



REPUBLIC OF KENYA



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**Mwangirani v Republic (Criminal Appeal 18 of 2021)
[2024] KECA 209 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KECA 209 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 18 OF 2021
MSA MAKHANDIA, AK MURGOR & GV ODUNGA, JJA
MARCH 1, 2024**

BETWEEN

NGUMBAO KARISA MWANGIRANI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi delivered on 27th September, 2018 by Meoli, J in High Court Criminal Appeal No 25 of 2011 Original Kilifi SRM Criminal Case No. 748 of 2019)

JUDGMENT

1. This second appeal was lodged by the appellant against the judgement delivered on 27th September, 2018 by Meoli, J in Malindi High Court Criminal Appeal No 25 of 2011. The Appellant together with three others were charged before the Senior Resident Magistrates Court at Kilifi with the offence of Robbery with Violence contrary to Section 296(2) as read with Section 295 of the Penal Code. The particulars were that on the 24th March, 2012 at St Andrews Primary School polling station, Kisumu Ndogo Village in Malindi District within Kilifi County, with others not before court, while armed with offensive weapons to wit pangas and runqus robbed no, 220763 APC Matano Rumba Masai a G3 rifle Serial No. 77095542 and a magazine with 20 rounds of ammunition valued at Kshs 120,000/= the property of the Government of Kenya and at or immediately before or immediately after such robbery used actual violence to (sic) the said Matano Rumba Masai.
2. At the conclusion of the trial, the appellant who was the second accused was found guilty and sentenced to death.
3. The prosecution's case as presented by PW1, PW2 and PW3 was that on 24th March, 2021 between 10.00 am and 10.30am they were at St. Andrews School, Kisumu Ndogo in Malindi where they had been deployed to provide security in a mock election exercise; that a group of more than 10 people



invaded the polling station and started causing trouble claiming that they were Mombasa Republican Council (MRC) members and that the Coast region was not in Kenya; that PW1 was who was requested to assist in restoring order went to one of the classrooms to find out what was going on; that he was confronted by a man who told him that the Coast region was not in Kenya and that foreigners should leave; that while still engaging the man, PW1 felt his gun being pulled from behind; that when he turned to get hold of the gun the appellant grabbed his neck and squeezed it; and that PW1 lost his gun in the process.

4. According to PW1, he identified the appellant in an identification parade conducted on 9th April, 2012, by PW8, Inspector Moses Kibowen Sang. It was his evidence that he was with the appellant for 5 minutes in the classroom.
5. PW2's evidence was that while performing security duties in the company of PW1 and PW3, at the said school, a group of about 20 youth entered the school; that they were alerted that someone had ordered that the polling station be closed as Coast region was not part of Kenya; that PW1 entered the classroom to find out what was happening; that there was commotion inside the classroom and she heard a shot in the air and ran into hiding when PW3 was hit from behind; and that she identified the appellant as the leader of the group having seen him before as a motor vehicle conductor at Watamu stage.
6. PW3 confirmed that she was assaulted on the head and that the group that had attacked them dispersed when PW2 shot in the air; that as she was going to take refuge in a pick-up in the compound, she saw the appellant who was carrying a G3 gun cock the gun before she was rushed to the Hospital; that she later, on 9th April, 2012, she attended an identification parade where she identified the appellant whom she knew previously as a conductor in matatus plying Malindi-Watamu route; and that the appellant even greeted them as he was entering the polling station.
7. PW7 was the Presiding Officer at the polling station where the mock elections were being conducted on 24th March, 2012. According to her at about 10.30am, the appellant entered the classroom and asked for the person in charge; that PW7 responded that she was the one; that the appellant told her that he did not want to deal with her; that the appellant walked to the place where the elections observers were seated at the back and asked them if they knew that elections were not supposed to be held in the area; that shortly thereafter, PW1, an Administration Police Officer went to talk to the appellant; that the appellant and another man grabbed PW1 with the appellant holding PW1 by the head; that she ran out of the room to hide in a nearby house; and that the appellant was in the room for 4 to 5 minutes.
8. The incident was investigated by PW12 who accompanied the DCIO, Malindi to the School and found that PW1 had been robbed of his G3 rifle with 20 rounds of ammunition; that he issued P3 form to PW1 who had been injured; that he commenced investigations and recorded statements from witnesses; and that on 6th April, 2012, the appellant was arrested; that the appellant was identified at an identification parade conducted on 9th April, 2012 by PW13.
9. Upon being placed on his defence, the appellant denied committing the alleged crime. In his defence, he raised an alibi defence that on 24th March 2012, the material date of the crime, he was working as a driver of a matatu Reg No. KAY 389M. He denied being at the scene of crime and called two witnesses to support his alibi defence. Both witnesses corroborated the appellant's defence that the appellant was a driver of the motor vehicle which had been handed to him by DW3 the day before. DW2 also gave evidence that on the material day, they were working together the entire day.
10. In her judgement, the learned judge of the High Court, found that the evidence placed the appellant at the scene of crime on 24th March, 2012; that the offence occurred during day time; that the



circumstances were ideal for positive identification; that the identification of the appellant by PW3 was by way of recognition; that the identification parade that was conducted after the appellant had been charged was not prejudicial to the appellant; that the appellant's alibi defence was dislodged by the evidence of PW1, PW3 and PW7 who identified him in the identification parade; that there were no contradictions with regard to the physical description of the appellant as given by the witnesses; that the evidence proved that PW1's gun was stolen as well as 20 rounds of ammunition; that violence was used in the course of the robbery; that all the ingredients of robbery with violence were proved; and that the death sentence imposed on the appellant was improper as minimal violence was used in the commission of the offence.

11. The learned judge, while upholding the appellant's conviction, therefore substituted the death sentence imposed on the appellant by the trial court with a sentence of 25 years imprisonment to run from the of the trial court's judgement.
12. That was the decision that aggrieved the appellant and provoked this appeal which is based on the grounds that the High Court relied on the evidence of identification parade conducted contrary to the law and practice; that both the trial court and the High Court misapprehended the evidence of identification and recognition against the appellant and failed to satisfy themselves that the circumstances of identification were not free from the possibility of error; that the learned judge in upholding the appellant's conviction failed to consider the fact that there were no cogent reasons to link the appellant to the commission of the alleged offence; that the High Court failed to resolve the material contradictions and inconsistencies in the evidence tendered against the appellant in his favour; that the learned judge erred in failing to hold that in light of the acquittal of the 1st accused by the trial court, the case against the appellant failed to stand and the conviction was unsafe; and that the High Court erred in failing to find that the evidence adduced against the appellant failed to meet the threshold of beyond reasonable doubt.
13. We heard this appeal on the Court's GoTo platform on 25th September, 2023 during which the appellant, who appeared from Manyani Prison, was represented by learned counsel, Ms Oluoch Wambi while learned counsel, Mr Mwangi Kamanu, appeared for the respondent. Both learned counsel relied entirely on their written submissions.
14. According to the appellant, from the evidence, the environment in which the crime was committed was tense; that it was difficult for the witnesses to make an infallible impression and description of the alleged attackers in the chaos that erupted; that there were a lot of people in the classroom; that the evidence of identification against the appellant ought to have been examined and weighed carefully against the situation prevailing; that the attack took relatively a short time; and that the scene was full of commotion and disorder. The appellant relied on *Wamunga v R* [1989] KLR 426 for the holding that where the only evidence against a defendant is that of identification or recognition, a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction; that the three witnesses who alleged to have identified the appellant at the identification parade never gave the description of the appellant prior to attending the parade. See *Gabriel Njoroge v R* (1982-1988) 1 KAR 134.
15. It was further submitted that the Police Standing Orders were not followed during the parade; that the parade was held after the appellants had been charged and plea taken contrary to the decision in *David Mwita Wanja & 2 Others v R* [2007] eKLR which emphasised the need to hold identification parade with scrupulous fairness and in accordance with the instructions contained in the Police Force Standing Orders and *Njihia v R* [1986] KLR 422 for undesirability of conducting a parade after the



taking plea; and that the stolen gun was never recovered in the appellant's possession, this submission being based on *Anjononi v R* [1976]-80] 1 KLR 1566.

16. In addition, it was submitted that there were crucial contradictions in the evidence of the witnesses during the attack; whether the men in kanzus were involved in the attack and that these contradictions, in line with the holding in *Richard Munene v R* [2018] eKLR ought to be resolved in favour of the appellant; that the 1st accused having been acquitted based on the manner in which the identification was carried out, the appellant ought to have been acquitted since the identification parade for the appellant was similarly flawed; that the court failed to record any reasons or explanations why it disregarded and failed to place any weight on the defence evidence regarding the appellant's alibi as held in *Kiarie v R* [1984] KLR; that the trial court shifted the burden of proof of the alibi defence to the appellant contrary to the holding in *Victor Mwendwa Mulinge v R* [2014] eKLR.
17. The Respondent, on the other hand, submitted, on the authority of *Johana Ndungu v Republic Criminal Appeal No. 116 of 2005 (UR)* that the ingredients of the offence of robbery with violence are that the offender is armed with any dangerous weapon or instrument; or that he is in the company with one or more other person or persons; or that at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person. According to the respondents all these ingredients were met by the prosecution.
18. As regards the alibi defence of the appellant, it was submitted that the same was an afterthought and reliance was placed on *R v Sukha Singh S/O Wazir Singh & Others (1939) 6EACA 145* and *Victor Mwendwa Mulinge vs Republic (supra)* where it was held that the defence of alibi ought to be raised at an early stage in the case so that it can be tested by those responsible for investigating the offence and thereby prevent any suggestion that the defence was an afterthought. According to the respondent, the prosecution was never given an opportunity to investigate the alibi raised by the appellant and the same could only have been nothing more than an afterthought. It was contended that the High Court evaluated the evidence before the trial court whether the defence by the appellant dislodged the evidence tendered by the prosecution and rightly found that the alibi defence raised by the appellant did nothing to affect the prosecution's case.
19. On the issue of identification, it was submitted that in the identification parade, the appellant was identified by PW1 and PW2 who actually knew the appellant before the incident, PW3 who also knew the appellant before the material day; that the incident occurred in broad daylight and there could have been no mistake that it was the appellant who was positively identified; that based on the testimony of PW8 who conducted the identification parade that led to the identification of the appellant and the identification form, proper procedure was complied with and none of the standing orders referred to by the appellant were breached; that it was for that reason that the appellant signed the identification form having been satisfied that the process was done in compliance with the law; and that the High Court came to the same conclusion as the lower court that there was no issue of mistaken identity and that proper procedure was complied with.
20. We have considered the above submissions.
21. In a second appeal such as this, our mandate under Section 361 of the Criminal Procedure Code is limited to a consideration of matters of law. In *Karani vs. R* [2010] 1 KLR 73 the Court express that:

“By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should



have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

22. This Court, in addition, does not normally deal with issues raised for the first time before it as a second appellate court and which were not raised before the two courts below as this Court appreciated in *Alfayo Gombe Okello v. Republic* [2010] eKLR where it held that:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

23. The predecessor to this Court in *Alwi Abdulrehman Saggaf vs. Abed Ali Algeredi* [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be allowed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

“The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.”

24. In this appeal the issues that fall for determination before us are:

1. Whether the two courts properly addressed themselves on identification of the appellant.
2. Whether there were inconsistencies in the evidence of the prosecution witnesses and whether such inconsistencies, if any, were resolved.
3. Whether the identification parade was properly conducted.
4. Whether the appellant’s defence of alibi was considered.

25. Regarding the issue of identification, it is clear that the identity of the appellant was not simply based on identification. There was evidence that the appellant was known to PW2 and PW3. According to PW3:

“I identified one person at the police station. I had known the person before. He used to be a conductor in matatus plying the Malindi- Watamu route...He is before court... He even greeted us when he entered the compound.”

26. The evidence of PW2, on the other hand, was to the effect that:

“I only know one of them by face. I used to see him. He was the one leading the group...He is before the court.”



27. In cross-examination by the appellant the witness asserted:

“I have stated that I had known you before. I had known you by face. I did record in my statement that I knew one of them by face. My statement states that one was familiar to me physically. I knew you. I used to see you at Watamu stage as a conductor. I recognised you when I saw you.”

28. The appellant in his evidence admitted that he was a driver along Mombasa-Watamu route. It is therefore clear that the evidence against the appellant was not merely that of identification but also recognition by the witnesses who not only knew him prior to the date of the incident but one whom he greeted a few minutes before the incident. It is therefore clear that the appellant’s case was not the same as those of his co-accused who were acquitted against whom the evidence only revolved around the identification at the parade. While we agree that conducting the identification parade after the appellant had taken plea was troubling, the case against the appellant was not solely based on his identification at the parade. Therefore, the appellant’s identification being one of recognition as opposed to the identification of a stranger, it was more satisfactory, reassuring and reliable because it depended upon personal knowledge of the appellant. See *Anjononi & Others vs. Republic* [1980] KLR 59.

29. In our view the appellant’s identification by way of recognition was proper and the two courts below cannot be faulted in finding, as a matter of fact, that the appellant was one of the people who attacked the polling station and robbed PW1 of the gun. Indeed, in our view the identification parade was even superfluous given that the appellant was known to the witness.

30. As regards the issue of contradictions and inconsistencies, it is true that the failure by the first appellate court to resolve the same, if they exist, is a proper ground upon which this Court, albeit sitting as a second appeal may entertain the appeal since the failure to do so may well amount to the failure by the first appellate court to discharge its duty of re-evaluating the evidence which is a legal requirement. See *Jonas Akuno O’kubasu v Republic* [2000] eKLR. Where, however, the first appellate court has discharged its obligation, this Court would not be justified in interfering with the concurrent findings of fact by the two courts below. See *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007; *Njoroge v Republic* [1982] KLR 388.

31. In her judgement the learned judge held that:

“Contrary to the submissions by the appellant that there were sharp contradictions with regard to the physical description given by the witnesses about him, I see none on the record. The witnesses were clear that the group of between 10 to 20 men went to the polling station on the morning of 24th March, 2012 and that there were here men in kanzus (sic) had gone to the polling station before the said group and left after a short time. The witnesses were categorical that the three men were not the ones who attacked them, but the appellant and his group did so”

32. It was therefore a finding of fact that there were no contradictions in the evidence of the prosecution witnesses regarding the identity of the appellant as one of the perpetrators of the attack. In the case of *Dzombo Mataza vs. R* [2014] eKLR this Court succinctly observed;

“By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to



consider matters that they should have considered or that looking at the evidence they were plainly wrong.”

33. It has not been shown to us that the decisions arrived at by the two courts below were plainly wrong.
34. As regards the irregularities in the conduct of the identification parade, we have found that even without the said parade there was sufficient evidence of recognition by PW2 and PW3, that placed the appellant at the scene of crime. Nothing therefore turns upon the conduct of the identification parade.
35. On the issue of the appellant’s alibi defence, we agree that the trial court’s remarks were rather unfortunate. To quote the learned trial magistrate:

“I note that none of the witnesses availed a driving licence to prove that they are qualified drivers, existence of the said vehicle was not proved save for the statements made by the witnesses. I also note that none of witnesses indicated they routes they covered on the material day.”

36. One would be forgiven to take the view that the learned trial magistrate was shifting the burden of proving the alibi defence to the appellant. The consistency with which this Court has dealt with the issue was emphasised in *Wang’ombe v The Republic* [1980] KLR 149, where this Court (Madan, Miller and Potter, JJA) held that:

“...in *Ssentale vs. Uganda* [1968] EA 365, 368 [Sir Udo Udoma CJ]...said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion.”

37. However, the misdirection by the trial court was cured by the first appellate, as it was obliged to do, when the said defence was re-evaluated and found wanting in light of the evidence of PW2, PW3 and PW7. We associate ourselves with the decision of the Supreme Court of Uganda, in *Festo Androa Asenua vs. Uganda*, Cr. App No. 1 of 1998 when it observed that:

“We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.

Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed, in *Ganzi & 2 Others vs. Republic* [2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant’s defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence...”



38. In Wang'ombe v The Republic (supra), the Court found that:

“The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it...In England, in order to distribute the burden of the prosecution fairly, the Criminal Justice Act, 1967, section 11(1), provides that on a trial on indictment the defendant may not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi. Under section 11(8) ‘the prescribed period’ means the period of seven days from the end of the proceedings before the examining justices. Section 11(1) applies where the defendant alone is to testify that he was elsewhere at the material time; see R vs. Jackson and Robertson [1973] Crim. LR 356... The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy’s evidence. To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers. They do not have to pendantize. What other approach is there? Judicial officers are not clairvoyant!”

39. We have considered the said alibi defence as well as the prosecution evidence. In this case two witnesses were emphatic that they knew the appellant and recognized him in favourable circumstances. In our view, the appellant’s defence of alibi raised no doubts as to the presence of the appellant at the scene of the crime and participation in the commission of the crime and was properly displaced by the prosecution evidence.

40. We have considered this appeal and find no reason to disturb the findings by the learned judge of the High Court who upheld the appellant’s conviction but interfered with the sentence imposed by the trial court. We accordingly dismiss the appeal.

DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF MARCH 2024

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL



I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

