



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutuota v Republic (Criminal Appeal 40 of 2021)  
[2023] KECA 756 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 756 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 40 OF 2021  
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA  
JUNE 22, 2023**

**BETWEEN**

**TIMOTHY WAWERU MUTUOTA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi & Achode, JJ.) dated 1st July, 2014 in Nairobi HCCRA No. 104 of 2013)*

**JUDGMENT**

1. This is a second appeal and therefore our jurisdiction is circumscribed by section 361 of the [Criminal Procedure Code](#) to consideration of matters of law only. This jurisdiction was succinctly set out in the case of *Karani vs Republic [2010] 1 KLR 73* 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.'

2. The appeal arises from the judgment of Mbogholi and Achode, JJ, (as they then were) delivered on July 1, 2014 in Nairobi HCCRA No 104 of 2013 in which the learned Judges upheld the judgment and sentence of the trial court which had convicted the appellant for the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#) and sentenced him to suffer death. The appellant's co-accused were however acquitted.



3. The facts of the case albeit briefly are that on the March 7, 2013 at around 3.00am, PW1, Livingstone Ngari Teo, was preparing dough to cook mandazis. He had sent his wife to the kitchen to pick some papers and as she was shutting the door on her way back, a group of three men armed with a knife and a 'rungu' (club) suddenly burst into the house. They ordered PW1 into his bedroom and demanded his motorcycle keys, which they were given. They also demanded and were given Kshs 1,400.00. His wife tried to alert the neighbours but by the time they responded, the robbers who had spent around 15 minutes with them had escaped. PW1 was robbed of his motorcycle make, Boxer, registration number xxxx, mobile phone make Tecno and cash Kshs 1,400.00 all valued at Kshs 97,000.00.
4. According to PW1, he identified the appellant among the robbers as he was not hooded and the electricity light was on throughout and which was very bright. The appellant had a club and was the one who ordered him to enter the bedroom where he threatened to kill him. The appellant was further a person well known to him for over one year. He used to go by the name Weche, which was his alias name.
5. PW2, Stephen Kimemia a brother to PW1 was approached by one Mburu, who led him to other men whom he identified by their names as Waweru, Njogu, and Mburu. They wanted him to assist them in finding a buyer for a motorcycle which they were selling. He identified the appellant among those that had approached him and was a person well known to him.
6. PW3, Absalom- Ibwa Meshack's evidence was that the appellant and his co-accused were among a group of people who had approached him on March 6, 2013, at around 7.00pm at his place of work, looking for a torch. The men intimated that they would pass by later at 1.00am which came to pass. Together with his colleagues, they kept vigil and at 3.00am they heard screams nearby and suspected the same men were the ones committing a crime. He later learnt that a motorcycle had been stolen from PW1 and instinctively suspected that the said men could have been involved.
7. PW4, Patrick Njoroge was at the Ngegwa Police Patrol Base on March 8, 2013 when the appellant was brought in by members of the public and PW1. It was his evidence that PW1 identified the appellant as being among the people who had robbed him. PW5, Colleta Mutua, was the investigating officer. She testified that PW1 told her that he could identify the robbers by their appearance and also by their names. The appellant was arrested by members of the public and PW1, and was brought to the police post where she re-arrested him.
8. In his defence, the appellant denied the offence. In a sworn statement, he told the court that on March 8, 2013, two people namely Kimemia and Absalom went to him and inquired whether he knew his co-accused. He answered in the affirmative as they used to sell chang'aa and bhang together. They then told him that PW1 had reported to them that he had robbed him. They took him to the police post where he was placed in the cells and was later charged with the co-accused for the offence he knew nothing about.
9. Upon reviewing and evaluating the evidence, the trial court was satisfied that the prosecution had established its case against the appellant. With that, the appellant was convicted and sentenced to death. The appellant's co-accused were as already stated acquitted.
10. Dissatisfied with the findings of the trial court, the appellant filed an appeal in the High Court. The High Court after re-evaluating the evidence, dismissed the appeal in its entirety. The appellant is now before us on a second appeal on the grounds that the learned Judges erred in law by not finding that the trial court superintended over an unfair trial which left the appellant prejudiced; when they upheld the conviction yet the circumstantial evidence did not meet the threshold; when they confirmed the



appellant's conviction on shoddy evidence, and when they failed to find that the ingredients of the offence were not proved.

11. The appeal was canvassed by way of written submissions with limited oral highlights. On the first ground, the appellant through Mr Kimathi, learned counsel, submitted that the trial was unfair and the appellant was prejudiced for reasons that he was not furnished with all the evidence the prosecution intended to rely on. The appellant was thus ambushed and was made to stand trial on a weak pedestal and could not appropriately defend himself, which went against the tenets of Article 50(1) of the Constitution on the right to a fair trial.
12. It was further submitted that the evidence tendered by the prosecution did not support the charge sheet. For instance, there was no mention of which weapons were used by the assailants. It was further submitted that failure of the charge sheet to spell out with clarity, in terms of the exact offence committed, was a violation of sections 134 and 135 of the Criminal Procedure Code and thus, a contravention of the appellant's right to a fair trial.
13. It was the submission of the appellant that the prosecution relied on evidence of the informers that did not meet the threshold. The appellant faulted both the trial court and the first appellate court for failing to observe that the evidence of the witnesses was not credible. The two courts erred in law for not analyzing the circumstances under which the offence was committed. That though PW1 said that he was able to identify the robbers and even gave their names to police officers, he never led to the arrest of any of the robbers. The appellant submitted that the police ought to have conducted an identification parade. The appellant relied on the case of *Wamunga vs Republic [1989] KLR 424* to submit that there must be not only positive identification of the accused but further that the identification should rhyme with the first report. That the witnesses did not give his description to the police during their first report. The trial court did not analyze and interrogate whether the circumstances in the instant case were favourable for positive identification. The appellant thus prayed that the appeal be allowed in its entirety.
14. The respondent through Mr Kimanathi, learned Prosecution Counsel in opposing the appeal submitted that this Court should uphold the judgments of the two courts below for the reason that this Court can only entertain appeals on matters of law. That the grounds of appeal raised, deal with matters of fact. That the two courts below did not proceed on the wrong principles to warrant the intervention of this Court. That the first appellate court re-evaluated and re-analyzed the entire evidence that had been tendered in the trial court and came up with a conclusive finding that the prosecution witnesses were corroborative, consistent and cogent with no possibility of mistake or error in their evidence. It was therefore urged that the appeal be dismissed in its entirety.
15. We have carefully considered the grounds of appeal, the parties' submissions, the record and the applicable law. The issues for determination in this appeal in our view are: whether the appellant's rights to a fair trial were contravened; whether the appellant's identification and or recognition was proper; and, whether the prosecution's case was proved as required.
16. On the first issue, the appellant has alleged that the trial proceeded without him being supplied with the evidence that the prosecution intended to rely on and as such, he was ambushed during the trial. That despite the request being brought to the attention of the trial court, the court proceeded without addressing the issue. The record however shows that when the case came up for hearing on May 7, 2013, the appellant and the co-accused were categorical that they were ready to proceed. It appears that by then, they must have been supplied with the evidence. Otherwise, there was nothing to stop them from insisting that they required the evidence before they could proceed. From the said proceedings, again the appellant cross-examined the witnesses at length which gives the impression that he was



conversant with the prosecution evidence. We therefore find it strange that the appellant can now claim that the trial was an ambush when in fact he was accorded all the rights and requirements of the law in conducting his defence. It cannot be a basis of this appeal therefore that he was denied the evidence to prepare for trial when from the record the contrary is true.

17. As regards the second issue, the appellant has submitted that his identification by the complainant was not free from the possibility of error. He alleged that the incident took place at night and therefore his identification could not be said to have been positive. That this Court in the case of *Mwaura vs. Republic [1987] KLR 645* stated:

' In cases of visual identification by one or more witnesses, a reference to the circumstances usually require a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light.'

18. Again, this Court in the case of *Anjononi and Others vs Republic [1976- 1980] KLR 1566* held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other. That given the prevailing circumstances it cannot be said that his recognition was free from the possibility of mistake.

19. It is noted that the incident took place past 3.00am on the material date and hence such evidence of identification, and even recognition should be tested with great care and should be absolutely watertight in order to justify a conviction.

20. In the case of *Maitanyi vs. Republic [1986] eKLR*, this Court stated that in determining the quality of identification of using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position from the suspect and the witnesses.

21. The record shows that the robbers were not hooded or disguised in any manner. They stormed into the house when the electricity light was on and which was very bright according to PW1. At no time was the electric light ever switched off. The appellant had a club and was the one who ordered the complainant to enter the bedroom where he threatened to kill him. The appellant was a person well known to him for over one year. Further, the ordeal took around 15 minutes and the parties were in close proximity. This accorded PW1 sufficient time and opportunity to recognize the appellant among the robbers. He even gave the name of the appellant in his first report to the police. His recognition cannot therefore be mistaken or faulted. In any event, the two courts below made a concurrent finding that the appellant had been properly identified and recognized. The learned trial magistrate had the following to say on the issue:

' In respect of the second accused, I notice that he was positively identified at the time of the offence. His name was given at the time the first report was made and further, the circumstantial evidence surrounding the offence places him in the organization of the offence. All the evidence points to his guilt. I am well satisfied with the identification made and find that there was no need for an identification parade to be conducted'

22. The High Court in its analysis stated thus:

' The appellant was not a total stranger to PW1 the complainant who used to see him at Ngenia area. On the night of the robbery, the lights in the complainant's house were on as he was kneading some dough for baking. The appellant held a club and is the one who forced PW1 into his bedroom.



There was communication between the assailants and PW1. They demanded the motor cycle ignition key and asked first for a phone which was surrendered by his wife. In the bedroom the appellant commanded PW1 to enter the bed and threatened to stab him with a knife. He asked for money and took Kshs 1,400/= from his trouser. The assailants took about 15 minutes in the house. All this while they were not hooded. We are persuaded that there was sufficient time for PW1 to make a positive identification of the appellant free from error.

The appellant was also one of those people who passed by the place of work of PW3 to borrow a torch because theirs had low batteries. They did not disclose why they needed a brighter torch. On the same night PW1 was robbed. This evidence considered alongside that of the complainant provides strong circumstantial evidence to link the appellant to the crime.'

We are satisfied that the two courts below did not err in their findings on the identification and or recognition of the appellant. This being a case of recognition as opposed to identification of a stranger, conducting a police identification parade as demanded by the appellant would have been superfluous. Further and contrary to the appellant's submissions, this was not a case of circumstantial evidence but one of recognition.

23. As to whether the offence was proved beyond reasonable doubt, the elements of the offence of robbery with violence were set out by this Court in the case of *Oluoch vs Republic [1985] KLR* thus:

' Robbery with violence is committed in any of the following circumstances:

- a. The offender is armed with any dangerous and offensive weapon or instrument; or
- b. The offender is in company with one or more person or persons; or
- c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.'

According to the case of *Dima Denge Dima & Others vs. Republic Criminal Appeal No 300 of 2007*:

' 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.'

24. Therefore, it is not necessary to look for the presence of all three ingredients, as proof of one, would suffice to secure a conviction. The two courts below were satisfied that the offence was committed at night with more than one person who included the appellant and they were armed and visited violence on the complainant. The High Court after re- evaluating the evidence stated:

' The assailants were more than one and the appellant was one of them. They were armed with offensive weapons and in fact the appellant threatened to stab the complainant in his bedroom. The ingredients of robbery with violence under section 296 (2) of the Penal Code were satisfied.'

25. The above reasoning by the High Court cannot be faulted. We are thus satisfied just like the two courts below that the ingredients of the offence were proved.
26. In the ultimate, we dismiss the appeal in its entirety.



DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE, 2023.

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

