Wachira v Republic (Criminal Appeal 36 of 2015)
[2023] KECA 1235 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1235 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 36 OF 2015

F SICHALE, LA ACHODE & WK KORIR, JJA

OCTOBER 6, 2023

BETWEEN

BENSON GACHANJA WACHIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Nakuru, Ongeri & Kiarie JJ,), dated and delivered on 21st July 2015) IN HC. CRA NO. 24 OF 2013)

JUDGMENT

1. Benson Gachanja Wachira (the appellant herein), has preferred this second appeal challenging the dismissal of his first appeal by the High Court which he had lodged against his conviction and sentence that had been imposed by the Senior Resident Magisate's Court in Narok (Hon T.A Sitati) for the offence of robbery with violence conary to Section 296 (2) of the *Penal Code*.

2. The particulars of the offence were that on the 6th day of October 2012, at Oloombokish village in Narok East Disict within Narok County, jointly with others not before court while armed with dangerous weapons namely; a pistol, robbed Doris Naresiae Kuresha Kshs 2,000.00 and a mobile phone make Nokia C-2 and during the time of such robbery used actual violence on the said Doris Naresiae Kuresha.

3. The appellant denied the charge after which a full ial ensued with the State calling a total of 8 prosecution witnesses while the appellant gave unsworn statement and did not call any witnesses. In a judgment delivered on 24th December 2013, Hon T.A Sitati (then Senior Resident Magisate) found the appellant guilty of the offence, convicted him and sentenced him to suffer death as by law provided.

4. Being aggrieved with the aforesaid conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 21st July 2015, Ongeri & Kiarie JJ, found the appeal to be devoid of merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

5. Unrelenting, the appellant has now filed this appeal vide a Notice of Appeal dated 30th July 2015, and undated Supplementary grounds of appeal raising 4 grounds of appeal. Subsequently thereafter, the appellant through his counsel filed Amended Grounds of Appeal dated 28th April 2023, raising the following grounds of appeal:

> "(a). That the subordinate courts erred in law by convicting the appellant.
>
> (b). That the sentence imposed against the appellant was excessively high".

6. The relevant facts in this appeal as narrated by the testimony of the prosecution witnesses are as follows: PW1 was Doris Naresiae Kuresha. She testified that on 6th October 2012, at about 7PM she was at home with her two children when she heard the dogs barking. She went out with a spotlight to check out why the dogs were barking and suddenly three men emerged and grabbed and took away the torch while demanding for cash while asking for the whereabouts of her husband. It was her further evidence that as they pushed her back to the house, she spoke to her daughter in the Maasai language insucting her to alert the neighbours. That just then, Nkapepen, her guard showed up and found that a pistol had been placed on her neck and on seeing him, she told him not to throw the sword that he had at them. When the assailants saw the guard, they gave a chase and arrested him and bundled them together back to the house.

7. She further testified as the other assailants were ransacking the house, the one who had a pistol kept an eye on them and took her mobile phone and purse containing Kshs 2,000.00. That, suddenly she heard a gunshot outside the house and that she peeped through the window and saw that her father in-law had been shot. It was her further evidence that lights were on in the house at the time of the robbery and on 17th May 2013, she received a call from a CID officer with news that some suspects had been arrested. She was summoned to the police station for an identification parade that was to be carried out the following day.

8. She further informed the police officers that if she saw any of the suspects she would especially recognize the one who was wielding the pistol and who had no head cover, was clean shaven and had a chain around his neck. She attended the parade where 10 men had been lined up. The 10 men resembled each other. She examined each man and identified the appellant by touching him.

9. PW2 was Ibrahim Mpooke. It was his evidence that on 4th October 2012, he was in his shop attending to customers and at about 8.20PM, his neighbor Legumok Parmuala (PW4), called him on his mobile phone and told him that he had heard sound of gunshots in his home. He then ied calling his wife (PW1) but her phone was off whereupon he ied contacting the village elder who indeed confirmed hearing the gunshots. He then drove to Eor- Ekule police station and met police officers who were already aware of the incident. The police officers later escorted him to his home where he found his father had already been killed.

10. PW3 was Nkapilil Ole Nanyoi. He testified that on 6th October 2012, he was at the deceased's house with the deceased when PW1's daughter came running towards them and informed them that her mother was under attack. He immediately armed himself with a Maasai sword and rungu and proceeded to PW1's house and overheard PW1 pleading with the assailants not to beat her anymore. He heard them demanding cash from her. When he approached them, one of the assailants spotted him and he unsheathed his sword but PW1 warned him not to do anything as they had a pistol whereupon

he turned to flee. One of the assailants caught up with him warning him that he would shoot him dead if he ied to run any further and disarmed him and took him back to the main house. Suddenly he heard gunshots outside the house and upon getting out, he found out that PW2's father had been killed. It was his further evidence that the man who had a pistol and chased him and disarmed him while threatening to shoot him was the appellant.

11. PW4 was Legumok Parmuala. It was his evidence that on 6th October 2012, at 8PM he was in his house when heard gunshots coming from PW2's house and he immediately called PW2 informing him of the same. He later learnt that there had been robbers at PW2's house and that Mzee Mpooke (PW2's father) had been killed.

12. PW5 was PC Henry Kiboma attached to Narok CID scenes of crimes unit. He produced photos taken at the scene of crime in respect of the body of Oloisuiya Oloimboki (the deceased), a male adult aged about 73 years. He later processed the photos and produced a certificate dated 1st May 2013.

13. PW6, Chief Inspector Peter Muiruri conducted the identification parade on 17th May 2013. He got 8 members from the police cells who were of a similar height and general physical appearance and called out the suspect and informed him of the purpose of the parade. The appellant agreed to participate in the parade. He then lined up the 8 members and asked the suspect to stand anywhere. The appellant stood between member number 4 and 5 on the line and the witness (PW1), identified him by touching him on the right shoulder.

14. PW7 was Daniel Chorop attached to Narok Disict Hospital. He produced a P3 Form in respect of PW1, who had reported of having been attacked by 6 men known to her. Upon examination, she had a cut on the right eye, both shoulders and back had cuts and she had tenderness of the lower back. The age of the injuries was said to be 20 hours and the degree of injury was classified as harm. He later produced the P3 Form as an exhibit.

15. PW 8 was PC Zadok Wafula attached to Narok police station. It was evidence that on 6th October 2012, Corporal Namunyu, PC Kiboma and himself were on paol in Narok town at about 30 PM when the Deputy DCIO Peter Muiruri (PW6), called them informing them of a robbery at Olombokishi area and requested them to accompany him to the scene. On arrival, they found many people gathered and found the body of a dead man.

16. On 14th May 2013, his colleagues who were on normal paol duties nabbed 11 civilians for the offence of drinking after hours. On 17th May 2013, as he was perusing the police occurrence book he stumbled upon the suspect's name and alerted the DCIO and PW6 prayed for production order for the appellant to be presented in court. Together with PC Okoth and PC Sirma, they went and collected the suspect at the GK prison and searched him and found him with a multicolored necklace which PW1 had said that the ringleader had. He later called PW1 to come for the identification parade and PW1 identified the appellant as the assailant who had the pistol during the robbery.

17. The appellant in his defence gave an unsworn statement and called no witnesses and denied having committed the offence. He testified that on 13th May 2013, he was arrested while taking beer after hours and duly arraigned and charged in court and fined Kshs 20,000.00 or in default to serve 6 months' imprisonment. He was unable to raise the fine. While in prison, he was called out by 3 DCI officers who informed him that he was going to be charged afresh. It was his further evidence that the officers took him to Narok police station and gave him some papers and that subsequently, thereafter a lady came and touched him and he later learnt that the lady had identified him. It was his further evidence that the description given by PW1 as regards one of her attackers did not match his description and that he knew nothing about the charges that he was facing.

18. When the matter came up for plenary hearing on 23rd May 2023, Ms. Daye learned counsel appeared for the appellant whereas Miss Kisoo appeared for the respondent. Both parties relied on their written submissions dated 28th April 2023 and 11th May 2023 respectively.

19. Turning to the identification parade, it was submitted for the appellant that the same is governed by the *National Police Service Standing Orders (2017)*. That Chapter 42 of the said standing orders provides, *inter alia*, that: "the accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her" and that in the instant case, PW1 described her assailant as brown, medium, clean-shaven (which she referred to as "Jordan Style") and of medium height and not short. That the appellant herein was serving a 6 month's sentence for the offence of drinking after hours and was therefore clean shaven by virtue of him being a convict.

20. It was further submitted that the appellant was placed in a parade whose members were remandees and not convicts and this made it very easy for the complainant to pinpoint the appellant who had been clean shaven, being a convict.

21. It was further submitted that the identification parade was not properly conducted as the multi coloured necklace was not adorned by all the 8 members of the parade and in the alternative, the necklace ought to have been removed from the appellant to ensure uniformity amongst members of the parade. Consequently, it was submitted that the identification parade was a sham.

22. On the evidence, it was submitted that this was merely circumstantial and that apart from the identification parade, there was no other evidence linking the appellant to the events that took place on the night of 6th October 2012. Further, the appellant was never found with the phone stolen from PW1.

23. On the sentence, it was submitted that the sentence imposed on the appellant namely; death was exemely harsh and that the ial court erred by not taking into consideration the mitigating factors. Consequently, we were urged to set aside the sentence imposed on the appellant.

24. On the other hand, it was submitted for the respondent that the appellant was properly identified as the rooms in the house where PW1 was were well lit with lighting from solar bulbs. Further, that PW1 had stated that she could identify the appellant because he had no head cover, was clean shaven, and had a chain around his neck and was the one who was armed with a pistol which he used to point at her neck. He is the one who took her mobile phone Nokia C2 and Kshs 2,000.00 from her purse. It was further submitted that the appellant was in close proximity to PW1 for about 1 hour before he (the appellant), eventually left after fatally shooting PW1's father in-law.

25. It was contended that the identification parade was conducted by PW6, a police officer of the rank of Chief Inspector who assembled 8 members of the parade who were of a similar height and general appearance; that the parade was organized in the absence of PW1 who identified the appellant by touching him on his shoulder; and that PW1 identified the appellant as the gunman from his physical appearance even though he was still wearing the necklace that he had at the time of the robbery. It was contended that the presence of this necklace did not vitiate the identification of the appellant.

26. Turning to sentencing, it was submitted that an innocent life was lost during the robbery coupled with the fact that PW1 was assaulted by the appellant and his accomplices who inflicted several panga cuts on her. Further, there was a threat of fatal injury to PW1 who had a gun pointed on her neck during the robbery. It was thus submitted that the circumstances of the robbery offence were serious in nature and deserving of the sentence meted out on the appellant.

27. We have carefully considered the record, the rival written submissions by the parties, the authorities cited and the law. The appeal before us is a second appeal. Our mandate as regards a second appeal is well defined. By dint of Section 361 (1)(a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr. Appeal No 149 of 2006 (UR) this Court rendered itself thus on this issue:

> "...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

28. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> " Only matters of law fall for consideration and the court 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 demonsably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* [1984] KLR 213)."

29. Having carefully gone through the pleadings and the rival submissions by the parties, we are of the considered opinion that the following 3 main issues arise for our determination:

    i. Whether there was proper identification of the appellant.

    ii. Whether the identification parade was properly conducted

    iii. Whether the sentence imposed on the appellant was harsh and excessive in the circumstances.

30. Turning to the first issue, it is common ground that a robbery occurred on the night of 6th October 2012, in the home of PW1 and in the process PW1's father in-law was fatally shot. It is also common ground that PW1's home had been invaded by a gang of 6 members but only the appellant was arrested. It is also not in dispute that the incident happened at around 7PM and the conditions may not have been favourable for a positive identification. It is also not in dispute that only PW1 and PW3 witnessed this incident. Be that as it may, PW1 testified that each room in the house had a bulb though the compound did not have security lights. The intensity of the light in the room was however not stated. PW1 in cross examination stated that she had never seen any of the 6 robbers prior to the fateful night.

31. PW1 in her evidence in chief did not give a description of the gunman whom she spent a considerable time with during the robbery and she only attempted to do so when she was called by officers from DCI on 17th May 2013, for purposes of an identification parade. In her evidence, she stated thus:

> " On 17 May 2013, I received a phone call from a CID officer with news that some suspects had been arrested. He summoned me to the station and informed me that an identification parade was being organized that day. I told him that if I saw any of the suspects I could recognize especially the pistol man who had no head cover and who was clean shaven, he had a chain around his neck. He is the one who placed the pistol on my neck. The officer asked me to wait. I was kept behind the CID officers (sic) waiting for the men to be arraigned in the parade. I was then called to the parade by the deputy DCIO. I went to the office where about 10 men were lined up. The men resembled each other. I went around and examined each man. I then touched the man now in the dock...." (Emphasis supplied).

32. In cross examination, PW1 further said:

> "You stuck close to me most of the time of the robbery. You placed the pistol on my neck. My statement says brown-medium. You are brown- medium. Your colour is being noted by the court (accused no so dark not light-mid complexion)."

33. It is well settled that evidence on identification should be eated with a lot of care and the court has to satisfy itself that it is free from the possibility of error or mistaken identity. This Court in *Wamunga v Republic* (1989) KLR 424 had this to say on the issue:

> " Where the only evidence against a defendant is evidence of identification or recognition, a ial 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."

34. Again, in *Roria v Republic* [1967] EA 583, the predecessor to this Court warned on the dangers of convicting on the evidence of a single identifying witness, stating:

> " 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 though 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 safe to act on such identification."

35. From the circumstances of this case and for the reasons we have alluded to earlier, the conditions prevailing at the time that the offence was committed were not conducive for positive identification. PW1 stated that after her father in-law was shot, she lost consciousness only to regain the same later. There is no doubt that PW1 underwent a very harrowing ordeal and she must have been greatly aumatized. In addition, the ial court and the 1st appellate court did not warn themselves of the dangers of relying on the evidence of a single identifying witness. This duty was aptly stated by this Court in the case of *Paul Etole & Reuben Ombima v Republic* Criminal Appeal No 24 of 2000 as follows:

> "The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person 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 weakness which had appeared in the identification evidence. It is ue that recognition may be more reliable than the identification of a sanger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonsated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light

available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant?" (Emphasis supplied).

36. The physical description of the assailant given by PW1 of "not so dark not light mid complexion" is a description that can fit many a soul. It is also disturbing to note that PW1 in her examination in chief said the assailant was wearing a chain. During the parade, the appellant adorned multi- colored beads and in an attempt to reconcile the two versions, PW1 stated that it was a multi-coloured chain. On our part, we cannot fathom how a chain can be multi-coloured.

37. Regarding the testimony of PW3 who was the other witness who witnessed the robbery; his testimony as regards the identity of the appellant was follows:

> "I recalled seeing the faces of some of the suspects. I saw the man who had a pistol, he is the one who chased after me before disarming me of my sword as he pointed to my face threatening to shoot me dead. My encounter with him was both outside and inside the house. I had not met the pistol man before. He is in the dock. That is all." (Emphasis supplied).

38. It is evident that the identification of the appellant by PW3 was dock identification and has been stated by this Court severally a dock identification is generally unreliable. Taking into totality all the circumstances in this case, we are of the view that the circumstances prevailing at the time of the robbery were not conducive for positive identification and free from the possibility of error. Consequently, we hold and find that the appellant was not properly identified.

39. Turning to the issue as to whether the identification parade was properly conducted, it is indeed not in dispute that a robbery occurred in the home of PW1 on the night of 6th October 2012, culminating in the arrest of the appellant on or around 17th May 2013, which was about 7 months from the date of the robbery. PW6 Chief Inspector Peter Muiruri who conducted the identification parade testified that on 17th May 2013, at 30am, he conducted an identification parade and got 8 members of the parade who were of similar height and general appearance from the police cells. PW1 identified the appellant by touching him on the shoulder.

40. In the the case of *David Mwita Wanja & 2 others v Republic* [2007] eKLR this Court stated as follows regarding identification parades:

> "The purposes for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the insuctions contained in Police Force Standing Orders. See *R v Mwango s/o Manaa* (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis *Njihia v Republic* [1986] KLR 422 where the court stated at page 424: -
>
> > "It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade.

> But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpeated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

> "6.
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> (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -
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> .....
>
> (d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;
>
> .....
>
> (n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;" (Emphasis ours)

41. Although PW6 testified that he organized an identification parade where he got 8 members from the police cells and that these men were of similar height and general physical appearance, PW1 in cross examination stated that she identified the appellant on the basis of a multi coloured necklace that the appellant was wearing at the time of the identification parade and on the date of the robbery. She stated thus in cross examination:

> " I saw you wearing the necklace at the parade, that helped me identify you. I also remembered from my mental the face."

42. The other members on the identification parade did not adorn similar necklaces as the one that was worn by the appellant at the time of the identification parade. Additionally, at the time the identification parade was being conducted (on 17th May 2013), the appellant was serving a prison term for the offence of drinking after hours and was therefore clean shaven as is required of convicts and this Court takes judicial notice of the fact that indeed convicts are normally clean shaven.

43. There was no evidence on record that the other members on the identification parade were clean shaven like the appellant. PW6 informed the ial court that the 8 members on the identification parade were remandees and not convicts unlike the appellant who was clean shaven by virtue of being a convict.

As a matter fact the said witness in cross examination confirmed that remandees are not clean shaven unlike the convicts when he stated thus:

> " No, remandees are not shaved off their hair. It is convicts who are shaved off their hair...."

44. From our above analysis, it is evident that the appellant had two distinct features at the time that the identification parade was conducted namely; the multi coloured necklace and he was clean shaven unlike the other members on the parade. Can it therefore be said that the identification parade herein was conducted in conformity with Standing Order 6 (d) and (n) which inter alia provides:

> "(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;
>
> .....
>
> (n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;" (Emphasis supplied).

45. We think not as the appellant clearly stood out from the rest of the members on the identification parade by virtue of the two distinct features. The ideal situation would have been to ensure the other members in the parade adorned the same necklace as the appellant or have it excluded all together and have them clean shaven like the appellant to ensure a level playing field.

46. In *Samuel Kilonzo Musau v Republic* [2014] eKLR this Court while discussing the importance of an identification parade stated as follows:

> "The purpose of an identification parade, as explained in Kinyanjui & 2 others v Republic (1989) KLR 60, "is to give an opportunity to a witness under conolled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion ." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification." (Emphasis ours).

47. We fully agree, adopt and reiterate the above position. We think we have said enough to demonsate that the identification parade conducted herein failed the test of law and we accordingly hold and find that the same was not properly conducted.

48. In view of the foregoing and having found that the appellant was not properly identified and that the identification parade was not properly conducted and that his identification was not free from the possibility of error, we hold and find that the conviction of the appellant was not safe and cannot stand. There is no doubt that PW1 underwent a harrowing aumatizing ordeal under the hands of her attackers, in addition to an innocent life being lost. Be that as it may, given the circumstances in this case, we have no choice other than to quash the appellant's conviction and set aside the sentence of death. He is to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a ue copy of the original

DEPUTY REGISTRAR