



**Mbogo v Republic (Criminal Appeal 21 of 2018)
[2024] KECA 927 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 927 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 21 OF 2018
S OLE KANTAI, FA OCHIENG & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

EVANS NJOROGI MBOGO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Naivasha
(C. Meoli, J.) dated 3rd May 2017 in HC.CRA. No. 5 of 2016)*

JUDGMENT

1. Evans Njoroge, the appellant, was at the trial charged with robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars were that on the 19th February 2014 at Ngondi Trading Centre in Naivasha Sub-County within Nakuru County, the appellant, jointly with others not before Court, while armed with dangerous weapons, namely, pangas and rungas, robbed Paul Maina Mbugua of cash Kshs. 190/- and one Nokia mobile phone valued at Kshs. 4,000/- and during the time of such robbery used actual violence on the complainant.
2. In the second count, the appellant was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the charge being that on the 19th February 2014, at Ngondi Trading Centre in Naivasha Sub-County within Nakuru County the appellant, jointly with another not before court, assaulted Stephen Mbugua Kamau thereby occasioning him actual bodily harm.
3. The appellant was convicted on both counts and sentenced to death on the first count while the sentence for count 2 was held in abeyance. His appeal to the High Court was not successful prompting him to lodge this second appeal. We condense his grounds of appeal as follows: that the identification parade was not conducted in accordance with the law; that he was not properly identified; and that his defence was not considered.



4. In the case against the appellant, Paul Maina Mbugua (PW1) testified that on 19th February 2014 at about 10.00 pm while he was walking home from the market, he was attacked by two people who tied his hands and stuffed a handkerchief in his mouth. He was robbed of Kshs. 190/- and a Nokia 1280 mobile phone. He had money in his M-PESA account and he was compelled to issue the assailants with his M-PESA PIN. Thereafter, he proceeded home and together with his father (PW2) they trudged back to the market with a view to reporting the incident to the police and blocking the SIM card. On the way, they were again attacked by the same assailants and he sustained serious injuries. PW1 testified that he identified the appellant using light from the moon and that he knew him because he lived in their locality.
5. Stephen M. Kamau (PW2) stated that on 19th February 2014 at about 10.00 pm, PW1 went home with his hands tied and informed him that he had been robbed. Immediately, they left for the market to block the M-PESA account. On the way, they were accosted by two assailants who attacked them with pangas. He recognized the appellant by his voice as he had known him from his childhood and had even employed him at one point.
6. David Kinuthia Gitome (PW3) was an M-PESA agent within Ngondi market. On the material day, at about 11.00 pm, the appellant went to his shop seeking to withdraw Ksh. 5,800/-. He noticed that the appellant had a Nokia 1280 mobile phone. The transaction was however not completed since the appellant declined to produce his national identity card. The following day, the appellant reached out to him through the phone of PW4 and threatened him. PW3 reported the matter to the police and handed over the money. It was also his evidence that he recognized the appellant with the aid of the shop's security lights.
7. Peter Nyutu Kimani (PW4) testified that on 20th February 2014, he received a telephone call from a customer he had attended to the previous night. The customer requested him to hand over the handset to PW3 so that they could talk.
8. John Njogu (PW5) worked as a guard in a parking bay for trucks in Maai Mahiu. His testimony was that on 21st February 2014, the appellant approached him at 5.00 pm seeking to sell a phone to get his fare to Narok. They negotiated the price and settled at Ksh. 700/-. He would later be tracked down and arrested by the DCI officers from Naivasha. Upon his arrest he explained to the officers how he had acquired the phone. While in the cells, an identification parade was conducted and he identified the appellant as the person who sold him the phone.
9. Police Constable Isaac Mwanja (PW6) was at the material time stationed at Ngodi Police Station Patrol Base. On 20th February 2014 he received a report from PW3 of a threat from a client he had served the previous night. PW3 reported that he had declined to release the withdrawn money to the client because he lacked an identity card. PW6 who had earlier been informed of a robbery incident by the Officer Commanding Station later handed over the matter to DCI officers from Naivasha.
10. Corporal Julius Rop (PW7) gave an account of how he arrested the appellant in Longonot upon being informed by the DCI Naivasha that he was a fugitive.
11. Tabitha Ndunge (PW8) was a clinician at Naivasha Hospital.
She attended to PW1 and PW2 and produced P3 forms as exhibits confirming that they had sustained injuries.
12. Corporal Daniel Chepkwony (PW9) who investigated the matter gave an account of his investigations from the time he received the report from PW6 to the arrest of PW5 and the eventual arrest of the



- appellant. He stated that they arrested the appellant in Longonot and brought him back to Naivasha where an identification parade was conducted.
13. Chief Inspector Nzioka Singi (PW10) conducted an identification parade at the request of PW9. During the parade, PW6 was able to identify the appellant as the person who sold him the phone stolen from PW1.
 14. In upholding the judgment of the trial court, C. Meoli, J. rejected the appellant's argument that an identification parade was necessary for PW1 and PW2. The learned Judge also found that the evidence on record connected the appellant to the crimes. She also applied the doctrine of recent possession and concluded that the appellant's defence was a mere denial.
 15. When this appeal came up for hearing on the Court's virtual platform on 8th April 2024, learned counsel Ms. Audrey appeared for the appellant while Mr. Omutelema appeared for the respondent. Counsel having filed their written submissions opted to wholly rely on them.
 16. Through the submissions dated 7th February 2024, counsel for the appellant cited *R v. Turnbull* [1977] QB 224 and *Nzaro v Republic* [1991] 2 KAR 212 as enunciating the principles applicable to evidence of identification. Counsel proceeded to submit that the learned Judge failed to consider the fact that prevailing circumstances at the time of the commission of the offence were not favourable for proper identification by PW1 and PW2. Counsel referred to *Kiarie v Republic* [1984] eKLR 739 and *Charles Maitany v. Republic* [1986] 1 KLR 198 to emphasize that courts ought to exercise caution and circumspection before relying on evidence of identification to convict an accused person. Additionally, counsel urged that the evidence on the identity of the stolen phone remained marred with contradictions and was uncertain. He cited *Peter Ngure Mwangi v Republic* [2014] eKLR and *Richard Munene v Republic* [2018] eKLR to argue that where the contradictions go to the root of the matter, as was the case in the appellant's matter, the conviction should be reversed. As for sentence, counsel urged that were we to reject the appeal against conviction we should set aside the death penalty and substitute it with a definite prison term. In summary, counsel urged that we allow the appeal in its entirety.
 17. In opposition to the appeal, Mr. Omutelema for the respondent submitted that the appellant was properly identified and the evidence in that regard was correctly appreciated by the learned Judge. Counsel restated the evidence of PW1 and PW2 and relied on *Charles Maitany v. Republic* (supra) to submit that the principles governing the use of the evidence of identification to convict were adhered to. According to counsel, we should therefore uphold the concurrent findings of fact by the trial court and the first appellate court. Counsel also submitted that the learned Judge properly invoked the doctrine of recent possession as the appellant failed to tender an explanation as to how he came into possession of the complainant's stolen phone. In urging us to dismiss the appeal on conviction, counsel stressed that all the elements of the offence of robbery with violence were proved against the appellant. As for sentence, counsel was not opposed to the imposition of a severe definite prison term.
 18. This being a second appeal, our mandated is as was stated in *Karingo v R* [1982] KLR 213 as follows:

“The three appellants have now brought second appeals to this Court. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari s/o Karanja v R* [1950] 17 EACA 146).”
 19. We have reviewed the record of appeal and the submissions by counsel as well as the authorities cited. Three issues arise for our determination in this appeal: whether the appellant's identity was proved;



whether the prosecution's case was marred with contradictions fatal to the respondent's case; and, if the conviction is upheld, whether the appellant has made out a case for our interference with the sentence.

20. In determining this appeal, our first observation is that the first appellate court whose judgment we are being asked to review did not rely on the identification of the appellant in a parade by PW5. Rather, the Court relied on the evidence of PW1, PW2 as well as the linkage created by M-PESA transaction records produced by PW3 and the recovery of the stolen phone from PW5.

21. The first appellate court appreciated the due care that a court seized of a matter must accord evidence of visual identification.

In so holding, the court relied on *Joseph Muchangi Nyaga & Another v Republic* [2013] eKLR and *Anjononi v. Republic* [1980] KLR 59. On our part, we agree that the cited decisions correctly speak to the law as regard the manner in which evidence of visual identification should be treated. That law was as stated in *Cleophas Otieno Wamunga v Republic* [1989] eKLR as follows:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”

22. The appellant's case was, however, not about identification but recognition. On this, the applicable legal principle is as was expressed in *Anjononi v Republic* [supra] thus:

“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. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).”

23. From the evidence on record, there is no doubt that the appellant was known to PW1 and PW2 prior to the incident. As for PW1, it was clear that he relied on the moonlight to identify the appellant. We also observe that the PW1 encountered the appellant not once but twice on the material night. The evidence of PW1 was not challenged. As for PW2, he testified that he identified the appellant by voice. He had known the appellant from childhood and had, at some point, employed him. This evidence was not challenged in cross-examination. Upon careful consideration of the evidence of PW1 and PW2 on the appellant's identity, we arrive at the same conclusion with the two courts below that the appellant was properly recognized by the two witnesses.

24. The appellant challenged the evidence in respect to the identity of the stolen phone. On this, we concur with the finding of the first appellate court at paragraph 34 of its judgment that:

“PW1's identification of the phone was adequate: he identified the actual set. Ditto PW5. The fact that PW5 referred in one instance to Nokia 1200 handset or that PW1 did not tender receipts does not diminish the witnesses' evidence on identification. The set was in Court and was a Nokia 1280 and PW1, PW3 and PW5 positively identified [it], and at no point did the Appellant claim it to be his.”



- 25. The foregoing is a finding of fact which we must uphold and respect unless it is demonstrated that the finding is contrary to the evidence on record. We do not find any contradictory evidence on record. It was further submitted by counsel for the appellant that there were fundamental contradictions as to the identity of the stolen mobile phone. On our part, we find that the contradictions, if any, were immaterial and inconsequential bearing in mind that the stolen handset was produced at the trial.
- 26. Having cleared the air on the identity of the phone, we also note that the recovery of the phone linked the appellant to the robbery. The evidence on record is clear that PW5 bought the stolen phone from the appellant. In his evidence, he stated that he spent time negotiating with the appellant, a person he knew prior to transaction. Upon being linked to the stolen phone, it was incumbent upon the appellant to tender an explanation of how he came to be in possession of a recently stolen phone. In his defence, the appellant advanced what would amount to mere denial. This being the case, the learned Judge correctly presumed the appellant was the robber pursuant to the provisions of section 111 as read with section 119 of the *Evidence Act*.
- 27. Based on the foregoing, we find no error in the judgment of the learned Judge. We find that the appellant was properly identified and that the evidence of the identification parade was discarded by the learned Judge. In the circumstances, we find the appeal against conviction to be without merit and dismiss it.
- 28. Finally, we turn to the appellant’s call upon us to interrogate the death penalty meted upon him by the trial court and affirmed by the first appellate court. We have perused the record and confirm that the issue of sentence was never raised by the appellant before the first appellate court. That being the case, the issue does not fall for determination in this appeal. The appeal against sentence therefore fails.
- 29. The upshot is that the appellant’s appeal fails in its entirety and is dismissed.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY 2024

S. ole KANTAI

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

