances. Indeed, when he testified in court, after going blind following the incident, he explained his recognition of the appellant in the following manner, 'The person who attacked me is known to me. Even if I can't see him now. I knew him as Boniface. If he talks I can recognise his voice.' We are persuaded, as the two courts below were, that there was sufficient lighting at the scene of crime that enabled PW1 to recognise the appellant and identify him as the perpetrator of the offence. In so holding, we are guided by the persuasive reasoning of this Court in Peter Okee Omukaga & Another Vs. Republic [2011] KECA 332 (KLR);

> There are, therefore, concurrent findings made by the two courts below that the appellants were properly identified as the robbers. We have re- examined the evidence upon which that

conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village'; that they had played football with them long time ago; and that their voices were also familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of appeal."

20. Similarly, in Shalen Shakimba Ole Betui & Another V Republic [2009] KECA 101 (KLR), the Court stated;

> " The present case was a case of recognition rather than identification and on our part we have considered this issue and are satisfied that in view of the concurrent findings of the two courts below the appellants were positively identified and recognized by PW1 and PW2. There could be no possibility of a mistaken identity. We are satisfied that the appellants were convicted on very sound evidence of recognition in circumstances which were conducive to proper identification/recognition."

21. In the timeless decision of Reuben Taabu Anjononi, Benjamin Akisa Anjononi And Monya Anjononi Vs. Republic [1980] KECA 23 (KLR), the Court stated on recognition, and we agree;

> The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, 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."

22. As to whether the prosecution failed to call vital witnesses, this issue was also addressed by the two courts below. Both the trial court and the High Court cited section 143 of the *Evidence Act* which provides that no number of witnesses is required in proving a fact. The learned judge further referred to Sahali Omar Vs. Republic [2017] eKLR, where this Court held that the prosecution is only supposed to call such witnesses as are sufficient to establish the charge beyond any reasonable doubt. Being of a similar mind as the trial court and the High Court, we see no reason to depart from their finding on this issue. We think the witnesses that testified were adequate to and did, in fact, establish the case against the appellant beyond reasonable doubt.

23. The appellant is also aggrieved by the failure of the prosecution to produce important exhibits. We discern from the record that PW4, the second investigations officer in the case, adequately explained this issue during trial and the appellant, who was represented by counsel, seemed satisfied as he did not raise any objection. PW4 explained that the items that were sent to the government analyst for examination were the white plastic container that contained the acid and the complainant's clothes. The analysis was carried out and a report done but along the way, the investigations officer who was handling the matter and in whose custody the exhibits were, died. PW4 stated that following the demise of that investigations officer, the exhibits were apparently misplaced. He, however, produced in evidence the exhibit memo form and the government chemist report, under sections 33 and 77 of *Evidence Act*, and the court admitted them without any protestation from the appellant. In the circumstances, we think that the failure to produce the exhibits by the prosecution was sufficiently clarified and hence nothing turns on this particular complaint.

24. The appellant did not address us on sentencing and we will not interfere with the sentence imposed by the learned Judge. We actually think it was too lenient given the monstrous injuries the appellant inflicted. Nevertheless, the prosecution did not seek enhancement of the sentence.

25. Ultimately, we find the appeal to be devoid of merit and dismiss it in entirety.

Order accordingly.

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

P. O. KIAGE

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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