



**Mbaabu & 2 others v Republic (Criminal Appeal 45 of 2017)
[2024] KECA 1292 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1292 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 45 OF 2017
W KARANJA, J MOHAMMED & LK KIMARU, JJA
SEPTEMBER 20, 2024**

BETWEEN

MOSES MBAABU 1ST APPELLANT

BERNARD MUNJURI 2ND APPELLANT

DAVID MITHIKA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against conviction and sentence from the judgment of the High Court of Kenya at Meru (R.P.V. Wendoh, J.) dated 1st February, 2017 in HCCR No. 55 of 2011)

JUDGMENT

1. Moses Mbaabu, Bernard Munjuri and David Mithika (the 1st, 2nd and 3rd appellants) were arraigned before the High Court in Meru and jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 29th May, 2011 at Kiguru Location, Igembe South District within Meru County they jointly murdered Jeremiah Kimathi Muindi (the deceased).
2. The appellants denied the charge leading to a trial in which the prosecution called six (6) witnesses in support of its case. Kaimba M'ambao (PW1) testified that the deceased was his nephew. He recalled that on 29th May, 2011 he received a call from his wife, Seberina Mukompara (PW4) who urged him to hurry back home as the deceased had been killed. It was his evidence that he went to the Assistant Chief who accompanied him to the scene where the body of the deceased had a cut on the neck. It was his evidence that he did not witness the murder. It was his further evidence that he knew all the three accused persons and identified Mithika (the 3rd appellant) as his nephew and Moses (the 1st appellant) who was married to his daughter.



3. Julius Muindi (PW2) was the father of the deceased. It was his testimony that he was informed of the death of the deceased by PW4. That he, PW1 and PW4 reported the death of the deceased to the police station. It was his evidence that the body of the deceased was lying on a bed in the deceased's house and the head was nearly chopped off. It was PW2's further evidence that the deceased had been employed by one Karimba to guard miraa. It was his further testimony that he knew the three appellants as he used to see them at a place called Thaicu.
4. Damaris Muthoni (PW3), testified that she was PW1's niece and a cousin to the deceased. It was her evidence that on the material night at about 3.00am she heard screams. That the screams were from the deceased's house which was about 15 meters from her house. That she heard someone scream out that "Timothy should not kill him" whereupon she went out of the house with a torch. That she flashed the torch and saw the three appellants. It was her evidence that the 1st appellant had a panga and he stated that he would finalize the work for Seberina Mukompara (PW4). It was her evidence that she knew all three appellants. That the 1st appellant had married into the family and had been given a piece of land to live on by PW4. It was her testimony that she had known the 2nd and 3rd appellants since childhood. It was her further testimony that the appellant often beat PW1 and PW4.
5. It was her testimony that she stood at the scene about 15 meters away and that with the torch that she had she was able to see the appellants well. It was her evidence that the torch batteries were new and the torch was therefore bright enough.
6. It was her further evidence that she felt scared and went back into her house. That when she woke up the next morning at about 5.00am the deceased's house was open. It was her testimony that she felt scared of entering into the house and she ran to call PW4, the owner of the house. It was her evidence that PW4 called her husband (PW1) and they all proceeded to the police station whereupon the police collected the body of the deceased and took it to the mortuary. It was her further testimony that that she saw the body of the deceased and observed that it had a cut on the right side of the neck. In cross examination PW3 testified that she used the torch as it was dark and that her torch had 3 batteries.
7. Seberina Mukompara (PW 4) testified that on the material day, she went to open her kiosk and found the door open. She saw the body of the deceased and noticed that the deceased had been cut on the right side of the neck. It was her evidence that there was a lot of blood in the house. She called her husband (PW1) and he went to report the incident at the police station. It was her testimony that PW3 informed her that the appellants, who she named, had murdered the deceased. It was PW4's further evidence that she knew all three appellants who lived in the same village. That the 1st appellant was living on her land and was cohabiting with PW1's daughter while the 2nd appellant was a neighbour who she had known since childhood. In cross-examination PW4 informed the court that she had heard the appellants threaten the deceased before the murder took place as they had been stealing items from her kiosk.
8. Dr. James Kisilu (PW5) a medical doctor based at Meru Level 5 Hospital produced the post-mortem report, which was conducted by Dr. Mutegi who was not available to testify. Dr Mutegi found that the deceased's neck was severed off but was held up on the left side by a small portion of skin and that the cervical spine was severed. Dr. Mutegi formed the opinion that the cause of death was manslaughter. It was Dr Kisilu's observation that the actual cause of death was cardiac arrest due to severe hemorrhage and bleeding because of the severed blood vessels.
9. PC Esau Khanani (PW 6) was the Investigating Officer. It was his evidence that he was assigned the case on the material day. That when he went to the scene, he found the deceased's body on a bed in a pool of blood with the neck nearly severed off. It was his further evidence that during the recording



- of statements PW3 informed him that she had seen the 3 appellants leave the deceased's house on the night of 28th May and that the appellants were arrested about three months later by the Assistant Chief and members of the public.
10. At the close of the prosecution's case, the learned Judge found that the appellants had a case to answer and placed them on their defence. The appellants gave sworn statements. Moses Mbaabu (DW1), the 1st appellant, denied committing the offence and stated that he was a farmer and that he had married PW1's daughter. That on the material day he had been hired to work at Kinguru village. Further, that at about 8.00am while outside the home of his father-in-law (PW1) he heard screams and proceeded to the scene where the screams were coming from. That he found PW4 at her shop and enquired about the screams. DW1 testified that PW4 informed him that the deceased who used to live in her shop had died. DW1 further testified that he was present when PW4 called her husband (PW1) and the Assistant Chief, Samwel Mwika. That upon the arrival of the police, he helped PW1 and the Assistant Chief load the body of the deceased into the police vehicle and they proceeded to the police station. It was his evidence that upon reaching the police station, PW1 urged him to give false evidence to the police which he declined to do. It was his evidence that he was arrested in September, 2011.
 11. Bernard Munjuri Mubea (DW2), the 2nd appellant, testified that before his arrest he was a farmer. He testified that on the material day he was at home the whole day and that he went to PW1's home to return a spray pump when he was informed that the deceased had been killed whereupon he proceeded to the scene. DW2 further testified that he and the deceased related well and that there was no dispute between them. It was his evidence that he was arrested in September 2011.
 12. David Mithika (DW3), the 3rd appellant, testified that before his arrest he was a farmer. It was his evidence that on the material day he was at home at 8.30 am and had planned to go to Church as it was a Sunday. That before proceeding to Church he passed by a shop for change when he was informed that somebody had died in PW1's home. He proceeded to the scene where he found PW4 and proceeded to view the body of the deceased. It was his evidence that he observed that the deceased's neck had been cut off and that he was not at the scene when the police arrived. It was his further evidence that he related well with the deceased and that he was arrested in October 2011. In cross-examination DW3 stated that he had known PW3 since childhood and that he related well with her.
 13. Samuel Gatheru Mwika (DW4) gave a sworn statement and testified that he was the Assistant Chief. He testified that he had known the 2nd appellant for about a period of one year as they lived in the same area. It was his further evidence that he knew the 1st and 3rd appellants since childhood as they all hailed from the same sub-location. It was his evidence that on the material day as he prepared to go to Church PW4 telephoned him and informed him that somebody had been killed in her house. It was his evidence that he proceeded to the scene and confirmed the death of the deceased who used to work in his location. It was his further evidence that he telephoned the Officer Commanding Station (OCS) who collected the body of the deceased. It was his further evidence that all three appellants disappeared from the area after the offence was committed until they were arrested.
 14. The High Court (R.P.V Wendoh, J.) heard the case, evaluated the evidence tendered and found the appellants guilty of murder, convicted and sentenced them to death.
 15. Aggrieved by the judgment and sentence of the High Court, the appellants preferred the instant appeal raising ten grounds of appeal and later through their counsel Ms. Nelima, they lodged a supplementary memorandum of appeal based on grounds: that the conviction was against the weight of evidence; and that the prosecution failed to prove all the ingredients of the offence of murder. Further, that the trial court erred in law and in fact: in convicting the appellants on the basis of the evidence of identification and recognition which was not favourable and or free from error given the circumstances under which



the offence occurred; by failing to carefully examine and caution itself before receiving the evidence of PW3, the single identifying witness; and in convicting the appellants based on evidence that was full of contradictions and inconsistencies. The final ground of appeal is that the sentence meted on the appellants was harsh and excessive under the circumstances and that the trial court failed to consider the appellants' mitigation.

Submissions by Counsel

16. During the hearing of the appeal, learned counsel Ms. Nelima represented the appellants while the respondent was represented by Ms. Kitoto, the learned Senior Principal Prosecution Counsel. Both parties had filed written submissions, which they orally highlighted.
17. Ms. Nelima submitted that the fact of the death of the deceased is not disputed but what is in dispute is the cause of death. Counsel submitted that the cause of death is normally proved by a postmortem report where one has been conducted, as in the instant case. Counsel emphasized that Dr. Mutegi who carried out the post mortem but who was not available to testify noted several injuries on the body of the deceased including that the neck was severed and that the only thing holding on to it was a portion of skin. Further, Dr Mutegi observed that the deceased's spinal cord was severed. Counsel submitted that the cause of death as opined by the doctor was inconsistent with his observations upon examination as the cause of death was stated as manslaughter which is inconsistent to the injuries observed by the doctor. It was submitted that manslaughter is what is used to define an unlawful killing and cannot be a cause of death.
18. It was further submitted that Dr. Kisilu (PW5) who testified on behalf of Dr. Mutegi stated that the cause of death was cardiac arrest as a result of massive bleeding caused by the severed vessels. Counsel submitted that the opinions of the two doctors as to the cause of death differ completely and as such the cause of death was not proved. Counsel contended that in the circumstances, the 1st appellate court erred in considering the postmortem report as conclusive proof of death.
19. On the question whether the unlawful killing of the deceased was as a result of the actions of the appellants, counsel submitted that the prosecution failed to prove that the appellants caused the death of the deceased. Counsel asserted that the evidence of the prosecution on this issue is that of a single identifying witness who claimed to have identified the appellants at night with the aid of a torch. Counsel further asserted that the circumstances of identification were clearly not favorable for proper identification of the appellants as the assailants. In counsel's opinion the court did not properly caution itself as required by the law before relying on that piece of evidence.
20. Counsel emphasized that PW3 was the only witness who claimed to have identified the appellants as the assailants. That it was PW3's testimony that she heard screams at about 3.00am and went out of her house with a torch to see what was happening. That the screams were coming from the deceased's house which is 15 meters from where she was. That she flashed her torch from that distance and saw the appellants and went back to her house and slept until 5.00am. and that she was able to see them using the torch because the batteries were new and bright enough. Reliance was placed on the case of *R v Turnbull* {1976}3 All ER 349 on the guidelines that the court ought to follow before relying on such evidence to convict.
21. Counsel further submitted that the trial court did not carefully examine PW3's evidence and failed to properly caution itself against relying on it. Counsel contended that the trial court only enquired into 2 issues, which were whether PW3 knew the appellants; and the nature of light used by PW3, which she testified, was a torch, which had new batteries.



22. Counsel further asserted that the trial court failed to make an inquiry regarding the strength and brightness of the torch used, its size, and the size of the batteries used. Counsel further emphasized that no description of the appellants was given to the police and on which part of the body PW3 shone her torch to enable her identify the appellants. Counsel further asserted that PW3 in her testimony did not give the names of the appellants to the Investigating Officer (PW6) and that she only gave the names of the assailants to PW4.
23. Counsel asserted that save for the evidence of the single identifying witness, there was no other piece of evidence to corroborate what PW3 testified. Counsel raised issue with PW3's evidence when she testified that she heard the 1st appellant say that he would finalize the work for PW4. Counsel further raised issue with the fact that PW3 testified that she heard one of the appellants say "Timothy should not kill him". Counsel stressed that none of the appellants went by the name Timothy which meant that somebody else was in the locus in quo and not necessarily the appellants. Counsel posed the question why it took about 3 months for the police to arrest the appellants if PW3 had informed the Investigating Officer who the assailants were?
24. In conclusion, counsel submitted that the appellant's conviction was unsafe as the only evidence relied upon to convict them was that of PW3, a single identifying witness. That the conviction was not free from error. Counsel urged this Court to allow the appeal and set the appellants at liberty.
25. In opposing the appeal, Ms. Kitoto asserted that the appellants were positively identified through recognition by PW3. Further, the body of the deceased was found on a bed in the deceased's house shortly after the appellants were seen by PW3 near the deceased's house. Counsel submitted that the appellants were placed at the scene by PW3 who was an eyewitness and who saw the appellants who were well known to her from childhood. PW3 testified that the 1st appellant was armed with a panga at the time the three appellants were at the deceased's house. Counsel acknowledged that the prosecution evidence did not reveal the actual person who caused the death of the deceased. Counsel conceded that no eye witness saw who among the three appellants caused the actual injury leading to the death of the deceased. Counsel submitted that the fact that the appellants went to attack the deceased at his home in the wee hours while armed with pangas shows that they all had a common intention as provided by Section 21 of the Penal Code. Counsel further submitted that in the circumstances, it is therefore irrelevant whether the appellants are the ones who committed the actual deed of murdering the deceased as they all had a common intention and executed the same.
26. As regards the evidence of a single identifying witness, counsel conceded that the prosecution relied on the evidence of a single identifying witness. Counsel stressed that the circumstances leading to the identification in this case were quite favourable as the appellants were well known to PW3 and they were about 15 meters away from where she stood. Counsel asserted that even though it was in wee hours of the morning, PW3 had a bright shining torch which she used and was able to identify the assailants.
27. Reliance was placed on this Court's decision in *Ogeto v Republic* [2004] KLR 19 and in *Wamunga v. Republic* [1989] KLR 424 where the Court stated that evidence of a single identifying witness can still prove a fact in a criminal trial thus leading to a conviction.
28. As regards the failure to recover the murder weapon from the appellants, counsel submitted that there is no requirement in law for a murder weapon to be produced in criminal cases as was stated in *Karani v Republic* [2010]1 KLR 73 and in *Ramadhan Kombe v Republic*, Mombasa C.A No.168 of 2002. Counsel submitted that the appellants were arrested several months after the offence was committed owing to their having fled from the area and remained at large for a couple of months.



29. On the question whether the appellants' defences were considered, counsel submitted that the appellants merely denied having been the perpetrators and that the submission alluded to the defence of alibi. Counsel stressed that the appellants did not state where they were at the time of the offence and in the circumstances, strictly speaking, no alibi was advanced by them. Counsel further emphasized that there was no evidence on record that there was any form of grudge between the appellants and the prosecution witnesses. Counsel submitted that trial court analyzed the appellants' defenses brought forth by the appellants and rightfully dismissed the same.
30. With regard to sentence, counsel submitted that the appellants were sentenced to suffer death as provided under Section 204 of the *Penal Code*. That guided by the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic, Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), this Court may review the sentence meted to the appellants as it deems fit based on the circumstances of the case.
31. Counsel concluded that the prosecution discharged its burden of adducing evidence beyond reasonable doubt and the evidence remained unchallenged. In the premises, counsel invited this Court to dismiss the appeal in totality for lack of merit.

Determination

32. We have considered the record of appeal, the rival oral and written submissions, the authorities cited and the law. This is a first appeal and we appreciate our role as a first appellate Court as was stated in *Reuben Ombura Muma & Another v. Republic* [2018] eKLR:
- “This being a first appeal, our mandate as an appellate Court is to analyze evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses.”
33. We discern the issues for determination to be:
- a. whether the prosecution proved its case beyond reasonable doubt;
 - b. whether the sentence imposed on the appellants was lawful in view of the determination in *Francis Karioko Muruatetu (supra)*.
34. It is trite that the evidentiary threshold in criminal matters is beyond a reasonable doubt. It is therefore the responsibility of the courts to ensure that the prosecution attains this threshold before a conviction is returned against an accused person. Thus, the prosecution must at all times prove the concurrence of mens rea and actus reus. This Court pronounced itself on this in the decision of *Joseph Kimani Njau v. Republic* [2014] eKLR as follows:
- “In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard.”
35. Counsel for the appellants challenged their conviction on the basis that PW3 in her testimony did not give the names of the appellants to the Investigating Officer (PW6), and that she only gave the names of the assailants to PW4.



36. The consequences of failure to describe or mention the name of the attacker in the prosecution case were succinctly set out by this Court in the case of *Simiyu & another versus Republic* [2005] 1KLR 192 at page 195 in the following terms:

“If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given. See Republic versus Kabogo S/O Wagunyu 23(1) KLR 50.

The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers’ identity.”

37. By parity of reasoning, we find that the failure by PW3 to give the appellants’ names to the Investigating Officer soon after the attack casts doubt on whether PW3 was sure of the identity of the appellants as the assailants who murdered the deceased.
38. The appellants were convicted based largely on the evidence of PW3 who was the single identifying witness. In *Roria v R* [1967] EA 583 this Court warned on the dangers of convicting on the evidence of a single identifying witness.
39. Further, in the case of *Abdallah Bin Wendo & Another V R* (1953) 20 EACA 168, the Court expressed the need for a court to warn itself of the dangers attendant to acting on the evidence of a single identifying witness; and the need for great circumspection when dealing with cases based wholly or mainly on identification evidence and in particular seeking other corroborative evidence in the following terms:

“Subject to certain well-known exemptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

40. In *Maitanyi V Rep* [1986] KLR 198 this Court stated as follows:-

“...In this case there is no other evidence, circumstantial or direct. The decision must turn on the need for testing with the greatest care the evidence of this single witness. Is that what the courts below really did? It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect are all



important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.”

41. Further, in *Wamunga v Republic* (*supra*) this Court while discussing the caution to be taken where the only evidence against an accused is of identification succinctly stated as follows:

“Evidence of visual identification in criminal cases can bring about miscarriage 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 mere identification 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.”

42. On the issue of identification by a single identifying witness, the trial court rendered itself as follows:

“In the instant case, PW3 told the court that she was woken up by screams at about 3.00 a.m. PW3 said she had a torch which uses 3 batteries, the batteries were new and she flashed it for where the screams emanated - where the deceased slept - PW3 and 4 and both confirmed that PW3 's house and the place where deceased lived was about 15 metres apart. The accused persons were not strangers to the PW3. PW3 was a niece of PW1, and was housed in that plot belonging to PW 1 just as the deceased was. PW3 even said that accused 1 had a panga and he spoke saying how they were completing the work. Apart from seeing the accused using the torch light she knew him by his voice. She had known the accused 1 who had married her cousin and lived at their home, she had known accused 2 and 3 since childhood. Soon after this incident, PW 3 was the person who reported to PW4 early morning of 29/5/2011 that the three accused murdered the deceased and then later to the police. The incident occurred on the night of 28-29th May 2011. PW6 the investigating officer confirmed that he visited the scene on 29/5/2011 and later recorded statements. He recorded PW3's statement on 30/5/2011 where she maintained that she saw the three accused persons at the deceased's home on the night he was murdered after hearing screams. Having sufficiently warned myself of the dangers of relying on the evidence of PW3 alone and having taken all the precautions I am satisfied that PW3 was able to identify the three accused from the light from the torch she had. She was close to them. She informed PW4 of having seen the three accused and the police. The accused admitted that there was no good reason as to why PW3 would have framed them. The fact that she was a niece to PW1 does not mean she would necessarily lie. Her testimony was unchallenged in cross- examination and I believe PW3 to be truthful. The identification of the accused was by way of recognition which is more reliable than identification of a stranger.”

43. The unassailable identification of an accused person is a critical aspect of any offence. It plays a critical role in the criminal justice process. Once eyewitness testimony is lawfully obtained, preserved and presented, and unerringly links the accused to the commission of the offence, it is likely to be the most significant prosecution evidence available.
44. Further, we are fully aware that there is no formula applicable when it comes to consideration of the credibility of a single identifying witness. The trial Court must weigh the evidence adduced, consider its merits and demerits and determine whether or not it is credible notwithstanding that there may be shortcomings, defects or contradictions in the evidence.
45. In *Hassan Juma Kanenyera and Others v Republic* [1992] TLR 100 CA, it was stated that it is a rule of practice, not of law, that corroboration is required of the evidence of a single identifying witness made



under un- favorable conditions. Further, that the rule does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth.

46. Our analysis of the appeal before us is that it is suffice to state that the appellants were convicted on the evidence of a single identifying witness, PW3. The time of the attack according to PW3 was about 3.00am, hence in the hours of darkness. PW3 however told the trial court that she was able to identify the appellants using a torch which was bright as it had new batteries.
47. From the evidence of PW3 she heard screams at about 3.00am and went out of her house and flashed her torch. It was her evidence that the screams were from the deceased's house, which was about 15 meters from her house. It was her further evidence that she heard one scream out 'Timothy should not kill him.' This Court in *Samuel Awiti Karani v Republic* [1985] eKLR states as follows regarding identification by voice:

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other case care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.”
48. It is also notable that in the instant case PW3 did not testify as to which of the appellants uttered those words or that she identified any of them by voice in addition to identification by recognition. It is further notable that none of the appellants went by the name 'Timothy' and as submitted by counsel for the appellants, someone else by that name may have been in the deceased's house at the time the offence of murder was committed.
49. PW3 further testified that she saw the three appellants who she recognized as the 1st appellant who had married PW1's daughter and lived in the homestead where the attack took place. The 2nd and 3rd appellants were well known to her as she had known them since childhood. It was her evidence that she saw the appellant holding a panga and that she felt scared and went back to her house and slept until 5.00am. It was her further evidence that in the morning she saw blood in the deceased's house and called PW4 and together with PW1 they went into the deceased's house. PW3 testified that she observed that the body of the deceased had cut on the right side of the neck.
50. The narration of the sequence of evidence given by PW3 causes us some uneasiness. It was her evidence that she heard someone screaming that Timothy should not kill him. It is notable that none of the appellants go by the name Timothy. As submitted by counsel for the appellants, there may have been another assailant or other assailants in the deceased's house at the time the offence of murder was committed.
51. It is also notable that PW3 who testified that she was scared when she heard the screams at about 3.00am. She further testified that when she went out it was dark and that the torch that she used to identify the appellants had new batteries. It is notable that the no enquiry was made regarding the strength and brightness of the torch, the size of the batteries or how long PW3 had the appellants under her observation.
52. Four important issues emerge from the evidence of PW3, the single identifying witness: the incident occurred at about 3.00am in the wee hours of the night; it was dark when she went out of her house when she heard screams; PW3 as the single identifying witness admitted to being scared when she heard screams; and that she failed to point out the assailants' identities in her first report to the police. We



are of the considered opinion that in the circumstances, these critical issues leave some doubt whether, relying on the evidence of the single identifying witness, the appellants' convictions were safe.

53. In the decision of *Roria v Republic (supra)* the predecessor of this

Court held as follows:

“A conviction resting entirely on identity invariably causes a degree of uneasiness...That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all circumstances it is safer to act on such identification.”

54. By parity of reasoning, in view of the doubts cast in the prosecution evidence, we are of the considered view that the ends of justice will be best served if the appellants are afforded the benefit of doubt.

55. In the circumstances, we quash the convictions, set aside the sentences imposed by the trial court and direct that the appellants be set at liberty forthwith unless they are otherwise lawfully held.

56. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

