



**Amalemba v Republic (Criminal Appeal 106 of 2019)  
[2023] KECA 807 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 807 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 106 OF 2019  
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA  
JULY 7, 2023**

**BETWEEN**

**WYCLIFF AMALEMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru & Nyamweya, JJ.) dated 14th November 2013 in Nairobi H.C.CR. Appeal Nos. 482 and 483 of 2009)*

**JUDGMENT**

1. This is a second appeal and therefore our jurisdiction is circumscribed by section 361 of the [Criminal Procedure Code](#) to consider only matters of law. Our role as the second appellate court was succinctly set out in the case of *Karani vs. R* [2010] 1 KLR 73 wherein 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.”

2. We shall bear in mind the foregoing as we consider this appeal. The appeal is from the judgment of Kimaru and Nyamweya JJ. (as they were then) delivered on November 14, 2013 in consolidated Nairobi Criminal Appeal Nos. 482 and 483 of 2009, in which the learned Judges upheld the judgment of the trial court which had convicted the appellant for attempted robbery with violence contrary to section 297(2) of the [Penal Code](#) and sentenced him to death.



3. The particulars of the offence were that on the November 25, 2009 along Daisy Road in Runda area within Nairobi province, the appellant jointly with co-accused being armed with a dangerous weapon namely a pistol, attempted to rob Gilbert Omoga Owinga of his motor vehicle registration number KAV 324W Honda CRV valued at KShs. 1,000,000.00 and at the time of such attempted robbery, threatened to use physical violence on the said Gilbert Omoga Owinga.
4. The appellant with co-accused was arraigned in the trial court on December 9, 2009 and pleaded not guilty to the charge. The prosecution called a total of six witnesses. PW1, Gilbert Owinga stated that on November 25, 2009, he was driving home in his motor vehicle aforesaid, and as he approached his gate in Runda Estate, he called his employee, Mary Kisiku Kinyua (PW2) to open the gate. About 20 to 30 metres from his gate, he saw three men walking on the right side of the road. Suddenly, one of them jumped onto the road with a gun, and he accelerated and hit him on the leg with the motor vehicle and drove past the gate. He called his father who in turn called the police officers. He confirmed that he did not see the faces of the men but was able to identify the clothes they were wearing.
5. PW2, Mary Kisiku Kinyua, an employee of PW1 stated that on November 25, 2009, PW1 called her to open the gate for him and as she was doing so, she saw three men, one of whom jumped onto the road holding something that looked like a gun and was hit by PW1's car. She stated that there were security lights at the gate and she could see the men clearly, who were 10 metres away. She further testified that she was able to recognize the appellant who was in the blue tracksuit, as he used to work for a neighbour.
6. PW3, Duncan Mukunzu who worked for PW1's neighbour testified that on November 27, 2009 when reporting on duty at 6.30am, he met the appellant's co-accused who was limping, and who told him that he had been hit by a vehicle. He stated that he had been told about the incident at PW1's gate by PW2, and that he then gave the information about the co-accused to PW1 and the police officers. PW4, PC Samwel Bornco in his evidence testified that he was the arresting officer. On November 25, 2009 at 8.00pm while on patrol duties with other police officers, they got a radio call of an attempted robbery at the PW1's house. They went to the house where PW1 and PW2 described to them the incident and the clothes worn by the suspected robbers. PW2 further stated she was able to recognize the appellant among them. On November 29, 2009, they proceeded to the house where PW2 stated the appellant worked and arrested him. PW5, IP Nahum Muli, conducted a police identification parade where PW2 identified the appellant. The last prosecution witness, PW6, Paul Abuto the investigating officer testified that he was informed of three suspects who had been arrested with regard to the attempted robbery on November 25, 2009. He then organized a police identification parade where PW2 picked out the appellant.
7. After the close of the prosecution case, the trial court placed the appellant on his defence. The appellant in an unsworn statement of defence testified that he was a caretaker in Runda Estate and that while at work on November 29, 2009 police came to his house, searched it, took away his trouser and jacket, and arrested him. He confirmed he was taken for a police identification parade and PW2 whom he claimed to be his girlfriend, identified him.
8. Upon reviewing and evaluating the evidence, the trial court convicted the appellant and sentenced him to death. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal in the High Court at Nairobi. The High Court after re-evaluating the evidence, dismissed the appeal in its entirety.
9. The appellant is now before us on a second and perhaps last appeal. He has advanced 10 grounds of appeal which can be collapsed into seven to wit; that the learned trial magistrate and the first appellate court erred in law in relying on the evidence of identification and or recognition which did not meet the threshold; relying on a defective charge sheet to return a conviction; in failing to appreciate that the



evidence on record did not disclose the offence of attempted robbery with violence; failing to consider that the constitutional rights of the appellant had been violated having overstayed in the police cells before being arraigned in court; the conviction was not supported by evidence; in not finding that the sentence of death following the conviction of the appellant was illegal under section 297 (2) of the Penal Code in contrast to section 389 of the Penal Code; and, in failing to appreciate that the appellant was not accorded a fair hearing.

10. The appeal was canvassed by way of written submissions and limited oral highlights.
11. On identification and or recognition, the appellant submitted that the trial magistrate convicted him on the evidence of a single witness, PW2, who purportedly recognized him as he was her neighbour. It was the contention of the appellant that the witness should have gone beyond mere recognition and stated some peculiarities and features that enabled her to positively recognize the appellant. Further, the trial court did not warn itself of the dangers of convicting the appellant on the evidence of a single witness, on matters of identification and or recognition. The appellant relied on the case of in Karanja & another v Republic [2004] 2 KLR 140, 147 in support of this proposition.
12. On whether visibility was clear, the appellant submitted that if it were clear then, indeed, PW2 should have called out his name. That PW2 did not state whether the place where the incident happened was well lit to afford her clear recognition. He further submitted that though PW2 identified him on the police identification parade, the prosecution failed to lead evidence to show that parade was properly conducted. That PW1 was not invited to the police identification parade and no explanation was given yet both PW1 and PW2 were at the scene.
13. Regarding the defectiveness of the charge sheet, the appellant submitted that the charge sheet was defective to the extent that the evidence tendered did not support the charge. That the charge sheet indicated “Attempted to rob motor vehicle KAV 324 Honda CRV”, yet no evidence was adduced to support that allegation. PW1, just said that he saw three people one of whom jumped on the road and he sped off. It was the appellant’s submission that the charge sheet was therefore at variance with the evidence adduced. Reliance was placed on the case of Peter Ngure Mwangi v Republic [2014] eKLR, for the proposition that a charge sheet can be defective if it was at variance with the evidence adduced in its support. Turning to the ingredients of the offence of attempted robbery, the appellant submitted that the particulars of the offence were that the appellant and his co-accused being armed, attempted to rob PW1 of a motor vehicle. That since the co-accused was acquitted, meant that the ingredients of the offence were not proved, and therefore, there was no commission of the offence.
14. As to whether the appellant’s constitutional rights were violated, and whether he was accorded a fair trial, the appellant submitted that he was arrested on November 28, 2009 and arraigned in court on December 9, 2009. No explanation was proffered for the delay of 11 or so days by the prosecution. The delay was therefore unlawful, illegal, and inordinate and led to an unfair trial.
15. Is there a conflict in law between sections 297(2) and 389 of the Penal Code, and if so, should the conflict be resolved in favour of the appellant? It is the appellant’s submission that indeed, there exists a conflict and associates himself with the concession by the respondent on the same.
16. The appeal was opposed by the respondent and limited to conviction only. It nonetheless conceded the appeal on sentence. The respondent reminded the court that this was a second appeal and therefore only matters of law fall for consideration
17. The respondent submitted that there was ample evidence on record that the appellant was recognized as one of the persons who attempted to rob PW1 of his motor vehicle on the evening of November 25, 2009. Further, PW2 who worked for PW1 testified that immediately after she opened the gate



for PW1 to enter, three young men appeared. She went on to state that there was a lot of light at the scene courtesy of the security lights that were on. She was able to recognize the appellant as she had known him for a period of eight months since he worked for a neighbour to PW1. This evidence was corroborated by the appellant when in his defence, he confirmed that he knew PW2 and that she was his girlfriend. This evidence was further bolstered by the evidence of the identification parade where she identified the appellant. Hence, this was a case of recognition as opposed to identification of a stranger.

18. On sentence, the respondent submitted that he supported the appeal on sentence and invited this Court to step in and interfere with the sentence imposed by the trial court and upheld by the first appellate court. That the appellant was sentenced to death under section 297(2) of the *Penal Code*. The sentence under that section is in conflict with the sentence envisaged in section 389 of the *Penal Code* which provides for a term of not more than seven years for attempted felony. Attempted robbery with violence is defined as a felony under section 4 of the *Penal Code*. The respondent relied on the cases of *Evans Kiratu Mwangi v DPP* [2021] eKLR and *Evason Muiruri Gichane v Republic* [2010] eKLR, to buttress the fact that indeed, the sentence imposed ought to be reviewed as the courts had found the two sections to be in conflict. The courts have preferred to impose sentences as envisaged under section 389 of the *Penal Code*.
19. Having said earlier that this is a second appeal, it raises only three main issues of law for determination. First, whether the prosecution proved its case beyond reasonable doubt; second, whether the appellant was properly identified and lastly, the legality of the sentence imposed.
20. On identification, we have reminded ourselves of the guidelines set out in the case of *Mwaura vs. Republic*[1987] KLR 645, in which this court stated, *inter alia*, that:

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires 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”.
21. In addition, it has been stated by this court in *Anjononi & others v Republic*, (1976-1980) KLR 1566 that when it comes to identification, the recognition of an accused is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the accused in some form or other.
22. We note that the alleged attempted robbery took place at night. PW1 stated that he was able to see the robbers courtesy of security lights that were on, though he was unable to recognize any of them. The only witness who testified to the identity of the appellant and the other robbers was PW2. According to her, when she was called by PW1 to open the gate, three men appeared. When PW1 approached, she saw one of them who was wearing a white cap pointing what looked like a gun at him but he did not stop. She was able to recognize one of the robbers as the appellant, whom she had known for 8 months as he worked for a neighbour. That during the police identification parade, she was able to pick out the appellant. The police identification parade in our view was superfluous and unnecessary as PW2 already knew the appellant and according to the appellant, they were even acquaintances. If indeed PW2 saw and recognized the appellant, whom she claimed to have been her acquaintance, she should have given this evidence when recording her evidence or to the police who went to the scene. Having failed to do so, her reliability as a witness is in doubt. Therefore, her evidence in this regard was of little probative value. Further, the prosecution could not have called PW1 to the identification parade since he categorically stated in his testimony that he did not identify or recognize any of the robbers.



23. It is trite that where the only evidence against an accused is that of identification and or recognition, the court must scrutinize that evidence with great care and be satisfied that there was no possibility of error. In *Wamunga v Republic* [1989] KLR 426, this court stated:

“It is trite law that where the only evidence against a defendant is evidence of 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 conviction.”

Similarly, this courtheld in *Nzaro v Republic* [1991] KAR 212 that evidence of identification or recognition at night must be watertight to justify a conviction. See also *Kiarie v Republic* [1984] KLR 739.

24. From the above decisions, it is clear that even if the Court is to rely on the evidence of recognition, such evidence must be evaluated with a lot of care and circumspection because a person may be mistaken for having identified a person he did not know very well. That is to say, even if a person believes that he knew the person at the time of the offence, it does not lessen the burden of examining the evidence of identification and or recognition with the greatest care due to the possibility of mistaken identity and recognition.

25. To us, the evidence of PW2 regarding the recognition of the appellant was insufficient. We doubt that after seeing one of the alleged robbers pull out a gun and direct it at PW1, PW2 would have remained at the scene sufficiently to identify the appellant. The first instinct would have been for her to take cover so that she is not seen or run for her dear life. She also does not specify how she was able to recognize the appellant. For instance, she does not state whether at any time the appellant turned his face towards her to enable her, to recognize him. Similarly, she does not state for how long the appellant was under her observation that enabled her to recognize him, given that robbers wore caps.

26. The defence of the appellant as to their relationship with PW2 ought to have been explored thoroughly. If they were acquaintances and there was a fallout, that could have been the impetus for PW2 to settle scores by falsely testifying against the appellant. We are not therefore convinced that the identification and recognition of the appellant by PW2 was free from the possibility of error.

27. Accordingly, we are not satisfied that the appellant was properly convicted. Having reached this conclusion it is not necessary to delve into consideration of the other issues framed for determination. This conclusion is sufficient to dispose of the appeal.

28. The upshot is that the appeal is accordingly allowed, the conviction quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA CIArb., FCIArb.**



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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

