



REPUBLIC OF KENYA



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**Kimani v Republic (Criminal Appeal 79 of 2016)
[2023] KECA 324 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 324 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 79 OF 2016
W KARANJA, J MOHAMMED & F TUIYOT, JJA
MARCH 17, 2023**

BETWEEN

ANN WAIRIMU KIMANI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Nyeri,
(Mativo, J.) dated 13th September, 2016 in HCCRA NO. 88 OF 2012)*

JUDGMENT

1. The appellant, Ann Wairimu Kimani was charged at the Chief Magistrate's Court at Nyeri with the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#).
2. The particulars of the offence were that on 21st December, 2010 at New Golden Lodge in Nyeri County Central Province, jointly with others not before court while armed with a dangerous weapon namely, a knife, robbed Lucy Wanjiru Muguku a Nokia mobile phone, one Samsung phone 1110 and cash Kshs. 25,880 all valued at Kshs. 43,748 and immediately before that robbery wounded the said Lucy Wanjiru Muguku.
3. The prosecution called six (6) witnesses in support of its case. At the conclusion of the trial, the appellant was found guilty of the offence of robbery with violence and convicted accordingly and was subsequently sentenced to death.
4. Aggrieved, the appellant appealed against the conviction and sentence before the High Court at Nyeri (Mativo, J. - as he then was). Her first appeal to the High Court was unsuccessful. Undeterred, the appellant filed this second appeal against conviction and sentence.
5. The jurisdiction of this Court on a second appeal is well settled.



In *Karani v Republic* [2010] 1 KLR 73, this Court expressed itself as follows: -

“This is a second appeal. 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.”

6. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-examined by the High Court in reaching the impugned judgment.
7. Lucy Wanjiru Muguku (PW1) was the single identifying witness. It was her evidence that she was the receptionist at the New Golden Lodge on 20th December, 2010 when at about 8.00pm a male customer paid for a room and enquired whether his brother could use the room in his place later in the day. PW1 responded in the affirmative with the condition that a receipt was produced as evidence of payment.
8. It was PW1’s further testimony that at around 3.00am on 21st December, 2010 a man checked into the lodge and produced the receipt that she had earlier issued. The man was accompanied by the appellant who was wearing a cream yellow jacket and black trouser. PW1 showed the two to their room whereupon the two pushed her into the room. The man produced a knife from his coat and aimed at cutting her throat. He stabbed her on her left hand as the appellant held her shoulders from behind and warned her against screaming or making noise. The appellant assured her that they would not kill her if she told them where the money was kept.
9. PW1 further testified that the appellant and her companion put her on the bed and the appellant covered PW1’s face with her jacket. The appellant ordered PW1 to drink a liquid from a water bottle that she was holding and threatened her with death if she declined to drink from it. It was PW1’s testimony that she drank $\frac{3}{4}$ of the liquid which had a bitter taste.
10. PW1 further testified that she informed the appellant and her companion that the money was at the reception whereupon the appellant took the key from PW1 and gave them to her companion who made a call and another man entered the room. Subsequently, the two men left the room and left the appellant with PW1. The appellant continued to force PW1 to finish drinking the liquid in the water bottle. The two men returned to the room, left with the appellant and locked PW1 in the room. It was PW1’s testimony that before the assailants left, the appellant covered her with a towel.
11. It was PW1’s evidence that she started feeling dizzy but managed to bang the door which attracted her colleague’s attention. The colleague, one Simon opened the door and upon reaching the reception, PW1 found all the lights off and all the money and three phones missing. The stolen money amounted to Kshs 28,000.
12. PW1 further testified that she lost consciousness and regained it in the hospital. She had a cut wound on her left hand. Subsequently, she and Simon went to the police station to report the incident where she saw the appellant and identified her at the police station. PW1’s evidence was that she was able to identify the appellant as there was light in the hotel room where they spent about 20 minutes together as the appellant held the water bottle for her to drink.
13. In cross-examination, PW1 testified that before the robbery incident she had not seen the appellant. She reiterated that she identified the appellant at the police station and that the appellant was wearing



- the same clothes that she had worn at the time the offence was committed including the jacket with she clearly identified.
14. Erastus Kinyali Wachira (PW2) was a taxi driver who testified that on 21st December, 2010 at around 4.30am, a lady customer requested for taxi services to Impala Hotel. On arrival at Impala Hotel, the lady requested to be taken to Karatina. It was PW2's further testimony that on their way to Karatina, they were followed and stopped by a boda boda rider (motorbike rider) and requested to turn back to Spinners Club as his lady customer had been involved in a robbery. On their way back, the lady customer was ordered to disembark from the taxi by police officers.
 15. Dr. James Waweru (PW3) a doctor at Nyeri Hospital testified that his colleague Dr. Muturi Wandar had filled the P3 form in respect of PW1. That Dr. Muturi Wandar was on study leave and he was familiar with her handwriting and signature as he had worked with her for about one year. PW3 produced the P3 form under Section 77 of the *Evidence Act*. PW3 further testified that PW1 had a cut wound on the left hand and that the injury was classified as harm. PW1 was treated and discharged.
 16. Cpl Joseph Toroitich (PW4), testified that on 21st December, 2010 at about 5.00 am while on duty he and other police officers came across about 6 motor cycles with their hazard lights on. Upon enquiry, they were informed that a lady had stolen money from Spinners Club. The motor cycle riders pointed to the suspect whereupon PW4 arrested her. It was his further testimony that they proceeded to Spinners Club where they found the Officer Commanding Station (OCS) and the duty officer and a big crowd. PW4 testified that he was instructed to take the lady suspect to the police station and that they did not recover any money from her.
 17. Jack Irungu Gichuki (PW5) was a boda boda rider. It was his testimony that on 21st December, 2010 at 4.30 am, he was on duty at Spinners Bar when a lady emerged from the bar running and screaming that she had been robbed. The lady requested him to take her to Nyeri Police Station which he obliged. It was his testimony that she was in the police station for between 10 and 20 minutes when she walked out and informed him that she had not been assisted. She requested him to take her to Impala Bar and thereafter to a place where she could get a taxi. She entered into a taxi and drove off towards Impala Bar.
 18. It was his further testimony that one Musayuni, a tea seller, requested him to contact the lady passenger as she was alleged to have taken part in a robbery. He rode towards Impala Bar and alerted other boda boda cyclists to pursue the taxi carrying the lady. It was his testimony that they caught up with the taxi at Total Petrol Station where highway police arrived and the lady passenger was arrested. It was his testimony that he identified the appellant as the lady he had carried on his motor cycle and who he had handed over to the taxi driver. It was his further testimony that he had carried many female passengers. He testified that "In my view, had she been the thief, she would not have gone to the police station, from that date, I am only seeing her today. I am not 100 per cent (*sic*) it is her."
 19. Cpl Magasani Maro Wiyo (PW6), was the Investigating Officer in this case. It was his testimony that on 21st December, 2010, the appellant had been arrested in respect of a robbery with violence report which had been booked in the Occurrence Book (OB) at Nyeri Police Station. It was his testimony that he recorded statements from witnesses among them the complainant. Further, that he was shown Room 13 of New Golden Lodge which had been booked on the material night by one Martin Warugongo, the holder of Identity Card No. 27283960.
 20. The appellant was put on her defence and in her unsworn evidence, she stated that prior to her arrest she was in the business of buying second hand clothes from Gikomba Market for resale at Karatina Market and at her shop in Nyeri Town. It was her evidence that on the material day, she woke up at 4 am to prepare to go to Nairobi and called one Ndung'u, a hand cart pusher to help her carry 3 sacks of clothes. Further, that Ndung'u disappeared with her clothes whereupon she proceeded to a bus stop



where she asked a boda boda rider to take her to the police station to report the theft of her clothes. She stated that she stayed at the police station for about 30 minutes where the police informed her that her matter could be handled by the Chief. She then hailed a taxi to Karatina but on the way there she was intercepted and taken to the police station and interrogated about a robbery incident.

21. The High Court was satisfied that the appellant's conviction and sentence were well founded and dismissed the first appeal as earlier stated. Undeterred, the appellant filed the instant appeal on the grounds that: the learned Judge erred in upholding her conviction when the circumstances for identification were difficult; that the process of identification was not proper as the police exposed her to witnesses in violation of the police standing orders; that the prosecution case was not proved to the required standard as she was not found to be in possession of any incriminating weapon or stolen items; that the prosecution failed to properly analyze the evidence; that the charge against her was not properly proved; and that her defence was not considered.
22. The appeal was heard by way of written submissions with oral highlighting. Learned counsel for the appellant, Mrs. Julie Matole submitted that the learned Judge erred in law in relying on the evidence of a single identifying witness. That the learned Judge should have warned himself of the danger of relying on the evidence of a single identifying witness. Further, that the circumstances surrounding the offence were difficult and that it was PW1's evidence that the assailant had covered PW1's face using a jacket and thereafter a towel and that throughout the period PW1's face remained covered. Further, that PW1 did not indicate in her evidence how far she was from the assailant when she was allegedly forced to drink the bitter liquid. Further, that no witness placed the appellant at the scene of crime. Counsel asserted that the prosecution did not prove the offence against the appellant beyond all reasonable doubt and that the evidence adduced by the prosecution was marred with contradictions. Further, that the name of the man who booked the room at Golden Lodge was not indicated by PW1 yet PW6, the Investigating Officer gave the full name and identity card number of the man who booked the room which was peculiar as there was no evidence where PW6 had obtained this information.
23. Counsel emphasized that it was the evidence of PW1 that on the material day, four (4) phones and Kshs 28,000 were stolen. Three of the phones belonged to customers and one Samsung phone belonged to her. Counsel asserted that on the other hand, the charge sheet indicates that 3 phones and Kshs 25,850 were stolen and that this discrepancy has not been explained. Counsel decried that the charge sheet was never amended to rectify the errors and as such the appellant was convicted on the basis of a defective charge sheet and is entitled to an acquittal. Further, that none of the alleged customers whose phones were allegedly stolen made a report or adduced any evidence of ownership of the phones.
24. Counsel further submitted that there was a further contradiction as the charge sheet refers to a theft at Golden Lodge and not Spinners Bar yet PW2 handed the appellant over to the police as he was informed by PW5 that she was responsible for a robbery at Spinners Bar. Counsel urged us to allow the appeal.
25. Learned counsel, Ms. Maina, the Principal Prosecution Counsel opposed the appeal.
26. We discern the following issues for determination:
 - a. whether the 1st appellate court properly directed itself and properly considered the evidence of identification;
 - b. whether the 1st appellate court properly reconsidered and reevaluated the evidence which was adduced before the trial court, and if so, whether the evidence adduced is sufficient to sustain the appellant's conviction; and



- c. whether the 1st appellate court erred in failing to consider that the prosecution case was marred by contradictions and inconsistencies.
27. On the issue of identification, counsel for the appellant assailed the 1st appellate court for failing to test the evidence of a single identifying witness. Counsel submitted that it was PW1's testimony that the assailant's face was covered with heavy clothing during the 20 minutes that she spoke to PW1 who could therefore not have been able to identify the assailant and there was need for an identification parade.
28. On the other hand, counsel for the respondent maintained that PW1 was with the appellant in a room with sufficient lighting for about 20 minutes and was therefore able to identify the appellant at the police station a few hours later as she was wearing the same clothes that she had worn during the robbery. The 1st appellate court found PW1's testimony to be positive and reliable.
29. The appellant was convicted on the evidence of PW1 who was the single identifying witness. It is notable that PW2 and PW5 did not identify the appellant or attend an identification parade.
30. From the record, PW1 was therefore the only substantive witness. In *Roria v R* [1967] EA 583 the Court warned on the dangers of convicting on the evidence of a single identifying witness and stated that:
- “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.”
31. The case of *Abdallah Bin Wendo & Another v R* 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 as follows:
- “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 the evidence, whether it was 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 error.”
32. From the impugned judgment of the High Court, it is clear that the 1st appellate court properly directed itself on its duty by relying on *Wamunga Vs. R* [1989] KLR 424 which provides 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 one or more than one identification of the accused which he alleges to be mistaken, the court must itself of the special need for caution before convicting the defendant in reliance on the correctness of identification.”



33. The learned Judge of the first appellate court rendered himself as follows:

“The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution... She spent about 20 minutes with the assailants and particularly the lady who remained with her. There is nothing to suggest that her mental, physical, and emotional state before, during, and after the observation was such that she could not remember the assailants. There is nothing to show that her view or observation of the assailants was obstructed in any manner or to the extent that her view was substantially or wholly obstructed... I find that the identification was reliable, positive and free from error.”

34. Further,

“I am fully aware that there is no formula to apply when it comes to consideration of the credibility of a single witness. The trial Court must weigh the evidence, consider its merits and demerits and having done so, decide whether or not it is trustworthy despite the fact that there are shortcomings and/or defects or contradictions in the testimony. 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 witness of identification of the accused made under un favorable conditions; but 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. I have reviewed the conditions prevailing at the time of the alleged offence and I find that the conditions cannot be said to have been un favorable. In fact as stated above, the conditions were favorable for the witness to identify the assailant.

Thus, even if the trial court is convinced beyond reasonable doubt that a crime was committed by someone, it cannot convict the accused of that crime unless it is also convinced beyond reasonable doubt that he/she is the person who committed that crime. See *People V Knight* 87 N.Y. 2d 873 [1995].

It is my finding that from the evidence adduced right from PW1 to the rest of the witness; a strong chain has been established showing that the appellant participated in the robbery. I also find that the prosecution evidence was not shaken on cross examination.”

35. With respect, despite the correct appreciation of the law, the learned Judge did not properly test the evidence of PW1 at the time of the incident. PW1 testified that she was able to identify the appellant yet it was her testimony that during the 20 minutes they were together in the hotel room, her face was covered by the appellant’s jacket and subsequently by a towel. The possibility of PW1 not having been completely sure of the identity of her assailants was not ruled out.

36. This was evidence of a witness in difficult circumstances as PW1 testified that she was pushed into a room and threatened by a knife wielding assailant who was accompanied by a woman who was forcing her to drink a bitter liquid. The incident took place at night in circumstances that were stressful, the possibility of a mistaken albeit honest identification cannot be ruled out. See *Maitanyi V R* [1986] KLR 198.

37. It is notable that PW1 testified that she identified the appellant at the police station as she was wearing the same clothes that she had allegedly worn during the robbery. PW1 in cross-examination testified that the appellant was wearing a cream yellow jacket and black trousers and that she identified the



appellant at the police station as she was wearing the same clothes she had worn during the robbery. PW2 in cross examination testified that the lady passenger who he carried and who was arrested by police officers wore jeans and a pullover, with many colours including ‘reddish’.

38. It is notable that no identification parade was carried out.
39. In *John Mwangi Kamau V R* [2014] eKLR, this Court stressed the importance of conducting identification parades in the following terms:

“15. Identification parades are meant to test the correctness of a witness’s identification of a suspect. See this Court’s decision in *John Kamau Wamatu V. Republic*, Criminal Appeal No. 68 & 69 of 2008.”

40. On the contradictions and inconsistencies, PW1 testified that she was a receptionist at New Golden Lodge. From the evidence of PW2, PW4 and PW5, all refer to the appellant being at Spinners Bar. PW2 testified that he was on duty when the appellant was dropped by a motor cycle and asked him to drop her at Impala Hotel and thereafter to Karatina. He further testified that they were intercepted and directed to drive back to Spinners Bar. PW4, the arresting officer testified that he was informed by boda boda riders that the appellant had been involved in a robbery at Spinners Bar on the basis of which he arrested her. PW5 testified that the appellant came out of Spinners Bar and that she informed him that she had been robbed. She requested him to take her to the police station to report the robbery. It is notable that the charge sheet indicates that the robbery took place at New Golden Lodge. The prosecution did not adduce any evidence to show a nexus between Spinners Bar and New Golden Lodge. Further, PW2 and PW5 did not identify the appellant and testified that they ferried a woman passenger to and from Spinners Bar respectively. We find that in the circumstances, the contradictions and inconsistencies, taken in conjunction with the failure of the investigators to test the credibility of the eye witness evidence of PW1 in an identification parade, were material and went to the root of the matter and should have been resolved in favour of the appellant.
41. Consequently, the appeal against conviction must succeed. In view of our finding on the issue of conviction, the sentence meted out by the trial court and affirmed by the 1st appellate court cannot stand.
42. Accordingly, we allow the appeal, against both the conviction and sentence, quash the appellant’s conviction and set aside the death sentence. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF MARCH, 2023

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

