



**Were v Republic (Criminal Appeal 254 of 2019)
[2024] KECA 1266 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1266 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 254 OF 2019
HM OKWENGU, JM MATIVO & JM NGUGI, JJA
SEPTEMBER 20, 2024**

BETWEEN

ISMAEL ABDALLAH WERE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (D. Majanja, J.) dated on 13th October, 2019 in High Court Criminal Appeal No. 262 of 2012)

JUDGMENT

1. Ismael Abdallah Were (the appellant) was charged with the with offence of robbery with violence contrary to section 296 (2) the *Penal Code* jointly with Malik Okunda Abdallah and Kassim Shiundu Murunga in Mumias SPMC Criminal Case No. 339 of 2011. It was alleged that on 9th June 2011 at about 8.00pm at Shikonezi Village, Kholera Sub-location, Matungu District, Kakamega County, armed with dangerous weapons, namely firearm, panga and rungus, they jointly robbed, Abdallah Kupe Were cash Kshs.37, 800 and one mobile phone Max C 1600 valued at Kshs.5,500, all valued at Kshs.43,300, and at the time of the alleged robbery, they used actual violence on the said Abdallah Kupe Were by injuring him.
2. The appellant faced a separate additional count of resisting arrest contrary to section 254 of the *Penal Code*. It was alleged that on 7th July 2011, at about 12.00 midnight at Makunda Village, Kholera Sub-location in Matungu District within Kakamega County, he unlawfully resisted arrest for the offence of robbery, executed by A.P. Sergeant Peter Ekadeli, and armed with a panga, confronted and threatened to cut the said officer who was executing his lawful duties.
3. The appellant and his co-accused all pleaded not guilty to the charges and the case proceeded for trial before the learned magistrate. In a judgment delivered on 24th October 2012, the learned magistrate found the 3 accused persons guilty of the offence of robbery with violence and sentenced them to suffer



- death. The appellant was separately convicted for the offence of resisting arrest. However, the learned magistrate did not pronounce a sentence in respect of the said count. Instead, he ordered the sentence be held abeyance in light of the death penalty.
4. The three accused persons appealed to the High Court at Kakamega against both conviction and sentence being Kakamega High Court Criminal Appeal Nos. 262 of 2012 consolidated with 261 of 2012 and 263 of 2012. The 1st, 2nd and 3rd appellants in the consolidated appeal were Malik Okunda Abdallah, Ismael Abdallah Were and Kassim Shiundu Murunga respectively. However, 3rd appellant Kassim Shiundu Murunga died during the pendency of the appeals. The thrust of their appeals before the High Court was that their identification was doubtful; that the prosecution evidence was full of inconsistencies; and that crucial witness were not called to testify.
 5. In the impugned judgment dated 13th September 2013, Majanja, J. allowed the appeal of Malik Okunda and set him free. However, the appellant's appeal was dismissed. The learned judge noted the omission by the trial magistrate to prescribe a sentence upon the appellant upon finding him guilty of the offence of resisting arrest and sentenced him to serve 3 three years in prison for the said offence. However, it ordered that the said sentence be held in abeyance in view of the death penalty.
 6. Aggrieved by the above verdict, the appellant appealed to this Court contending that:- (a) the sentence is excessive and unconstitutional. (b) he was not provided with an advocate in breach of his right to a fair hearing. (c) prior to his arraignment in court he was detained longer than the law permits. (d) his defense of alibi was never rebutted. (e) the offence of robbery with violence was not sufficiently proved. (f) the law governing identification parade was not followed.
 7. When the matter came up for virtual hearing before us on 13th March 2024, learned counsel Mr. Menezes appeared for the appellant while Ms. Busienei Senior Prosecuting Counsel appeared for the respondent.
 8. Mr. Menezes relied on his written submissions dated 5th March 2024 which he briefly orally highlighted. Briefly, Mr. Menezes argued that the appellant's identification was not free from error. Counsel submitted that the matter involved a polygamous family with unending squabbles, blame games and treacheries where PW1, PW2 and PW3 all came from one house while the appellant was from the house of a divorced wife. He maintained that the witnesses' statements were recorded 10 days after the robbery, thus providing an opportunity for manipulation against the appellant who was clearly unwanted. Counsel faulted the two courts below for failing to ascertain the authenticity of the prosecution witnesses' statements and the correctness of the identification evidence. He relied on *Wamunga v Republic* [1989] KLR 424 where this Court underscored the need for caution while admitting visual identification.
 9. Mr. Menezes contended that that the appellant's alibi defence was never considered by the two courts below. He maintained that the appellant testified that he was in his house when he heard noise coming from his father's house, and he went out to find out what was happening. He argued that it is on record that PW1's wife tied the appellant's hand then PW1's son took the appellant to Mayoni Administrative Police Post. Counsel maintained that some women who were outside the house during the robbery were never called as witnesses to testify whether the appellant was present during the robbery and what role he played. He cited *Bukenya & Another v Uganda* [1972] E.A. 549 in support of the holding that the prosecution must avail all witnesses necessary to establish the truth even though their evidence may be adverse to its case.
 10. Regarding the sentence, Mr. Menezes submitted that the Supreme Court in Petition No. 15 of 2015; *Francis Karioko Muruatetu and Others v Republic*, declared the mandatory nature of the death sentence unconstitutional. Consequently, the appellant herein was denied the right to mitigate as



- provided by sections 323, 329, 216 and 215 of the *Criminal Procedure Code*, which amounts to discrimination contrary to Article 27 of the *Constitution*. He cited *William Okungu Kittiny v Republic* [2018] eKLR where this Court confirmed that resentencing can also be applied in cases where the law provides for a mandatory sentence.
11. Regarding the appellant's pre-trial detention, counsel submitted that the police took 7 days to present the appellant before court contrary to Article 49 (1) (f) of the *Constitution*, and that the appellant was held in custody without being released on bail contrary to Article 49 (2) of the *Constitution*. Counsel cited *Betty Jemutai Kimeiywa v Republic* [2018] eKLR in support of the proposition that the requirement that an arrested person be arraigned in court within 24 hours from the time of arrest is to obviate extra-judicial pre-trial detentions and to uphold the principle that an accused person remains innocent until proven guilty.
 12. Counsel submitted that the appellant's right to a fair hearing was violated, because he was never provided with legal representation by the state in accordance with Article 50 (2) (h) of the *Constitution* despite facing a capital offence, nor was he informed of his right to have an advocate assigned to him. Therefore, the trial court abdicated its duty under section 43 of the *Legal Aid Act* by failing to promptly inform him of his right to legal representation. Counsel cited *Mark Wanjala Wanyama v Republic* [2008] eKLR where this Court held that unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of the prosecution evidence.
 13. The respondent's counsel Ms. Busienei entirely relied on her written submissions dated 7th March 2024. She maintained that the three ingredients of robbery with violence were proved. Regarding the appellant's identification, he submitted that PW1 testified that on the night of 9th June 2011, his son, PW3 knocked and asked him to open the door. Upon opening, he saw six men with torches, among them, Kassim Shiundu (deceased), and the appellant standing behind him. It was his evidence that when the attackers entered the house, one person stood at the door armed with a firearm, that the appellant demanded money from him, and he gave him Kshs.400, which angered the person who was holding a firearm, forcing PW1 to give Kshs.3,000 and his cell phone. The respondent's counsel also submitted that PW1 saw the appellant holding a panga, with which he attempted to cut PW1's head, and PW1 tried to block it with his hand, and PW1's wrist was cut off prompting him to scream causing the assailants to flee. Subsequently PW1's arm was amputated.
 14. Counsel submitted that PW1's evidence was corroborated by PW2 who was in the house during the robbery, and by PW3 who led the appellant to PW1's house. Consequently, the appellant was clearly recognized and placed at the centre of the robbery, and his defence that he entered into PW1's house in response to the alarm raised by PW1 was negated by the prosecution evidence.
 15. Regarding the sentence, Ms. Busienei maintained that the death penalty is lawful and applicable as a discretionary maximum punishment as per the directions in *Muruetetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions). Counsel argued that the trial court heard the appellant's mitigation and it was convinced that the death penalty was the most appropriate in the circumstances. Lastly, the respondent urged this court not to overturn the concurrent findings of the two lower courts, because the charges were proved beyond reasonable doubt, and urged this Court to dismiss this appeal.
 16. This being a second appeal, this Court's jurisdiction is limited to consideration of matters of law only, as stipulated under Section 361 of the *Criminal Procedure Code*. A second appeal must be confined to points of law, and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless based on no evidence. The test to be applied is whether there was any evidence on



which the trial court could find as it did. (See *Reuben Karari S/o Karanja v R.* [1956] 1 E.A.C.A. 146, *Chemogong v R* [1984] KLR 611 and *Ogeto v R.* [2004] KLR 14).

17. As to what constitutes “matters of law” in relation to this court’s jurisdiction in a second appeal, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 Others* [2014] eKLR characterized the three elements of the phrase “matters of law” as follows:

SUBPARA a.

“the technical element: involving the interpretation of a constitutional or statutory provision;

- b. the practical element: involving the application of the *Constitution* and the law to a set of facts or evidence on record; and
- c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.”

18. The appellant has invited us to determine the following issues:

- (a) whether he was positively identified;
- (b) whether the offence of robbery was proved;
- (c) whether his alibi defence was considered;
- (d) whether his right to a fair trial was violated; (d) whether he was subjected to unlawful pretrial detention and (e) whether the death sentence meted upon him was unconstitutional;

19. The identification of a suspect in a criminal offence is always a crucial inquiry and whenever it arises, the trial court has to satisfy itself that the circumstances were favourable and identification was free from any error, before convicting. The evidence must be such that threshold set by the law and decided case law must be met. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. Further, the accuracy of an identifying witness’s testimony also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before. This Court, in *Paul Etole & Another v Republic* [2001] eKLR, underscored the need for caution while receiving all forms of identification evidence. It stated: -

“identification evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.” [Emphasis supplied].



20. The evidence against the appellant was that of recognition. Lord Widgery C. J. in *R v Turnbull* (1956) 3 All ER 549 at 552 stated the following about recognition evidence: -

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

21. Concerning the probative value of recognition evidence, Madan, J.A in *Anjononi and Others v The Republic* [1980] KLR stated as follows:-

“...This, however, was 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. Mr. Abdalla Kupe Were, PW1 is the appellant’s biological father. It requires much more to suggest that he could not recognize his own son. His evidence was that he saw the appellant as he opened the door for PW3, Khalid Abdalla Kupe. He also testified that the appellant demanded money from him during the robbery. It was also PW1’s evidence that the appellant aimed a panga at his head and as he blocked it, his wrist was cut off. PW1’s evidence was corroborated by PW2 whose evidence was that she saw the appellant in the corridor of PW1’s bedroom when one of the assailants lit his torch and that the appellant was wearing a police jacket. PW3 testified that it was the appellant who found him in the kitchen and led him to PW1’s house and asked him to request PW1 to open the door. All these witnesses are very close family members who knew the appellant very well.

23. The appellant’s counsel suggested that there existed sibling or a family feud between the witnesses and the appellant who was from a divorced mother. We find no basis to suggest the prosecution evidence was fabricated to implicate the appellant on the grounds suggested by the appellant. There is nothing to suggest that the identification evidence was not positive. We are satisfied that the learned Judge suitably re-evaluated the entire evidence and came to his own independent conclusion that the appellant was well- known to PW1, PW2 and PW3, and therefore he was positively identified.

24. The other critical issue is whether the offence of robbery with violence was proved to the required standard. Section 29 6(2) of the *Penal Code* as follows:

“ 296. Punishment of robbery (1)

.....

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

25. The ingredients of this offence were aptly stated by this Court (Cockar, C.J., Akiwumi & Shah, JJ.A.) in the case of *Jobana Ndungu v Republic* [1996] eKLR as follows:

“In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with



Section 295 of the PC. The essential ingredient of robbery under Section 295 is ‘use of or threat to use’ actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore - described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection:

- i. If the offender is armed with any dangerous or offensive weapon or instrument;
or
- ii. If he is in company with one or more other person or persons; or
- iii. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

26. Similarly, this Court in *Dima Denge & Others v Republic* [2013] eKLR, stated as follows:

“..the elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

27. Earlier in this judgment highlighted the prosecution evidence showing that the offenders were armed with dangerous weapons, that they used actual violence on the complainant, the complainant was injured, and that they robbed him. Therefore, we are satisfied that the elements of the offence were proved.

28. The other issue urged by the appellant is that his alibi defence was not considered. This Court in *Atbuman Salim Atbuman v Republic* [2016] eKLR stated:-

“The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in *R v Sukha Singh S/o Wazir Singh & Others* (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”

29. We note that the appellant’s alibi defence was raised at the time of the defence hearing and not at the beginning of the trial. In any event, the prosecution evidence placing the appellant at the scene was cogent and credible. The appellant’s father, PW1 not only placed the appellant at the scene of crime, but he also identified him. The appellant was also identified by PW2 and PW3, his close family members. We are persuaded that there was compelling evidence placing the appellant at the scene. In the circumstances, the appellant’s alibi that he only went to PW 1’s house after the alarm was raised and the robbers had left was properly rejected.

30. The other grounds urged by the appellant are:-



- (a) the death penalty is unconstitutional,
- (b) his right to a fair trial was violated,
- c. he was not informed of his right to legal representation, and,
- c. he was subjected to a pre-trial detention in violation of the Constitution. We have carefully considered the entire record and the appellant’s petition of Appeal dated 29th October 2012 filed before the High Court. The appellant never raised any of the above issues before the trial court or the High Court. Therefore, the lower court and the first appellate court did not have the benefit of applying their minds to the said grounds. This Court in Alfayo Gombe Okello v Republic [2010] eKLR stated:-

“...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.”

- 31. The reason this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the appellant’s grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lower courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof.
- 32. In any event, regarding the constitutionality of the death sentence raised for the first time before this Court, the Supreme Court recently affirmed the lawfulness of death sentences in capital robbery cases in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) when it stated:-
 - 57 “In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the Sexual Offences Act, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...
 - (62) “...we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.”
- 33. Flowing from our conclusions on the issues determined herein above, the inevitable conclusion is that the appellant has not established any grounds upon which we can interfere with his conviction and sentence. Accordingly, this appeal is without merit. We hereby dismiss it and affirm the appellant’s conviction and sentence.

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

HANNAH OKWENGU



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JUDGE OF APPEAL
J. MATIVO

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JUDGE OF APPEAL
JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

