



REPUBLIC OF KENYA



**KENYA LAW**  
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**Matinde v Republic (Criminal Appeal 126 of 2017)  
[2023] KECA 302 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 302 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 126 OF 2017  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
MARCH 17, 2023**

**BETWEEN**

**JOSEPH CHACHA MATINDE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Kisii  
(Sitati, Muriithi JJ.) dated 9th May, 2013 in HCCRA NO. 37 of 2011)*

**JUDGMENT**

1. The appellant, Joseph Chacha Matinde, was arraigned before the Senior Resident Magistrate’s Court at Kehancha on February 14, 2011 and charged with robbery with violence contrary to 296(2) of the *Penal Code*. The particulars of the offence were that on the night of 10<sup>th</sup> and February 11, 2011 at Nyamararegere village, Getong’anya sub-location in Kuria West District within Nyanza Province (as it was formerly known), jointly with others not before the court, while armed with an offensive weapon namely a firearm, he robbed, one Mark Rioba Marengo of two head of cattle valued at Kshs 40,000 and at or immediately before or immediately after the time of such robbery shot dead the said Mark Rioba Merengo.
2. The prosecution called 6 witnesses in support of its case. Esther Magaigwa, PW1, the deceased’s widow testified that on the fateful night, between 11pm and 12am, while they were asleep, their dog started barking. The deceased, armed with a torch and a panga, peered through the front door to assess the situation, all the while PW1 was still in bed. She described their house as modest consisting of two rooms, the sitting room and their bedroom without a connecting door. Suddenly, the deceased screamed and three gunshots rent in the air. Her husband fell into the house and said “I am dead”. She started screaming.



3. Soon after, a man, who was holding a gun, walked through the door and said to her “Go to sleep, I have had my justice”. She immediately recognized the voice as the appellant’s, whom she knew very well as he had once been her son-in-law. She also recognized the kitenge shirt he was wearing which had yellow and green flowers. PW1 stated that he had worn it on at least three occasions when he visited them together with his former wife, her daughter. The shirt was produced as an exhibit.
4. Additionally, the light emanating from her husband’s torch which had fallen to the ground together with the torch the appellant was holding provided sufficient light for PW1 to confirm the identity of the appellant. She, however, was unable to identify his companion. They both left her house, stole the cattle and disappeared into the night. PW1 then raised an alarm and neighbours came to her aid.
5. It was PW1’s testimony that the appellant’s marriage to her daughter Colletta, was tumultuous and after 3 years, the appellant eventually chased her away. He unsuccessfully tried to get a refund of his dowry, consisting of two cattle, from the deceased. He then escalated this grievance to the Chief’s baraza.
6. Joseph Magaigwa (PW2) a neighbour heard screams from the deceased’s home on the fateful night and headed there. Upon arrival, he found the deceased, who had been shot, lying on the ground. He quickly got his motorbike and rushed him to the hospital but he died en route.
7. PW2 was also present when the appellant was arrested while wearing a kitenge shirt with reddish and blackish flowers. He identified it as the exhibit in court.
8. Josiah Masiaga (PW3) was the Assistant Chief at Getong’anya sub-location. On the night of the crime, he received a phone call from a villager that there had been a robbery at the deceased’s home. He proceeded to the home, where he found a pool of blood in the sitting room. The deceased had already been rushed to the hospital. PW1 narrated to him what transpired during the robbery and how the appellant got away with the cattle. She disclosed the identity of the appellant as her son-law and also described the kitenge shirt he was wearing. PW1 also mentioned the dispute concerning the dowry which PW3 was aware of as it was at his office that the appellant had sought intervention.
9. Not too long after, together with, officer Hitler Amuka, PW4, from the Administration Police, he went to the appellant’s home and arrested him. They found his wife at the home and coincidentally the appellant wore the same kitenge shirt PW1 had described to him. According to him, it had white, black and green flowers and he identified it as the exhibit in court.
10. Corporal Samwel Kimetto, the investigation officer told the court that PW1 narrated the robbery to him and also described the appellant as one of the robbers, she saw him holding a gun and that he was wearing a kitenge shirt at the time. She also mentioned the dispute concerning the dowry between the appellant and the deceased. When the appellant was arrested, PW6 noted that the appellant was wearing the same kitenge shirt as described to him by PW1. He identified it as an exhibit. He also produced as an exhibit a ballistic report that showed that the cartridges collected from the scene of the crime were all fired from the same gun.
11. The post mortem report by Dr Indagiza was produced by the prosecution. It illustrated that the deceased died due to a gunshot wound. The bullet entered through his pubic region and exited through his gluteal region causing cardiovascular collapse due to perforation of the iliac vessels.
12. At the close of the prosecution’s case, the trial Magistrate Ndururi (SRM) found that prosecution had made out a prima facie case against the appellant and he was put on his defence.
13. The appellant gave a sworn statement denying the charges. He stated that on the fateful day he was arrested while at his home. He had gone to bed at 9.00pm after working as a boda boda cyclist from



- 11.00am to 6.00pm. He stated that no one else saw him that evening save for his wife whom he was with in the house. He acknowledged ownership of the kitenge and stated that he put it on before being taken to the AP camp. Later, he was taken to Kehancha Police Station prior to being arraigned in court.
14. During cross-examination, he acknowledged being married to the deceased's daughter after paying two head of cattle as dowry and afterwards, the marriage breaking down. He also acknowledged going to the Chief's office to demand for a refund of his dowry which the deceased accepted. However, at the time of his death, the deceased had not yet returned the cattle.
  15. Mary Motatiro, DW2, the appellant's wife gave a sworn statement in support of the appellant's alibi. She confirmed that she was with her husband throughout the day and night of 11<sup>th</sup> February. They did not have any visitors that evening and they went to be bed at around 9.00pm. She acknowledged that he had worn the kitenge shirt during the day and wore it when the police officers came to arrest him and also that Colleta was her co-wife. Contrarywise, during cross-examination she stated that the appellant's claim that he spent the day prior to his arrest doing boda boda business was untrue as he was at home with her all day. After evaluating the evidence tendered before the court, the learned Magistrate was cognisant that the identification of the appellant was hinged on a single witness but was satisfied that the identification was by recognition and therefore safe. The appellant was found guilty as charged and sentenced to death.
  16. Aggrieved, the appellant appealed to the High Court at Kisii. Sitati and Muriithi, JJ re-evaluated and re-analysed the evidence and held that the trial court fully weighed the entire evidence. They agreed with its findings on identification evidence through voice recognition of the appellant by PW1 and the kitenge shirt which he wore during the robbery. Thus, they upheld the conviction and sentence as meted against the appellant.
  17. Disappointed by the judgment of the High Court, the appellant has preferred this second appeal, based on 2 grounds, which are that the learned judge erred in law by;
    - a. Relying on the evidence of identification without considering that the prevailing conditions made it difficult for a positive identification to be made.
    - b. Upholding the mandatory sentence without considering its unconstitutionality.
  18. During the hearing of the appeal, learned Counsel Ms Anyango appeared for the appellant while the respondent was represented by Mr Okango the learned Senior Principal Prosecution Counsel. Both had filed written submissions.
  19. Ms Anyango wisely chose to abandon the second ground on the unconstitutionality of the mandatory nature of the death sentence in light of the Supreme Court's directions in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2).
  20. On the sole remaining ground of identification, she argued that since the robbery took place at night and the only available sources of light were two torches one of which was on the ground, these circumstances were not conducive for a proper identification. Counsel further argued that PW1 did not specify who between the two robbers uttered the words "Go to sleep, I have had my justice". We called her out on her mis-interpretation of the record which clearly indicated that PW1 specifically referred to the appellant, her former son-in-law, as the one who uttered those words. She remained adamant and maintained that there was some ambiguity from PW1's testimony on who between the two said those words.



21. Maintaining that since the identification of the appellant was unsafe, she urged the Court to set it aside, citing *Wamunga v Republic* [1989] KLR 424 and *Daniel Kipyegon Ng'eno v Republic* [2018] eKLR.
22. The Prosecution Counsel acknowledged that the identification on the night of the robberies had some deficiencies. However, he asserted that they were cured by the identification by recognition of the appellant's voice by PW1. He urged us to take PW1's testimony holistically since she was categorical in her recognition of the appellant who was her former son-in-law. Further, the recognition of the kitenge the appellant wore buttressed PW1's testimony especially because he was arrested while still wearing it. For those reasons, the Prosecution Counsel submitted that the evidence tendered by the prosecution was credible and was not ousted by the defence. He urged us to uphold the concurrent conviction of the appellant.
23. We have considered the record of appeal as well as submissions. We appreciate our role as the second appellate court and our jurisdiction which is limited to matters of law as defined in section 361 of the *Criminal Procedure Code*. This was affirmed by this court in *David Njoroge Macharia v Republic* [2011] eKLR as follows;

“That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v R* [1984] KLR 611.”
24. As the appellant's Counsel had abandoned her second ground of appeal, we are left with the identification of the appellant as the sole issue for consideration. This Court has the onus to interrogate the question of whether or not the circumstances surrounding an identification were ideal. We reiterate what was stated in *Wamunga v Republic* (*supra*);

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”
25. It is without controversy that two head of cattle were stolen from the deceased's home on the night of the robbery. It is also without a doubt that the deceased died of a gun shot wound. The question posed to this Court is whether the appellant was positively identified as one of the robbers on the fateful night.
26. From the record, PW1, the sole identifying witness, stated that though it was in the dead of night, she had two sources of light to rely on in her identification of the appellant. As was pointed out by the both courts below, as the strength of the light could not be ascertained, it was not safe to accept the visual identification of the appellant under such circumstances. However, that was not all. As the learned Judges put it, and aptly in our view, the foregoing identification was strengthened by PW1's recognition of the appellant's voice when he ordered her to go back to sleep as he had obtained his justice. PW1 knew the appellant very well by virtue of his marriage to her daughter, though broken down at the time, that lasted for 3 years. The appellant acknowledged thus during his cross-examination, though he claimed that the marriage only lasted for one year.



27. Even though we are satisfied that the appellant's identification was by voice recognition, we place weight on the caution pronounced by the former Court of Appeal in *Abdallah Bin Wendo v R* 20 Eaca 166 at page 168 that:

“Subject to certain well-known exceptions 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 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.” (Emphasis added)

28. Guided by the foregoing, we shall consider other evidence whether direct or circumstantial to enable us determine whether the appellant's identification was free from error. PW1 also recognized the kitenge shirt the appellant wore during the robbery. She testified that she had seen the appellant wear it on several occasions when he visited their home. As fate would have it, the appellant wore the same kitenge shirt on the night of his arrest. This is what confirmed to PW3, that they had indeed arrested the right suspect. It was PW3's evidence that once he arrived at the scene of the crime on the fateful night, PW1 narrated to him the ordeal, affirmed her recognition of the appellant, described to him the kitenge shirt he was wearing and disclosed to him the dispute of the dowry between the appellant and the deceased.
29. This revelation was confirmed by the appellant during cross-examination when he stated that they had come to an agreement, at the Chief's office, that the deceased would return the cattle but that never materialized. The revelation made by PW1, of the now vital kitenge shirt and the dispute to PW3 at the earliest opportunity and the confirmation by the appellant of the dispute and ownership of the kitenge shirt lends credence to her testimony and adds probative value to the identification of the appellant. The significance of early reporting was pronounced in *Terekali & another v Republic* [1952] EA 259 as follows: -

“Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”

30. We are of the view that the description of the kitenge was a key corroborator to her evidence of recognition and the revelation of the dispute gives motive to the appellant's malicious attack on the deceased and subsequent theft of the two cattle.
31. As was pointed by the both courts below, the description of the kitenge shirt was subject to debate. According to PW1 it had yellow and blackish flowers; to PW2 it had reddish and blackish flowers; to PW3 it had white, black and green flowers; and to PW6 it was reddish brownish. The learned Judges resolved that there was no stark contrast in the various descriptions of it. To our minds, since the kitenge was produced in court and all the foregoing witnesses pointed to it as the kitenge that was worn by the appellant on the fateful night, they doubtless were all referring to the same shirt despite their differing



descriptions. To buttress this point, we adapt to this Court’s dictum in *John Nyaga Njuki & 4 others v R* [2002] eKLR where it held,

“But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”

32. Lastly, we shall delve into the alibi defence as provided by the DW2, the appellant’s wife. This Court in *Kiarie v Republic* [1984] KLR stated:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

33. In *Erick Otieno Meda v Republic* [2019] eKLR this Court after considering comparative decisions, made the following observations;

- a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
- b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlongu v S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014). (Emphasis added)

34. From the record, we find that alibi defence offered by DW2 was not reliable as it contradicted that of the appellant. The appellant stated that on the day leading to his arrest, he was conducting his boda boda business between 11.00am and 6.00pm. However, his wife’s testimony was they were together the whole day and night leading to his arrest. During cross-examination she categorically stated if the appellant’s claimed to have left their home to conduct boda boda business during that day then he was lying. This contradiction eliminates the credibility of the alibi defence.

26 In conclusion, we have no reason to depart from the concurrent findings of the two courts. We are convinced that the evidence of recognition as corroborated by the rest of the evidence was enough to secure the positive identification of the appellant. We are satisfied that the same was free from any possibility of error and that the appellant’s conviction was safe.

27 In the end, this appeal lacks merit and we dismiss it in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

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**PO KIAGE**

**JUDGE OF APPEAL**

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**F TUIYOTT**  
**JUDGE OF APPEAL**

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**JOEL NGUGI**  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

