



**Irungu & 2 others v Republic (Criminal Appeal 104, 105 & 106 of 2016) [2022] KECA 1354 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1354 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 104, 105 & 106 OF 2016  
HM OKWENGU, MSA MAKHANDIA & J MOHAMMED, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**JOHN NDERITU IRUNGU ..... 1<sup>ST</sup> APPELLANT**

**KENETH KIRIMI ..... 2<sup>ND</sup> APPELLANT**

**PETER KIMATHI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Nanyuki (Kasango, J.) delivered on 28th September 2016 in H.C.CR. A. No. 59, 60 & 61 of 2015)*

**JUDGMENT**

1. The three appellants, John Nderitu Irungu (Nderitu), Kenneth Kirimi (Kirimi) and Peter Kimathi (Kimathi), were jointly charged together with three others before the Senior Resident Magistrate's Court at Nanyuki, with two counts of robbery with violence contrary to section 296(2) of the [Penal Code](#). Upon hearing the evidence of the prosecution and the defence, the trial magistrate found the charges against the appellants' co-accused not proved, and acquitted them, but found Nderitu, Kirimi and Kimathi who were 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused, each guilty, and convicted them on the two counts. Consequently, the three were sentenced to death on the two counts, one of the death sentences being held in abeyance.
2. Nderitu, Kirimi and Kimathi who were aggrieved, each filed an appeal to the High Court, which appeals were consolidated and heard together. In the appeals, they each challenged their conviction on three main grounds. First, that the evidence of identification was uncorroborated and unreliable. Secondly, that the charges against them were not proved to the required standard, and thirdly, that their defences were improperly rejected.



3. Upon hearing the appeal, the High Court (Kasango, J.), dismissed it, finding that Nderitu was arrested at the scene of the robbery; that both Nderitu and Kimathi were properly identified by two of the prosecution witnesses; that Kirimi was actually spotted trying to escape from the scene of the robbery riding a motorcycle, and was followed by two prosecution witnesses who were able to see him clearly when the motorcycle stalled and they spoke to him; and that there was circumstantial evidence that linked Kirimi to the charge. The learned Judge was satisfied that the prosecution had established its case against Nderitu, Kirimi and Kimathi to the required standard; and that their defences were properly rejected because the identification evidence by the prosecution witnesses confirmed that they were at the scene of the robbery.
4. Nderitu, Kirimi and Kimathi did not give up, but each filed an appeal to this Court challenging the judgment of the High Court. Before the hearing of the appeals in this Court, Kirimi withdrew his appeal.
5. Nderitu and Kimathi raised similar grounds against the judgment of the High Court. The grounds were: first, that the High Court failed to critically analyse the evidence that was adduced against them and thereby arrived at a wrong conclusion; secondly, that the High Court erred in convicting them on the evidence of a single identifying witness in difficult circumstances, without corroboration; and thirdly, that the High Court erred in convicting the appellants against the weight of the evidence.
6. The two appeals were consolidated during the hearing. Nderitu and Kimathi were represented by learned Counsel Mr. Nderi, who was instructed by Nderi & King'ati Advocates, who filed written submissions in support of the appeals. In the submissions, they urged the Court to find that the learned Judge failed to properly analyse the evidence relating to their identification. Nderitu and Kimathi urged that the evidence of identification was not reliable. This is because although the main identifying witness Salome Muthoni (Salome) purported to have identified Nderitu because of his 'rasta' hairstyle, she did not mention the hairstyle in her first report, nor did she mention the hairstyle when Nderitu was first arrested in the compound of one Mogaka, and that the prosecution failed to lead evidence with regard to the time, intensity and presence of light, that enabled Salome to identify Nderitu, not only in the bar but also in Mogaka's compound.
7. In addition, Salome's identification of Kimathi was also not reliable as Kimathi was said to have had a scarf which covered part of his head, and therefore, it was not clear how she was able to identify him; and that Daniel Irungu Njoki (Daniel) the second identifying witness conceded that he did not record his alleged description of Nderitu as having 'rasta' or dented teeth.
8. As regards the evidence of Kelvin Waweru Njoroge (Njoroge), it was submitted that at no time was there any link between the arrest of Nderitu and the earlier robbery incident, and that Kelvin Murimi (Murimi) who was with Njoroge, was emphatic that the reason for Nderitu's arrest was trespass into Mogaka's compound; and that the evidence of other witnesses, PC Henry Githigi (PC Githigi) and Hassan Thurambura (Thurambura), had no connection with the robbery. It was urged that in arriving at their conclusions, the two courts below failed to properly analyse and evaluate the prosecution and defence evidence; and thereby erred in failing to find that the prosecution had not discharged the burden of proof; and that there was no evidence regarding the form of lighting at the scene where Nderitu was arrested.
9. In addition, the appellants pointed out that there were major inconsistencies in the evidence of the prosecution witnesses, which inconsistencies ought to have been resolved in favour of the appellants. For instance, whereas the investigation officer stated that Nderitu's hairstyle was the basis of the description that led to his identification, Salome was emphatic that she did not give this description



of Nderitu, nor was the description recorded in the statement of the investigation officer or that of Salome.

10. As regards the facial scar which was used to link Nderitu to the offence, it was argued that there was no evidence of how the scar had been inflicted. Further, the evidence of Njoroge and Murimi was contradictory in regard to the number of assailants that were seen fleeing, some witnesses testifying that the assailants escaped on a motorcycle, and yet Nderitu one of the assailants was arrested in the neighboring area about two hours after the robbery. It was urged that it was unsafe to convict on the uncorroborated evidence of a single witness.
11. In order to place the judgment of the High Court in the right perspective, we revert to the evidence which was adduced in the trial court. Eleven witnesses testified for the prosecution while each of the six accused persons gave evidence in their defence. In a nutshell, the prosecution evidence was that on the night of 13<sup>th</sup> October 2014, at about 9.45 pm, Salome, who runs a bar and restaurant business within Nanyuki town, was in the bar with three customers who included Daniel. Ten people armed with swords and pangas entered the bar from the back door, and proceeded to the counter. One of the men whom Salome perceived was the leader of the group ordered everyone in the bar to lie down. Salome did not know this man before but was able to identify him later by appearance as Kimathi. The assailants demanded money and Salome directed one of the men whom she later identified by appearance as Nderitu, to where the money was. Nderitu took cash Kshs. 13,000 and Salome's Samsung mobile phone. Nderitu then proceeded to rob Daniel of some documents and a total of Kshs. 15,000 which he removed from Daniel's pocket. Both Salome and Daniel testified that they were able to see and later identify the robbers because there was electric light both inside and outside the bar.
12. The robbers were apparently interrupted by Njoroge a son to Salome, who had driven to the bar to collect his mother. Njoroge who was in the company of his friend, Murimi, realizing that there was something amiss in the bar, drove off hooting, at the same time contacting the police. In the meantime, the robbers who were alarmed by the hooting, ran out of the bar. Njoroge and Murimi who were now driving back to the bar, saw a motorcycle being driven away with lights off and they followed the motorcycle until it stalled. They interrogated the rider of the motorcycle whom they later identified as Kirimi. The rider could not produce any identification. Though suspicious they had to leave the rider alone, when other motorcycle riders came to the scene as they feared for their security. They however managed to take a picture of the motorcycle.
13. Meanwhile, Thurambura a watchman who was on that night guarding opposite Camp George, saw a motorcycle drop two passengers at the gate and became curious. On peeping, he saw someone hiding inside the adjoining compound and he alerted the owner of the compound, who opened the gate. They found Nderitu hiding inside the compound. Nderitu who was carrying a sword was arrested and handed over to the police.
14. PC Woma Salome Nzilani (PC Nzilani) who was the investigating officer in the robbery incident later realized that Kimathi who had been arrested for a different offence, fitted a description that had been given by Salome. She arranged for an identification parade but Kimathi and his co-accused declined to participate in the parade. She therefore caused him to be charged with the robberies committed in Salome's bar.
15. When put to his defence, Nderitu gave sworn evidence, in which he explained that he was on his way home from work when he met someone who was holding a torch and a panga, and because the person directed the torch at him and he was not armed, he decided to take cover in the next homestead. The owner of the home then came, and together with the man, beat him up. Other people came and he



was taken to the police station where he was booked for trespass. He was surprised when the charge was later changed to one of robbery. He denied having been involved in the robbery.

16. Kimathi also gave sworn evidence in which he explained how he met one George Mathenge and stopped to talk to him. That as they were talking, a motor vehicle stopped and Mathenge talked to someone in the vehicle whom he referred to as Bishop. They were then told to enter the vehicle. One of the occupants of the vehicle said they wanted to stop at the police station, but when they arrived at the police station, Mathenge was told to take some animal meat which was inside the car, into the station. They were then referred to the report office and detained for selling meat without a permit. Later, one PC Githigi said Kimathi was wanted by the District Criminal Investigation Officer (DCIO), and Kimathi was surprised when charges of robbery with violence were read to him.
17. In her judgment, the learned Judge had this to say in regard to Nderitu's identification:

“19. Nderitu the first appellant was identified by PW 1 and 2. PW 1 was very emphatic that there was sufficient light in the bar to enable proper identification. Although Nderitu submitted that the prosecution failed to state the source of light at the bar it will be noted that when PW 1 was cross-examined by Kimathi she stated thus:

‘my pub had outside security lights and electricity lights inside the bar.’

That in my view sufficiently responds to Nderitu's submissions, the argument by Nderitu in his written submissions that upcountry bars have decorated lights was not in evidence either during prosecution's case or the defence evidence. It is therefore rejected. Nderitu approached the counter of the bar where PW 1 was lying down and indeed according to PW 1's evidence he stepped over her in order to reach where the cash was kept. PW 1 was able to see that Nderitu has rasta hairstyle and had a healing wound. It was imperative to note what the learned trial magistrate had to say about those identifying marks in Nderitu in his considered judgment. The trial magistrate stated: -

‘Important to note that even as at the time of hearing the first accused (Nderitu) had the same hairstyle (rasta) and a prominent scar on his face.’

20. The learned trial magistrate unlike this court had the opportunity to see the witnesses and more importantly saw Nderitu when he was before the court. I have no reason to differ with the learned trial magistrate's observation. It follows that the identifying marks noted by PW 1 and having been seen by the trial court are safe to rely upon in this appeal in respect of the identification of Nderitu.
21. Nderitu in his submissions argued that PW 1 failed to give information to the police about hairstyle when the police first attended her bar. PW 1 confirmed in her evidence that when the robbers ran away as a result of PW 3 hooting his car outside the bar, the police arrived at the scene and made what can be called preliminary inquiry of the incident. The investigating officer when being cross-examined by Nderitu stated that when she went to the scene of the robbery before Nderitu was found hiding at a compound PW 1 described



Nderitu as person with rasta hairstyle. Later on Nderitu was arrested hiding in the compound of a house which was said to be 30 minutes away from the bar. On being arrested at that compound PW 1 confirmed that Nderitu was part of the robbers. Since Nderitu was identified at the scene it follows that Nderitu reliance of the case of *Maitanyi v Republic* [1986] KLR 198, is misguided. It does not assist him because this is not a case where PW 1 gave a first report to the police of Nderitu's identity and was later required to take part in identifying Nderitu at an identification parade. The Court of Appeal in the (*supra*) stated thus:

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made... if a witness received a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she should not identify or recognize the person, then a later identification or recognition must be suspect, unless explained.”

22. Furthermore PW 2 who was not present when Nderitu was arrested while hiding in the compound of a house stated that he recorded his statement with the police and in the statement he described Nderitu as a person with rasta hairstyle.
23. On that basis Nderitu's argument on the allegation of initial report of misidentification is rejected.

18. And this is what the leaned Judge stated in regard to Kimathi's identification:

- “30. Kimathi the third appellant as stated before he together with Kirimi refused to participate in the identification parade. Kimathi argued that his was a case of mistaken identity. He submitted that he was not arrested at the scene and that (*sic*) nor was he arrested with the items that were the subject of the robbery. He also drew the court's attention to the fact that he was first arrested for another offence before he was charged with the offence of robbery with violence. The fact that he was arrested of another offence was confirmed by the investigating officer.
31. On identification PW 1 said that she saw Kimathi as the one leading the group of robbers. He heard him shout 'lalani' (lie down). She saw him holding a panga. PW 1 on being cross-examined by Kimathi said: -

“I was able to identify the attackers you Kimathi include. You (Kimathi) were wearing a suit coat and had partly covered your head with a scarf. I saw your appearance. ...I saw you coming in and you came and stood behind a customer and told us to lie down’

PW 1 proceeded to confirm that before Kimathi's arrest she described him to the police as a short person with small eyes and black in colour. It was because



of that description that Kimathi on being arrested for another offence was identified by the investigating officer and charged with the present offence.

#### Criminal Standard of Proof

31. Re-evaluating the evidence adduced by the prosecution this court finds that the prosecution met the required criminal standard of proof in respect of all the 3 appellants. I am guided by the decision in the case *Miller vs Minister Of Pension* [1947] where in discussing criminal standard of proof Denning J, stated: -

‘It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the court of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence ‘of course it is possible, but no in the least probable,’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.’

That standard was met by the prosecution.

33. The appellants erred to have argued that the trial court rejected their defences. Far from it, the trial court adequately discussed and analysed the appellants’ defences.
34. The defence offered by Nderitu was that he was wrongly arrested. That defence is rejected because of the identification evidence offered by PW 1 and 2 and the fact that as confirmed by PW 10 he was arrested on the same night of the robbery about 5 minutes away from the bar.

....

36. Kimathi was identified by PW 1. She saw him as the leader of the robbers. PW 1 described him to the police before he was arrested.”

19. It is clear from the above that the learned Judge properly addressed herself in regard to the law on identification, and considered relevant factors pertaining to the identification of Nderitu and Kimathi. As directed by this Court in *Wamunga v Republic* [1989] KLR 426:

“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.”

20. Both the trial court and the first appellate court were alive to the need to consider the identification evidence with caution. They addressed the evidence of the identifying witnesses, the time and opportunity that they had to observe their assailants, and the type of light that was present. We find that their conclusion that the identifying witnesses had appropriate time and opportunity to see and observe their assailants, and that there was ample lighting that facilitated positive identification of Nderitu and Kimathi, cannot be faulted. Unfortunately for Nderitu, his ‘rasta’ hairstyle was a distinguishing factor that made it easy for Salome and Daniel to identify him. In addition, there was a healing scar that even the trial magistrate was able to take note of, during the trial.



21. Nderitu was arrested in an area which was not too far away from the bar, in suspicious circumstances as he was trying to hide. His defence that he felt threatened by Thurambura was negated by Thurambura's evidence. It is clear that he had been dropped by a motorcycle and he tried to hide inside Mogaka's compound. Salome who was attracted by the noise from Mogaka's compound was able to identify him immediately she saw him. The issue of a first report did not therefore arise.
22. As for Kimathi, Salome took note of him during the robbery because he appeared to be the leader of the gang, and was the one who ordered the people in the bar to lie down. Although he was said to have partially covered his head with a scarf, Salome was able to see him clearly with aid of the electric light. Njoroge and Murimi saw him riding his motorcycle away from the direction of the bar with lights off. This was extremely suspicious, an alarm having just been raised concerning the robbery. Njoroge and Murimi had the opportunity to see him clearly when the motorcycle stalled and they spoke to him. Although he was later arrested for a different offence, Salome was able to give a description that helped the investigating officer PC Nzilani to connect him to the offence. We note that no identification parade was carried out in respect of Kimathi because he declined to participate in the parade. Nevertheless, his identification by Salome and the circumstances in which Njoroge and Murimi saw him escape from the scene, were sufficient to establish the charge against him.
23. We come to the conclusion that there was sufficient evidence to prove that Nderitu and Kimathi were among the assailants who invaded Salome's bar while armed with 'pangas' and 'simis' and robbed her and Daniel of their properties. Accordingly, we find that this appeal has no merit. It is accordingly dismissed in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

