



**Kanyingi v Respondent (Criminal Appeal 20 of 2020)  
[2022] KECA 755 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 755 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 20 OF 2020  
HM OKWENGU, MSA MAKHANDIA & S OLE KANTAI, JJA  
JUNE 24, 2022**

**BETWEEN**

**SIMON NJOROGE KANYINGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Nairobi  
(Kimaru, J.) dated 24th May, 2016 in HC. CR.A. No. 127 of 2014)*

**JUDGMENT**

1. This is a second appeal from the Judgment of the High Court of Kenya, Nairobi (Kimaru, J.) delivered on 24<sup>th</sup> May, 2016 where the first appeal was dismissed. The appellant, Simon Njoroge Kanyingi, had been charged before the Chief Magistrate’s Court, Kiambu, with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the [Penal Code](#) particulars being that on 1<sup>st</sup> day of July, 2013 at Banana Shopping Centre in Kiambu County he with others not before court while armed with dangerous weapons namely iron bars robbed Peter Kimani Kabaru of a mobile phone and cash of Ksh.5000 and immediately before the time of such robbery they used actual violence to the said person. Our mandate in an appeal like this one is limited by Section 361(1) Criminal Procedure Code to consider only issues of law if we find that there are any raised in the appeal. There are many judicial pronouncements by this Court on the effect of the said Section of the Criminal Procedure Code. For instance, in the case of *Stephen M’Irungi & Another v Republic* [1982-88] 1 KAR 360 this Court stated of that mandate:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no



reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

2. We visit the facts of the case purely to satisfy ourselves that the trial court and the High Court on first appeal carried out their mandate as required in law and deal with issues of law if there are any in this appeal.
3. The prosecution case was through the evidence of 7 witnesses.
4. Peter Kimani Kabaru (PW1 – Kimani) ran a bar (called “Big Five”) with his wife Lucy Nduta Kimani (Nduta – PW2) at Karuri in Kiambu County. On 1<sup>st</sup> July, 2013 they were in the bar entertaining guests who included Stephen Nganga (Nganga – PW3). At about 10.30 p.m. Nganga requested Nduta to escort him to the road as the area was known for thuggery. When he reached the road Nduta observed 4 or 5 young men accost Nganga and rob him. She screamed and this attracted her husband (Kimani) who rushed to the scene. He gave chase and managed to apprehend one of the robbers. The robber however shouted for help and his accomplices rushed back, attacked Kimani with iron bars, robbed him and freed their colleague. According to Nduta she clearly identified the appellant who lived in the neighbourhood and was commonly known as “Njoro” who she had known for about 1 year. Nduta was also attacked. Meanwhile Kimani was taken to Karuri Health Centre where he was treated for injuries which, according to Richard Munene (PW7) a Clinical Officer at Karuri Sub District Hospital included injuries to the face, right arm, right middle finger and left leg. A report was made at Karuri Police Station.
5. Kimani testified that when he went to the police station to report the incident he told police that it was the appellant who had assaulted and robbed him. According to Kimani, Nduta and Nganga the place where the attacks took place was well lit by electric light.

Nganga told the trial court:

“I recognized one of the suspects but I could not dare say his name. I know the accused person. He was the first one to attack. I have known the accused person for a long time but I would not dare call out his name for my own safety ”

6. Robert Ojwang (PW4) of Karuri Flying Squad was on 4<sup>th</sup> August, 2013 requested to conduct an identification parade. He did so; Kimani did not identify any suspect but Nduta identified the appellant at the parade. We shall address this issue later.
7. IP Peter Kiilu (PW5) of the said police station received report from Kimani and investigated the case. Nduta told him that she knew the appellant as one of the attackers and could identify him. On 2<sup>nd</sup> August, 2013 the appellant was arrested at Kiambu Law Courts where he was attending a case he had in court.
8. That was the case made out by the prosecution and the trial court found that there was a case to answer. In a sworn statement the appellant denied the charge saying that he knew nothing about the case before the Court. The trial court considered both sides of the case, found that the charge had been proved to the required standard, convicted the appellant and sentenced him to death. As we have seen the first appeal failed and was dismissed; findings that have provoked this appeal.
9. There are 9 grounds of appeal set out in the homemade Memorandum of Appeal. They range from an attack on the findings of the High Court, the appellant stating that the High Court erred in law by failing to reconsider and re-evaluate the evidence; that the High Court erred in law in finding that there was identification through recognition; that the defence was not considered and burden of proof was



shifted to the appellant contrary to law; that the prosecution case was riddled with contradictions; that the High Court erred in law in failing to consider Sections 150 and 169 Criminal Procedure Code and, finally, that the Judge erred in law in failing to find that Articles 50(1) (2) and 51 (2) of the *Constitution* were flouted and violated. There is a Supplementary Memorandum of Appeal drawn for the appellant by his lawyers Charles Kimathi & Company Advocates. The 5 grounds of appeal set out do not differ from what we have seen in the homemade Memorandum of Appeal.

10. When the appeal came up for hearing before us on a virtual platform on 28<sup>th</sup> March, 2022 the appellant was represented by learned counsel Mr. Kimathi while learned counsel Mr. Solomon Njeru appeared for the office of Director of Public Prosecutions. The appellant appeared from Manyani Prison. Both counsel had filed written submissions and in a highlight Mr. Kimathi submitted that the High Court had failed to consider that Kimani and Nduta, being operators of a bar, could have been drunk and be unable to identify suspects and that the attack took place at night. According to counsel the appellant was arrested 1 month after the robbery. Counsel further submitted that the appellant was below 18 years when he was charged and the trial should have been conducted for a person below the age of majority as per the Children’s Act. On sentence counsel requested us to consider a different appropriate sentence and cited the Supreme Court of Kenya decision in the case of *Francis Karioko Muruatetu & Others v Republic* [2017] eKLR. He asked us to allow the appeal or give a lesser sentence.
11. In opposing the appeal counsel for the respondent submitted that there was no evidence to show that the witnesses who testified and who had been in the bar were drunk. Counsel submitted that the appellant was recognized by Nduta who gave the information to police and that the scene of crime was well lit. Further, that identification parade was conducted to “buttress recognition”, and, finally, that the Muruatetu (supra) case did not apply to robbery with violence cases.
12. In a brief rejoinder counsel for the appellant submitted that identification is a matter of law, and because of the issue of age raised we should order a fresh trial.
13. We have considered the whole record, submissions made and the law and these are our analysis and findings on the determination of this appeal.
14. We agree with counsel for the appellant that identification is a matter of law calling for our attention. Another point of law raised is whether the High Court carried out its mandate of retrying the case; whether there was a shifting of the burden; whether the defence was considered and whether legal provisions were ignored or violated.
15. On the issue of identification as we have seen Nduta testified that she saw the appellant during the attack; there was sufficient electric light, the appellant lived in her neighbourhood and he was commonly known as “Njoro”. She gave this information to police. The High Court in re-evaluating that piece of evidence found that the appellant had properly been identified by Nduta through recognition. Citing the case of *Reuben Taabu Anjononi & 2 Others v Republic* [1980] KLR p.54 where this Court stated at p.60:

“Being night time the conditions for identification of robbers in this case was not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.”

16. The Judge found that Nduta was not identifying a stranger; she recognized the appellant and that recognition was more assuring than the identification of a stranger. Upon our own consideration we



are of the view that the Judge reached the correct decision in respect to identification. The appellant was properly identified through recognition and there was no error in the finding by the Judge.

17. We have gone through the Judgment of the High Court. The same is well set out and all relevant issues were considered. We cannot see any merit in the complaint that the Judge did not re-evaluate the evidence. There was no shifting of the burden and the appellant's defence was considered but rejected as it was displaced by the strong case made by the prosecution. The case was properly conducted; there was no violation of the law. The issue of age was not raised before the trial court or the High Court and it is inappropriate to raise it in a second appeal as we have no machinery or material on which to investigate or make findings on the same.
18. One issue that we earlier promised to visit was the identification parade mounted by the police at which Nduta identified the appellant. Nduta's case from the very beginning was that she knew the appellant by the time of the robbery and she had identified him as one of the robbers. Counsel for the respondent submits that such an identification parade was necessary to buttress the issue of recognition. We do not agree. Where a witness has recognized a suspect and volunteers that information to police there is no necessity for that witness to attend an identification parade to identify that suspect. This Court sitting at Malindi in the case of *Andrea Nabashon Mwarisha v Republic* [2018] eKLR held that an identification parade was superfluous in certain circumstances. We said:

“Identification parades are necessary though not absolutely where the witness purports to identify a suspect did in extremely difficult conditions, say, where the offence is committed at night and when visibility may have been a challenge having regard to the availability or lack of light and when the circumstances under which the offence is committed are harrowing to the witness thereby impairing his ability to positively perceive and with certainty identify the culprit or where the incident lasts for a short time. The purpose of identification parade as explained in *Kinyanjui & Others v Republic, (1989) KLR 60*: "is to give an opportunity to a witness under controlled 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....." Further identification parades are meant to gauge and test the correctness of a witness's identification of a suspect given the circumstances under which he claims to have identified the suspect. See *John Mwangi Kamau v Republic (2014) eKLR*.

19. In this case, the offence was not committed in difficult circumstances at all. It was during the day and visibility was not poor. The complainant too spent some time with the appellant at the scene of crime. Indeed, when the appellant and his accomplices dragged him into the forest, it was the appellant who used the complainant's scarf to gag him. He is also the one who tied him to a tree. Thereafter, as soon as the appellant was found in possession of the motorcycle, the complainant was summoned to the scene upon which he identified his motorcycle in the possession of the appellant before they all ended up at Kwale Police Station. In those circumstances, of what evidential value would have been the identification parade? We cannot think of any. To our mind, it would have been superfluous."
20. Nothing however stands or falls on this issue of a parade, we having found that the appellant was properly convicted.
21. We were asked to consider the issue of sentence and reduce it but counsel for the respondent reminds that the decision in *Murutetu* case (supra) does not apply to robbery with violence cases. That case involved a charge of murder and the Supreme Court held that a mandatory minimum sentence was unconstitutional. That Court later clarified that its decision did not have universal application. We do hope that the Supreme Court will consider the issue again to give further clarity to courts on the issue of sentencing where Parliament has set out a minimum sentence thus robbing the courts the opportunity



to consider appropriate sentences proportionate to circumstances of each case. We must for now pause and say no more on the issue.

23. The appeal has no merit and we dismiss it in its entirety.\*\*

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

DEPUTY REGISTRAR

