



REPUBLIC OF KENYA



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**Mwangi & another v Republic (Criminal Appeal 28 of 2017)
[2023] KECA 1432 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1432 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 28 OF 2017
K M'INOTI, F SICHALE & FA OCHIENG, JJA
NOVEMBER 24, 2023**

BETWEEN

MOSES MWANGI 1ST APPELLANT

PETER NDUATI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Narok (J.M. Bwonwonga, J.) dated 31st March, 2017 in HCCRA Nos. 43A, 43B & 43C of 2017)

JUDGMENT

1. The appellants, together with one, Daniel Njenga were charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The particulars of the offence were that; on July 4, 2012 at Enabelbel area in Narok North District, the appellants jointly with another not before the court, while armed with a dangerous weapon, namely, a knife, robbed Ann Sintamei Karia of a DVD, make victo, a mobile phone, Nokia 1110, Kshs. 10,000/-, all valued at Kshs. 17,000/- and immediately before or immediately after the time of such robbery, used actual violence on the said Ann Sintamei Karia.
2. The appellants denied the charges and soon thereafter, trial commenced. The prosecution called six witnesses in a bid to advance its case. Their testimonies were as follows:
3. PW1 was the complainant. She informed the court that she was headed home from her shop on July 4, 2012 at around 7:00 pm, when she met two people, the appellants herein. She told the court that she knew the appellants very well, and could recognize them by their voices. She also testified that it was not yet dark. The 2nd appellant greeted her and then jumped on her and pushed her down, while the 1st appellant took her handbag and sweater. The bag had a Nokia 1110 phone and Kshs. 10,000/-, while



- the sweater had her shop keys. When they left, she went home and called her husband who worked in Nairobi and informed him of what had happened. Her husband sent one, Kurunoi to the shop.
4. When she went to the shop the following morning, she found her shop open, and her DVD machine was missing. She also found a yellow paper bag next to the gate. It contained a metal bar and a torch. She went to report the matter at Narok Police Station, where she was informed that the 2nd accused person in the trial court had been found at the shop and was arrested. She knew him as Njenga. He named the appellants as the masterminds of the robbery. A neighbour arrested the 1st appellant, whereas the 2nd appellant was arrested in Eldoret. The stolen items were never recovered. The 1st appellant had come to stay with his sister who was married in the complainant's village; she used to give him work to mend her shoes. The 2nd appellant and Daniel Njenga, who was the 2nd accused, were both related to the 1st appellant, and they all lived in the village. PW1 informed the court that the 2nd appellant repaired umbrellas and that she had on one occasion given him an umbrella to repair. She further informed the court that the 1st appellant had threatened to cut her with a knife if she screamed. At this stage, it is necessary to indicate that although the trial court convicted all the three accused persons, the High Court later quashed the conviction of Daniel Njenga.
 5. PW2 was the complainant's neighbour. He corroborated the complainant's evidence that he had been called by her husband to check on the shop on the material day at around 7:30 pm. He went to the shop and saw that the gate was locked. However, he also saw four people jumping over the fence into the shop compound. It was dark and he could not see the four people. He called some neighbours and they all witnessed what was happening. He went back home. He informed the court that he knew the appellants and their coaccused well, as they stayed in their village.
 6. PW3 was the complainant's brother in-law. He told the court that the complainant had come to his house on the material day at around 8:00 pm and informed him that she had been robbed and beaten by thugs. He, together with around 10 neighbours rushed to the shop and found that goods had already been stolen. He found PW2 near the shop and they entered inside the shop where they found a yellow paper bag, metal bar, sack and a red torch. They arrested the 1st appellant who had bite marks on his hands, since the complainant had told him that she had bitten one of the thugs. PW3 informed the court that he had known the 1st appellant for a long time, and that they had grown up together.
 7. PW4 was a Clinical Officer at Narok District Hospital. He told the court that he had filled a P3 form for the complainant on 6th July, 2012. The complainant had multiple scratch marks around her mouth, bruises on the lower lip and a tender left neck. The degree of injury was harm. She had been previously treated at Manyatta medical clinic.
 8. PW5 was the arresting officer. He recorded the complainant's statement when she reported the matter to the police station. He was later informed that two suspects had been arrested by members of the public and he re-arrested them.
 9. PW6 was the investigating officer. He corroborated the testimonies of the other witnesses.
 10. Put to his defence, the 1st appellant in his unsworn statement denied the charge against him. He informed the court that he was a cobbler and that he used to stay with his sister. He told the court that he knew the complainant, and that he used to buy goods from her shop, and she was also his customer. He told the court that on the material day, he closed his job at around 8:00 pm and went to Susan's club, where he stayed until 9:30 pm before he went home and slept. He said that he did not meet the complainant or the 2nd appellant and the co-accused on that day. He stated that he was at the club with PW2 when he was called by the complainant's husband, and he accompanied PW2 to the shop. He



- said that he was arrested by the complainant's family while taking food to the co-accused, after learning of his arrest.
11. The 2nd appellant in his unsworn statement also denied the charge against him. He knew the complainant as mama Lisa. He told the court that on the material day, he was at home with his wife and two children.
 12. At the end of the trial, the appellants were found guilty of the offence of robbery with violence. Accordingly, they were convicted and sentenced to death.
 13. Aggrieved by the judgment, the appellants appealed to the High Court against the conviction and the sentence.
 14. The 1st appellant contended that he was convicted on the evidence of a single witness, and that the evidence of the complainant was not supported by the provisions of Section 137(d) of the *Criminal Procedure Code* to the effect tge complainant did not give his description to the police when she made her first report. The learned Judge held that the complainant was able to recognize the appellant because it was not dark, and also because she knew the 1st appellant prior to the commission of the offence. The learned Judge further held that the provisions of Section 137(d) was inapplicable, as it is in relation to consultation between the prosecution and the victim of the crime during plea bargaining. Therefore, the learned Judge held that the complainant positively identified the 1st appellant as one of the two robbers.
 15. The learned Judge held that the 1st appellant's defence was that of an alibi. However, given that there was evidence of recognition, the prosecution had proved its case against the 1st appellant beyond any reasonable doubt; and that he was convicted on sound evidence.
 16. The 2nd appellant contended that he was not positively identified by the complainant as one of the robbers. The learned Judge held that the complainant was able to recognize the 2nd appellant by his voice as the person who greeted her, and also as the person who pushed her to the ground and sat on her. The 2nd appellant was also well known to the complainant prior to the robbery as the person who repaired umbrellas.
 17. The 2nd appellant also contended that there were contradictions in the complainant's evidence with regard to where she was attacked. The learned Judge held that this contradiction was not material, as the complainant was attacked while on her way to her house.
 18. With regard to the 2nd appellant's claim that he was not accorded a fair hearing under Article 50(2) (6) (f) of the *Constitution*, the learned Judge held that the 2nd appellant was given an opportunity to cross-examine all the prosecution witnesses and make his defence, and he did so. The learned Judge further held that the omission by the trial court to record the 2nd appellant's response to the plea/charge was curable under Section 382 of the *Criminal Procedure Code*.
 19. The learned Judge held that the 2nd appellant was arrested in Eldoret after running away as testified to by PW6. The learned Judge held that the 2nd appellant's defence of alibi was rightly rejected in view of the recognition evidence of the complainant.
 20. Consequently, the learned Judge dismissed the appellants' appeal. The 2nd accused, who was the 2nd appellant before the High Court was acquitted.



21. Dissatisfied with the judgment on both conviction and sentence, the appellants lodged the current appeal. They raised six grounds of appeal to wit; that the learned Judge erred in law in:
- “ a) Ignoring the cardinal principle in criminal procedure and law that the burden of proof lies with the prosecution, and that the prosecution must prove every ingredient of the charge beyond any reasonable doubt.
 - b. Holding that the prosecution proved its case beyond a reasonable doubt while deciding the case against the weight of the evidence.
 - c. Failing to give due regard to material contradictions, discrepancies and inconsistencies in the prosecution case, thereby arriving at a wrong decision which resulted in a miscarriage of justice.
 - d. Holding that the 2nd appellant attended plea taking.
 - e. Holding that the appellants were accorded a fair hearing.
 - f. Appreciation of the law applicable and the evidence adduced against the appellants.”
22. When the appeal came up for hearing on 20th September 2023, Mr.Matoke, learned counsel, appeared for the appellants whereas Ms. Kisoo, learned prosecution counsel, was present for the respondent. This Appeal and Appeal No. 30 of 2017 by the 2nd appellant were heard together. Counsel relied on their respective written submissions.
23. The appellants were of the view that there was no credible evidence that the complainant was able to recognize her assailants. They submitted that there was limited time for the complainant to identify her assailants as the attack happened in an instant. They were of the view that the complainant did not describe her assailants, explain how their voices sounded or indicate their names to the police immediately after the incident, and as such, the complainant’s recognition was doubtful. They relied on the decision in the cases of *Maitanyi v Republic [1986]* eKLR, *Francis Kariuki Njiru & 7 Others v Republic [2001]* eKLR and *Daniel Muthomi Marigu v Republic [2021]* eKLR in support of this argument.
24. The appellants also argued that there were material contradictions as to the number of people who attacked the complainant, and wondered where the third attacker came from.
25. Citing the cases of *Adan v Republic [1973]* EA 445 and *Ombena v Republic [1981]* eKLR, the 2nd appellant submitted that the charges were not read to him, his answer to the charges was not recorded, and that the prosecution did not explain to him the facts. The 2nd appellant was of the view that it was immaterial whether or not he understood the proceedings even if plea was not taken. He urged that the proceedings against him were a nullity for want of plea taking.
26. The appellants’ submitted that they were not accorded a fair trial in accordance with Article 50(2)(g) of the *Constitution*, as they were not informed of their right to be represented by counsel. They were of the view that this failure was prejudicial to their case as they did not understand the nature of the proceedings before them, and they did not know what to do in their defence. They were of the view that this amounted to a mistrial and urged that the matter be retried. In support of this submission, they cited the cases of *Thomas Alugha Ndegwa v Republic [2016]* eKLR and *Republic v Karisa Chengo*



§ 2 Others [2017] eKLR. They further pointed out that they were not given witness statements and they were therefore not able to adequately prepare for trial.

27. Opposing the appeal, the respondent submitted that the appellants were properly identified by the complainant, who stated that they were well known to her. The respondent was of the view that the appellants' identification by recognition was sound and safe, as the complainant was also able to recognize the 2nd appellant's voice when he greeted her. The complainant had told the court that it was not yet dark when she was attacked, and she gave a detailed account of what had transpired, and the role of each of the appellants during the robbery. The respondent was of the view that since the complainant had previously interacted with the 2nd appellant, the evidence of recognition was corroborated by voice recognition. The robbery took about 15 minutes, with the appellants in close proximity with the complainant, which the respondent deemed as ample time for the complainant to recognise the appellants.
28. The respondent submitted that the complainant's testimony was that she was attacked by two assailants, who were the appellants herein. The respondent pointed out that it was immaterial that there was a third attacker as the complainant only recognized the appellants as her assailants. In any event, the 3rd person was arrested near the complainant's shop. The respondent urged that the contradiction did not go to the root of the prosecution case.
29. The respondent noted that the 2nd appellant was the 3rd accused person in the charge sheet dated 2nd October, 2012. Even though the proceedings began on 7th June, 2012; the 2nd appellant appeared in the proceedings for 2nd October, 2012 when his charge sheet was signed and his case was consolidated with that of his co-accused. The respondent was of the view that, on this date, the 2nd appellant was present in court at the time plea was taken, as the record shows that he requested for statements. He did not respond to the charge and a plea of not guilty was entered for all the accused persons, despite his response not having been recorded in the proceedings.
30. Citing the provisions of Section 382 of the *Criminal Procedure Code*, the respondent submitted that the failure to respond to the charge was an omission, but the same was not fatal to the prosecution case, as there was no injustice to the 2nd appellant, who fully participated in the trial and did not raise the issue at any point during the proceedings. The respondent was of the view that the omission was curable, and that the 2nd appellant had not demonstrated any prejudice occasioned to him as a result of the omission.
31. The respondent also pointed out that the appellants fully participated in the trial and the first appeal, and it is not apparent from the record that they encountered any difficulties. They understood the charges they were facing and put up their respective defences. They have not demonstrated any prejudice occasioned to them as a result of the failure to be informed of their right to counsel. The appellants also informed the court that they were ready to proceed with the trial, and they cannot, therefore, turn around and claim that they did not have adequate time and facilities to prepare for trial.
32. We have carefully considered the record of appeal, submissions by counsel, authorities cited and the law. The issues for determination are: whether or not the 2nd appellant took plea, whether or not there were material contradictions, whether or not the appellants were accorded a fair hearing, and whether or not the appellants were properly identified, as is closely linked with whether the prosecution case was proved beyond any reasonable doubt.
33. This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact which had been determined by the trial court and the first appellate



court. This is by dint of Section 361(1)(a) of the *Criminal Procedure Code*. This position was reiterated in the case of *M'Riungu v Republic [1983]* KLR 455 where the court stated thus:

“Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law.”

34. The 2nd appellant's contention was that he was not present at the time when plea was taken. As a result, he urged the court to declare that there was a mistrial. The respondent was of the view that this was an omission, and the same was curable under Section 382 of the Criminal Procedure Code.

35. It is common ground when plea was taken on 2nd October, 2012 the 2nd appellant's answer to the plea was not recorded. It is also evident from the record that on the date when plea was taken, the 2nd appellant was present in court, as he is recorded to have requested for witness statements to enable him prepare for trial. The issue we are called upon to determine is whether this omission was prejudicial to the 2nd appellant.

36. Section 207 of the *Criminal Procedure Code* provides that:

“The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.”

37. From the record, we find that the substance of the charge was read over and explained to each of the accused persons in Kiswahili. The 2nd appellant did not challenge these proceedings at any stage during trial. This issue was also not raised before the High Court, and the learned Judge only determined the issue, noting that it was curable under Section 382 of the *Criminal Procedure Code*, as it was directly linked to the 2nd appellant's contention that he was not accorded a fair hearing.

38. Section 382 of the *Criminal Procedure Code* provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

39. In the case of *Julius Oremo v Republic, Criminal Appeal No. 176 of 2010* (Unreported), the Court stated thus:

“As correctly observed by Ms Nyamosi, the trial proceeded as if a plea of not guilty had been entered and the appellant was given full opportunity to cross examine all the witnesses and to testify on his own behalf. At no stage of the trial was there any indication that the appellant was ready to plead guilty nor was any complaint raised at all. We think in all the



circumstances, therefore, that there was no failure of justice occasioned by the irregularity belatedly complained of and we find it was curable under section 382 of the CPC.”

40. Similarly, in the case of *David Irungu Murage & Another v Republic, Criminal Appeal No. 184 of 2004*, the Court stated:

“We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under section 382 of the CPC.”

41. In the case of Benjamin *Kariuki Wairimu v Republic [2013]* eKLR this Court addressed itself as follows:

“In the instant case, the appellant pleaded not guilty to the offence of simple robbery whose particulars were similar to the amended charge of robbery with violence. It is notable that the amendment was made before the matter proceeded for hearing. It is quite clear from the proceedings of the trial court that the appellant knew the offence he was charged with, therefore, failure to take plea on the amended charge did not in any way affect his defence on the evidence tendered.”

42. In the circumstances of the instant appeal, we find like in the authorities cited above, that the alleged lack of opportunity to plead did not occasion a failure of justice and any irregularities arising therefrom were curable under Section 382 of the *Criminal Procedure Code*. Furthermore, from the entry of a plea of not guilty, which then led to a full trial, we can surmise that the appellant was accorded an opportunity to plead to the charge.

43. As regards the contradictions in the number of people who attacked the complainant, we note from the record that the complainant told the court that she was robbed by two people, whom she identified as the appellants herein. It is clear from the record that the third co-accused was not mentioned as one of the people who attacked the complainant. We find that there was no contradiction as to the number of people who attacked the complainant.

44. The appellants pointed out that they were not accorded a fair hearing, because they were not informed of their right to legal representation. It is evident from the record that the appellants were not informed of this right. The question that then begs to be answered is whether the failure by the court to inform the appellants of their right to legal representation was prejudicial to them. Article 50(2) (g) of the *Constitution* provides that:

“Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by an advocate, and to be informed of this promptly;”

45. This court in the case of *David Njoroge Macharia v Republic [2011]* eKLR observed as follows:

“Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence



owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...”

46. It is common ground that the appellants represented themselves before the trial court. No evidence was adduced to the effect that the appellants suffered from any disability or that, there was a language barrier. The appellants were able to cross-examine all the prosecution witnesses. They also gave their testimonies, which the courts considered. In the circumstances, we have no doubt in our minds that the appellants understood the nature of the proceedings and that they were able to properly defend themselves. There were no complex issues of law or fact which the appellants encountered in the course of the trial that would have required that they be represented. The appellants also had the right to choose an advocate but they did not exercise that right. We find that the lack of legal representation was not shown to have caused an injustice to the appellants. In an ideal world, each accused person ought to be represented by counsel. However, the reality is such that we have not attained the status of the ideal world. In the prevailing circumstances, the lack of legal representation could only vitiate a trial if the appellant demonstrates that he was prejudiced.
47. The appellants were of the view that their identification was not proper. It is a well settled principle in law that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In *Wamunga v Republic [1989]* KLR 424, this Court held that:
- “... 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 a conviction.”
48. Both the trial and the 1st appellate courts were satisfied that the appellants identification was positive. While considering whether the identification of the appellants was free from error, we consider the quality of light, the distance between the identifying witness and the person identified and whether the circumstances surrounding the incident were conducive for a positive identification. In the case of *Maitanyi v Republic*, (supra), this Court held that:
- “It is at least essential to ascertain the nature of light available. What sort of light, size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into.”
49. From the evidence of the complainant, we are of the view that the identification of the appellants was proper and free from error. The complainant informed the trial court that it was around 7:00pm, it was getting dark but it was not yet dark. She knew the appellants prior to the incident, and the appellants also knew her. She was also able to recognize the 2nd appellant by his voice when he greeted her. They tussled for about 15 minutes. This to our minds, was sufficient time for the complainant to identify her assailants, as they were well known to her.
50. On whether the prosecution case was proved beyond reasonable doubt, Section 296(2) of the *penal Code* as stated in the case of *Oluoch v Republic [1985]* KLR outlines the three circumstances which need to be proven in order to sustain a conviction for an offence of robbery with violence. The prosecution needs to prove only one. The circumstances are that:
- a) the offender is armed with any dangerous or offensive weapon or instrument;
 - b. the offender is in the company of 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.”

51. From the evidence on record, we are satisfied that two elements of robbery with violence were proved beyond any reasonable doubt. The appellants were two, and therefore each of them was in the company of one or more person. They used violence on the complainant as demonstrated by the scratch marks on her body when she was examined by PW4. We find that the prosecution’s case against the appellants was overwhelmingly credible and that the High Court properly directed itself in dismissing the appeal on conviction.
52. The appellants did not appeal against their respective sentences. However, this Court is alive to the jurisprudence which has developed on the issue of sentences that the legislature has prescribed as being mandatory. Pursuant to the decision of the Supreme Court, in the case of Francis Karioko Muruatetu vs Republic, the mandatory nature of the death penalty is unconstitutional. Therefore, we find that when the High Court upheld the death sentence which had been handed down simply because it was deemed mandatory, it erred. In the circumstances, and in the interest of justice we are constrained to interfere with the said sentence.
53. Having given due consideration to the circumstances of the case, we hereby set aside the death sentence, and substitute it with a sentence of 30 years imprisonment, which will run from the date when the appellant was first sentenced.
54. The upshot is that the appeal against conviction lacks merit and it is dismissed. However, we set aside the sentence in the terms already set out herein.
55. This judgment is delivered pursuant to Rule 34(3) of the *Court of Appeal Rules, 2022* as F. Sichale, JA declined to sign it.

Orders accordingly.

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

K. M’INOTI

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

