



**Muchesia v Republic (Criminal Appeal 32 of 2017)
[2023] KECA 1448 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1448 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 32 OF 2017
PO KIAGE, M NGUGI & JM NGUGI, JJA
NOVEMBER 24, 2023**

BETWEEN

ISAAC MUCHESIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at
Kakamega (Sitati, J.) dated 19th March, 2017 in HCCRA. No. 38 of 2010)*

JUDGMENT

1. The appellant, Isaac Muchesia, was arraigned before the Chief Magistrate's Court at Kakamega and charged with the offence of Robbery with Violence contrary to Section 296(2) of the *Penal Code*. The particulars of the offence were that on the 16th day of May, 2009 at Ivakhale village Mtamba Sub-location in Kakamega East District within Western Province, jointly with others not before court and while armed with dangerous weapons, namely pangas robbed Jafred Musula of his bicycle make Raley (sic), layone Erickson, one pair of shoe cash Kshs. 500/= and assorted shop goods all valued at Kshs.57, 995/= and immediately before the time of such robbery threatened to use actual violence to the said Jafred Musula.
2. The appellant pleaded not guilty giving way to a trial. At the trial, the prosecution called three witnesses and closed its case. The trial magistrate made a finding that a *prima facie* case had been established and put the appellant on his defence. He gave an unsworn statement and called no witness. In a judgment delivered on 29th January 2010, the learned Magistrate, Hon. J. M. Nduna, SRM, found the appellant guilty and convicted him. He was, accordingly, sentenced to death.
3. The appellant was aggrieved by that decision and he appealed against both conviction and sentence to the High Court at Kakamega. The appeal was Criminal Appeal No. 38 of 2010. The High Court (Sitati



J.), in a judgment delivered on 19th January 2017 dismissed the appeal and affirmed both conviction and sentence.

4. Still dissatisfied by the decision of the High Court, the appellant has filed his second appeal to this Court contesting both conviction and sentence. Our remit as a second appellate court is limited to a consideration of matters of law only by dint of section 361(1) of the [Criminal Procedure Code](#). It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi vs. Republic* [2016] eKLR, our jurisdiction in second criminal appeals was stated thus:

“This is a second appeal and 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 [Chemangong -vs- R](#), [1984] KLR 611.”

5. For the purposes of this appeal, a brief summary of the evidence as it emerged at the trial court will suffice. The complainant, Jafred Musula, told the court that he is a shopkeeper at Kambiri village in Ivakale. He also sleeps in the one-roomed shop. On May 16, 2009, he closed his shop at 7:00pm. He retired to bed at 8:00pm. At around 1:00am, he heard someone knock on the wooden door to the shop. Shortly thereafter, the door was forced open. A group of men bugged in. They were armed with pangas and most carried torches. The complainant testified that he was immediately able to recognize the appellant, who was his neighbour. He was able to do so from the light from the torches which he described as “bright”.
6. Once they got into the shop, the assailants attacked the complainant – cutting him with a panga – and subdued him, forcing him to lie on the floor. They proceeded to steal the items listed in the charge sheet. The complainant raised alarm and the attackers fled. Members of the public came to the rescue. The complainant immediately informed one of them, a village elder, Patrick Salamba, that he had recognized the appellant as one of the assailants.
7. Patrick testified as PW1. He confirmed to the trial court that the complainant told him shortly after the incident that the appellant, a neighbour, was one of the assailants. Patrick, the complainant and other villagers decided to go look for the appellant at his home the same night. He was not there. His father was present and they informed him about the incident. They lay in wait for him. The appellant did not show up until about 7:00am in the morning. He was, according to Patrick, wet. They arrested him and took him to the Administration Police Post where he was re-arrested.
8. The final prosecution witness was Corporal Jacob Cherotich, the Investigating Officer and a CID Officer. He testified that the appellant was taken to him by a Police Officer from Kabras. He was told about the robbery. He visited the scene and did his investigations. At the conclusion of the investigations, he recommended that the appellant should be charged with the offence of robbery with violence.
9. When placed on his defence, the appellant told the court that he was at home on the night of May 15, 2009 when some people knocked on his door. He opened and found that it was the village elder and some vigilantes. They arrested him and took him around the village looking for stolen items but they found none. They then took him to the Administration Police Post at Kambiri from where he was taken to Kabras Police Station, and then eventually to Kakamega Police Station from whence he was charged.



10. The learned trial magistrate was persuaded that all the ingredients of robbery with violence had been established and that there was positive identification of the appellant. The magistrate returned a verdict of guilty and sentenced the appellant to the mandatory death penalty stipulated in the statute.
11. In his appeal before the High Court, the appellant listed nine grounds of appeal. The learned judge of the High Court grouped the grounds into three:
 - a. Whether the appellant was properly identified/recognized as one of the attackers who robbed the complainant;
 - b. Whether the prosecution had proved all the ingredients of robbery with violence; and
 - c. Whether the appellant's defence was rejected without a reason.
12. After due analysis, the learned judge of the High Court answered the first two framed questions in the affirmative and the third one in the negative paving ground for the affirmation of the conviction and sentence.
13. Before this Court, the appellant, through his advocate, has framed three grounds of appeal as follows:
 - a. Whether the judgment and sentence delivered on the January 19, 2017 (i.e. the High Court judgment on first appeal) should be dismissed and the appeal allowed;
 - b. Whether the learned judge erred in law in framing the wrong issues, answering irrelevant questions and failing to evaluate all evidence on record; and
 - c. Whether the learned judge erred in law and fact by misinterpreting and misapplying sections of the Law of *Evidence Act*.
14. The appeal is opposed by the State. Both the appellant and the State filed written submissions. On the day of the plenary hearing, learned counsel, Mr. Mukoya orally highlighted for the appellant while learned counsel Mr. Okango, highlighted on behalf of the respondent.
15. It is readily obvious that the appellant has cast his net quite wide by framing the grounds he wishes to pursue in as general a format as possible. We will, nonetheless, sift through them to address the authentic grounds that fit within our jurisdiction.
16. Turning to the first, rather unusual and odd ground where the learned counsel for the appellant asks whether the High Court judgment should be "dismissed", it turns out upon perusal of the submissions by counsel mostly raises issues of fact which are outside our remit as a second appellate court. In the main, the appellant takes issue with the concurrent findings of the two courts below that found the complainant a credible witness when he testified about the number of attackers and who attacked him because, the appellant argues, given the time of the night, the complainant must have been "disoriented." Most of the complaints raised under this ground must be dismissed with the reminder that this Court pays homage to concurrent findings of fact by the first two courts "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." These conditions are clearly not present here.
17. The only issue raised under that head that requires our attention is one of identification. The appellant complaint's in this regard are three-fold: first, that the conditions were not favourable for positive identification; second, that an identification parade was not conducted; and third, that the trial magistrate failed to warn himself of the dangers of accepting the evidence of a single, identifying witness. The appellant relied on a number of our authorities to advance these claims, chiefly: *Charles*



Maitanyi v R 1986 KLR 198; *Wangombe v R* (1986) KLR 149; *Moses Monyua Mucheru v R* Crim. App. No. 63 of 1987 (Court of Appeal); and *Walter A Amolo v R* (1991) 2 KAR 254.

18. It is true that this Court has consistently held that, owing to the possibility of wrongful conviction based on mistaken eyewitness misidentification, the evidence of identification/recognition at night must be tested with the greatest care using the guidelines enunciated in *Republic vs. Turnbull*, (1976) 3 All ER 549 and that such evidence must be watertight to justify conviction. (See, for example, *Nzaro vs. Republic*, 1991 KAR 212; *Kiarie vs. Republic*, 1984 KLR 739) and *Maitanyi vs. Republic*, (supra). In this regard, we reiterate what was stated in *Wamunga Vs. 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.”

19. Were the conditions here safe for an error-free identification which would render the conviction safe? We think they were. First, we note that although it was at night and dark, the complainant testified that the assailants had “bright” torches. Second, the complainant testified, and his testimony was not impugned, that the assailants shone the torches on themselves during the incident. Third, the incident happened in a small, one-roomed shop meaning both that the complainant’s proximity to the assailants was assured and that the intensity of the light from the torches brightened the room. Fourth, this was not just mere identification but recognition – and recognition by a neighbour who had known the appellant for many years. Fifth, the complainant made an immediate first report to the village elder – giving the name of the appellant as one of the assailants who had attacked him. Together with other villagers, they then went to the home of the appellant to look for him. The significance of early reporting was pronounced in *Terekali & Another Vs. 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...”

20. Furthermore, in the circumstances of this case, where the complainant outrightly stated that he knew the appellant, it would have been improper to mount an identification parade.
21. What about the fact that the learned trial magistrate did not warn himself of the dangers of convicting on the evidence of a single identifying witness? We reiterate categorically that it is good and recommended judicial practice for the trial court to state in express language that it has warned itself of the danger of such conviction. However, there are cases, such as here, where it is palpably clear that the trial court did, in fact, exercise such caution despite not expressly stating so. In such cases, a conviction is not vitiated by the mere non- verbalization of the talismanic words.
22. In the end, we are persuaded that the identification by recognition in this case was unequivocal and error-free.
23. In his second broad ground of appeal, the appellant faults the judge for framing wrong questions and answering irrelevant questions and failing to evaluate all the evidence on record. Under this heading, the appellant seems to complain, quite generally, that not all the ingredients of the offence of robbery with violence were proved and that the quality of the evidence did not reach the required threshold of beyond reasonable doubt.



24. As the respondent points out, the celebrated case of *Oluoch v R* [1985] KLR long established the ingredients of the offence of robbery with violence under section 296(2). Under that definition, the offence is established if robbery 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.
25. Our jurisprudence is quite clear that the ingredients are disjunctive not conjunctive – meaning that if robbery is proved and any of the three circumstances is proved to exist, then the offence of robbery with violence would have been established.
26. In the case at bar, the learned judge of the High Court specifically framed this as one of the key questions she had to answer. She, also, specifically framed the question whether all the ingredients had been proved beyond reasonable doubt as one of the questions she had to answer in her de novo re-evaluation of the evidence. It is, therefore, difficult to see which wrong issues were framed as alleged by the appellant.
- The record bears out that there was a robbery (items were stolen from the complainant’s shop); more than three assailants participated in the robbery; and in the course of the robbery, the assailants used actual violence on the complainant. The evidence in the case ticks not just one but two of the disjunctive ingredients for the offence.
27. Finally, the appellant complains that there was no sufficient evidence to warrant a finding that a *prima facie* case had been established and hence put the appellant on his defence. This is, in short, an implausible ground to argue on second appeal: it was not only not raised on first appeal but, also, given the fact that the trial court found that the prosecution had proved the charges beyond reasonable doubt; which was affirmed by the High Court upon independent evaluation of the evidence, an analysis whether a *prima facie* case was established at the trial stage or not is moot: a finding that the case was proved beyond reasonable doubt subsumes the complaint that *prima facie* was not established because the latter is a higher standard of proof.
28. The appellant did not proffer any grounds against the sentence. That is just as well given the guidance given by the Supreme Court in in *Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others* (Amicus Curiae) (2021) eKLR (Muruatetu 2) that the holding in *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR (Muruatetu 1) is inapplicable to the offence of robbery with violence; and the appellant having not preserved the constitutional question respecting the death penalty for our determination by raising it first in the High Court (See *Cyrus Kawai Onzere vs Republic* [2023] eKLR).
29. The upshot is that this appeal has no merit. It is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023.

P. O. KIAGE

JUDGE OF APPEAL
MUMBI NGUGI



JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

