



REPUBLIC OF KENYA



KENYA LAW
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**Mtere v Republic (Criminal Appeal E051 of 2024)
[2025] KEHC 5144 (KLR) (Crim) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E051 OF 2024
AM MUTETI, J
APRIL 28, 2025**

BETWEEN

GEORGE ONYANGO MTERE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the whole judgment and conviction of the learned
Honorable B. Ochoi Chief Magistrate in Criminal Case No. E4844 of
2020 at Nairobi Milimani Law Courts delivered on 19th April 2024)*

JUDGMENT

Introduction

1. The appellant in this matter was charged with the offense of Robbery with violence under Section 295 as read with 296 (2) of the [Penal Code](#).
2. The particulars of the charge were that on 7th December 2020 at about 5:00 PM at Mitsumi Business Park Computer Garage limited, Muthithi road in Westlands within Nairobi County jointly with others not before court while armed with dangerous weapons namely pistols robbed Daksha Patel of Kshs.150,000 USD equivalent of Kshs.15,000,000 Million and at or immediately before or after the time of such robbery threatened to shoot the said Daksha Patel.
3. The appellant together with four others were tried convicted and sentenced by the trial and it is against that decision that the appellant has moved to this court on appeal to challenge the conviction and sentence on the following grounds:-
 - i. That the prosecution and the trial of the Appellants was a breach of [the Constitution](#) and the Appellants Rights to a fair trial,



- ii. That the learned Chief Magistrate purportedly conducted a trial against the 3 Appellants for an offence not known to law in Kenya.
 - iii. That the learned Chief Magistrate erred in law and fact in convicting the Appellants for an offence that was not proved according to the law and more specifically purportedly relying in digital evidence illegally admitted in contravention of Section 106 (1) of the [Evidence Act](#)
 - iv. That the learned Chief Magistrate erred in law and fact by not properly evaluating the weight of the evidence adduced by the Appellants in relation to the offence they were charged with
 - v. That the learned Chief Magistrate misconstrued the prosecution evidence and reason wherefore he made erroneous finding that the 2nd Appellant had Committed the offence of Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the [Penal Code](#),
4. The conviction of the appellant as per the judgment of the learned Honorable magistrate was on the basis of the identification of the appellant by the victim relying on the CCTV Footage.
 5. The issue that therefore falls for consideration in this appeal is whether the identification of the appellant was free from error and that it amounted to positive identification of the appellant as one of the persons who robbed the victim.

Appellant's Case.

6. The evidence on identification has been faulted by the appellant in two very important aspects.
7. Firstly, the appellant contends that the person who produced the CCTV footage did not produce a certificate as required under the provisions of Section 78 and 106 B of the [Evidence Act](#).
8. The appellant stated that the certificate under section 78 of the Evidence is mandatory and without it, the evidence is inadmissible.
9. According to the appellant since the prosecution had failed to meet the requirements of the two provisions of the law, the CCTV footage should not have been admitted in evidence effectively leaving no evidence to connect the appellant to the offence.
10. The appellant further submitted that with the exclusion of that evidence there would not be any other evidence left in support of the case against him thus his appeal should be allowed.
11. Secondly, the appellant contended that the investigating officer by failing to conduct an identification parade botched the case for the prosecution in that he only tendered before the court what was essentially evidence of dock identification which in the appellant's view was worthless.
12. The appellant further took issue with the Learned Honorable Magistrate's decision for failure by the court to specify in the judgment the offense and section of the law under which the appellant was convicted. According to the appellant that violated the provisions of Section 169 of the [Criminal Procedure Code](#) a defect that was incurable.
13. The appellant cited the case of Willis Angatia v Republic 2018 eKLR in which Nyamweya J (as she then was) held that the failure to comply with the provisions of Section 169 of the [Criminal Procedure Code](#) is not a curable defect. This court agrees with the appellant's submission that a trial court must state the section of the law under which an accused person is found guilty. The trial court omitted to do so in this case.



14. Section 215 *Criminal Procedure Code* is not the provision under which a person can be convicted according to the appellant's counsel.
15. The appellant thus urged this court to consider allowing the appeal, quash the conviction and set aside the sentence.

Respondent's Case.

16. The prosecution through Mr. Chebii prosecution counsel supported the conviction and sentence and relied on their written submissions which this court has duly considered. The prosecution basically submitted that there was sufficient evidence to connect the appellant to the offence thus the conviction was safe according to them.

Analysis And Determination

17. The duty of this court as a first appellate court is well settled in the case of *Okeno v Republic* [1972] EA 32 at 36. In that case the court held that an appellant "on a first appeal is entitled to expect the Evidence as a whole to be submitted to a fresh and exhaustive examination(*Pandya v Rep* [1957] EA 336 and to the appellate court's own decision on the Evidence. The first appellate must itself weigh conflicting evidence and draw its own conclusions. (*Shentilal M. Ruwala v R* [1957] E.A 570. It is not the function of the first appellate court to merely scrutinize the Evidence to see if there was Some evidence to support lower court's findings and conclusions it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses, See *Peters v Sunday* [1958] E.A 424."
18. Although there were recoveries from the House of the appellant (who was the 5th Accused in the lower court) upon arrest , the learned Honorable Magistrate found as a matter of fact none of the items including the hat recovered from the appellant's house could be linked to the robbery.
19. The effect of that finding was that the trial court was only left with the evidence of identification to deal with as the only evidence that could link the appellant with the commission of the offence.
20. The issue of identification in a criminal matter is so central to the decision by a court to convict because it goes to the root of the matter of actus reus on the part of the accused person. It is this critical for trial court to closely scrutinize such evidence before relying on it to convict and satisfy itself as to the identity of the perpetrator. Any doubt on the identity of the perpetrator of a crime must be to the benefit of the accused.
21. In *R. v Turnbull* [1977] Q.B 224 the court settled the principles where a case depends wholly or substantially on the correctness of one or more witness's identification of the accused person. The court stated that the jury must examine the circumstances in which the identification was made in particular;
 - i. For how long did the weakness have the accused and observation.
 - ii. At what distance.
 - iii. In what light.
 - iv. Was the observation impeded in any way, such as by passing traffic or a press of people.
 - v. What time lapsed between the observation and the subsequent identification to the police.



- vi. Were there any discrepancies between the initial description given by the witness and the actual description of the accused.
22. The guidance by the court in the decision is very crucial in that mistakes do happen even in the identification of close relatives or friends that someone has interacted with over a period of time.
23. It is even more critical when a witness is alleged to have identified a total stranger under stressful circumstances.
24. In the instant case the victim PW1 Daksha Patel testified that she was accosted in the lift by two armed men. The two ordered her to release her laptop bag to them which had the cash and that she was also robbed of her mobile phone a Samsung J 7.
25. PW1 testified that “I did not recognize the two people if they were in a mask I got confused and shaken.” The evidence leaves no doubt that the circumstances did not favor positive identification of the perpetrators of the crime. The evidence buttresses the need for an identification parade to have been done upon the arrest of the appellant and his co-accused.
26. Immediately after making the above statement in evidence, the record shows that the prosecutor marked a CCTV footage. The prosecutor stated:

“I wish to mark the CCTV footage showing the robbery is marked PMFI- 16- Ground floor R)” . The marking was done by the prosecutor without laying a basis why the person who downloaded it could not be called.
27. Two things emerge from this that the witness, of her own admission, was not able to recognize the robbers and she went further to testify that the police came to the scene after about 30 minutes and that she did not see the video footage the same day.
28. The witness went further to stated that she recorded her statement the following morning and did not claim to have identified the robbers.
29. From the testimony of the witness, it is clear that at the time she recorded her statement she did not know who the attackers were and that she had not identified them.
30. It follows therefore that it would have been absolutely necessary for the police to conduct an identification parade upon the arrest of any suspect. The failure to organize an identification parade was a fatal omission since the witness Pw 1 who was the star witness would have participated to try and see whether she could identify her assailants.
31. It was not enough to simply produce a CCTV even without laying a basis for it and ask the witness to identify the persons appearing on the footage.
32. Interestingly, the victim PW1 stated this on observing the footage:

“the 5th accused(read appellant) is the one with a black cap on the CCTV footage.” The intriguing thing from that evidence is that the victim was able to identify the appellant on the footage as the man who was wearing a cap during the robbery yet she had said in her testimony earlier that the men who robbed her wore masks. The inconsistency in her evidence was material as to render the entire evidence on identification worthless.
33. It would appear that when she was shown the footage she simply went on to assign images to the accused persons before court.



34. The investigator dropped the ball by failing to summon the victim to an identification parade to try and identify the suspects after they were arrested.
35. The identification of the appellant in the footage before court was not preceded by the proper production and admission of the footage before the witness could be invited to comment on it. The absence of an electronic evidence certificate dealt the prosecution's case a fatal blow.
36. The record by the trial court does not even show whether the Magistrate was able to independently confirm from the footage that indeed the man in a cap in the footage was the appellant.
37. The law on a single identifying witness is that whereas a conviction may be based on a single identifying witness evidence, courts must exercise extreme caution and carefully scrutinize that evidence to ensure that it is reliable and free from error as a miscarriage of justice is possible. See *Wamunga v Republic* [1989] KLR 424.
38. The witness in this case had not given any description of the robbers other than stating that the two men wore masks and she could not recognize them.
39. The finding of this court is that the latter identification by the witness from the footage was irreconcilable with the first report and her testimony that she could not identify her assailants when she reported the incident to the police 30 minutes after the incident.
40. The witness at page 62 of the proceedings testified that “ the faces of the robbers cannot be seen clearly I saw the CCTV footage the following day by that time I had recorded a statement. I was never called for an identification parade apart from the employees I had not met the other two and they accused were arrested.”
41. It is clear from the evidence of the witness that the investigating officer had the opportunity to present the appellant and the other suspects for identification by the witness in an identification parade but he failed to do so. He instead chose to inform the witness of the arrests. That omission by the prosecution was fatal and rendered the whole evidence on identification unsafe to rely on in the absence of any other evidence to convict the appellant.
42. The lapses by the investigator cannot pass the scrutiny of the evidence on identification and there is no doubt that the identification of the appellant was flawed.
43. Having found that there was no other evidence to connect the appellant to the offense other than the identification by PW1 the court should have warned itself of the danger of convicting the appellant on the basis of that contradictory evidence of PW1.
44. The fact that PW1 noted that the faces of the persons appearing on the footage were unclear should have been good reason to grant the appellant the benefit of doubt.
45. On the failure to prepare a certificate and produce it in here with the provisions of section 78 and 106B of the *Evidence Act*. This court finds that the omission is fatal. The provisions of the law leave no discretion to the prosecutor or the investigator. It is trite law that where the electronic evidence is not accompanied by a certificate that evidence is not inadmissible. See *George Gabriel Kiguru & Another v Republic* [2022] eKLR.
46. The Certificate speaks to the reliability, integrity and originality of the electronic evidence. In this era of digital manipulation through tampering with electronic evidence, courts must exercise great caution whenever the prosecution of any person is predicated upon electronic evidence without an accompanying certificate. A conviction obtained through such evidence cannot be sustained.



47. This becomes even more critical in this era of electronic transformation with the use of artificial intelligence. Originality and authenticity of electronic documents become key concerns now more than ever before.
48. The reception of the CCTV footage in this case was therefore improper and irregular without the necessary certificate.
49. The analysis of the evidence above leads to the conclusion that the conviction of the appellant was not safely arrived at. The appeal is therefore allowed, the conviction is hereby quashed and the sentence is set aside.
50. The appellant shall be released from custody unless otherwise lawfully held.
51. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Agwata for Accused

Ms Njoroge for the State

