



**Kinoti & another v Director of Public Prosecutions (Criminal Appeal E116 & E117 of 2023 (Consolidated)) [2024] KEHC 4737 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4737 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E116 & E117 OF 2023 (CONSOLIDATED)**

**TW CHERERE, J**

**APRIL 25, 2024**

**BETWEEN**

**JIMAWIN KINOTI ALIAS KIM ALIAS KAMWARI ..... 1<sup>ST</sup> APPELLANT**

**MARTIN MUTEMBEI MARIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(Being an appeal against judgment, conviction and sentence in Isiolo Criminal Case No. 2351 of 2018 by Hon. E.Shimonjero (SRM) on 17<sup>th</sup> August 2023)*

**JUDGMENT**

(Being an appeal against judgment, conviction and sentence in Isiolo Criminal Case No. 2351 of 2018 by Hon. E.Shimonjero (SRM) on 17<sup>th</sup> August 2023)

**JUDGMENT**

**Background**

1. JIMAWIN KINOTI alias KIM alias KAMWARI and MARTIN MUTEMBEI MARIA who were the 1<sup>st</sup> and 2<sup>nd</sup> Accused at the trial were jointly charged with another that was acquitted with one count of robbery with violence contrary to Section 295 as read with section 296(2) of the Penal Code committed on 03<sup>rd</sup> October, 2018 against Eunice Ngiri Mwangera and Samson Mwangera. 1<sup>st</sup> Appellant was additionally charged with being in possession of a firearm without a firearms certificate contrary to Section 4 (1) as read with Section 4 (3) of the [Firearms Act](#) Cap 114 Laws of Kenya.

**Prosecution case**

2. Eunice Ngiri Mwangera stated that on 03<sup>rd</sup> October, 2018, she returned home with her husband at about 09.30 pm. She stated that she was in the process of closing the door when she realized that it was



being held from outside. That she looked to see what was the matter and saw two men one of whom was armed with a pistol and the other a knife. That she screamed and was hit on the head with the pistol and knife as a result of which she got injured. She stated that there was electric lighting in the house from which she identified the 1<sup>st</sup> Appellant that had a pistol and 2<sup>nd</sup> Appellant that had a knife who after ransacking the house stole from them a M/V KAT 395L and other goods all valued at KES. 900,000/-. It was her evidence that she did not know Appellants before the material date. Four days after the incident, she was summoned to the police station where she identified the 2 Appellants as the ones that robbed them.

3. Upon examination by Daudi Dabaso, a clinical officer, Eunice Ngiri Mwangera was found with deep cuts on head and bruises on her cheek which injuries were classified as harm.
4. On 04<sup>th</sup> October, 2018, Sgt Ben Amboka with his colleagues PC Kariuki and PC Makabora were in Runyenjes town when Sgt Ben Amboka stated he saw M/V KAT 395L that had been reported stolen in Isiolo. That he made an inquiry and they were directed to a house where they found 1<sup>st</sup> Appellant and others including the 3<sup>rd</sup> Accused in the trial and from 1<sup>st</sup> Appellant recovered ignition keys for M/V KAT 395L and a pistol S/No. E/P 17104084, driving licence, ID card, numerous sim cards, two phones and a knife.
5. CPL Kanteni with his colleagues Otieno and Kieni arrived at Runyenjes police station after the 1<sup>st</sup> Appellant was arrested. Upon his arrest, 1<sup>st</sup> Appellant is said to have implicated the 2<sup>nd</sup> Appellant who was arrested on 05<sup>th</sup> October, 2018 and both were subsequently charged after 1<sup>st</sup> complainant identified them in identification parades.
6. IP Mwangera examined a pistol S/No. E/P 17104084 make EKOL A29 and a magazine from the same pistol and found that they were pistol was a firearm under the [Firearms Act](#) Cap 114 Laws of Kenya.

### **Defence case**

7. 1<sup>st</sup> Appellant in his sworn defence denied the offences. He stated that he was framed by Sgt Amboka with who they had an argument over a love affair with the 3<sup>rd</sup> Accused at the trial. He denied that any car ignition key was recovered from him.
8. 2<sup>nd</sup> Appellant in his sworn defence denied the offence and stated that he was still at a loss as to why he was arrested, charged and convicted.
9. After the trial, both Appellants were convicted of the 1<sup>st</sup> count and sentenced to serve 40 years' imprisonment. 1<sup>st</sup> Appellant was additionally convicted of the 2<sup>nd</sup> count and sentenced to serve 7 years' imprisonment.

### **The Appeal**

10. The conviction and sentences provoked this appeal. Appellants by their separate amended grounds of appeal filed on 23<sup>rd</sup> November, 2023 raised numerous grounds but mainly that:
  1. Charge sheet was defective
  2. Identification of Appellants was not foolproof
  3. Complainant did not prove that any of the alleged recovered exhibits were hers
  4. Key witnesses did not testify
  5. Court relied on the evidence of a single witness



6. Defences were not considered

DIVISION - *Analysis and determination*

11. This being a first appeal, the court's duty is as was stated by the Court of Appeal in *Mark Oiruri Mose v Republic* [2013] e KLR that:

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”

12. I have considered the appeal in the light of the amended grounds of appeal and submissions by the Appellants and the DPP and I will deal with the grounds as hereunder.

SUBPARA 1.

Whether the charge sheet was defective

13. Appellants contend that the charge sheet did not state the section that defines the offence of robbery with violence and that the charge was therefore defective.

14. I appreciate the holding in *Johana Ndungu v Republic* [1996] eKLR that an offence of robbery with violence is disclosed upon prove of any of the essential ingredients including being more than one offender or the use or threat to use actual violence or that the offender at the time of robbery was armed with a dangerous or offensive weapon but find that no prejudice was occasioned by failure to quote section 295 for the reasons that the charge sheet describes the ingredients and the manner in which the offence was committed.

2. Identification of Appellants was not foolproof

15. It is trite that evidence of visual identification should always be approached with great care and caution (see *Waithaka Chege v R* {1979} KLR 271). Greater care should be exercised where the conditions for favourable identification are poor. (*Gikonyo Karume & Another v R* {1900} KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See *Abdalla bin Wendo & Another v R*, {195} 20 EACA 166; *Wamunga v R*, {1989} KLR 42; and *Maitanyi v R*, 1986 KLR 198).

16. The difference in approach between identification and recognition was expressed thus by Madan J.A in *Anjononi and Others v The Republic* [1980] KLR;

“.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

17. That is not to suggest of course, that cases of misrecognition cannot occur (See *Karanja & Anor vs. Republic* [2004] KLR 140) and courts are still duty-bound to examine such evidence with great care.

18. Complainant stated that the offence was committed at 09.30 pm and that there was electric lighting at the scene.



19. The Court of Appeal in the case of Joseph Muchangi Nyaga & another v Republic [2013] eKLR stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.
20. I notice from the evidence in this case that complainant did not give the description of her assailants when the first report was made. Secondly, the trial court did not make inquiries as to the nature of light, the intensity of such light, the location of the source of light in relation to the Appellants and time taken by the witness to observe the Appellants to be able to identify them subsequently.
21. From the foregoing, I have no difficulties agreeing with the Appellants that the evidence of their identification at the scene of crime was not reliable. I also agree with them that the subsequent identification parades, in the absence of evidence of description of the robbers by the complainant, did not suffice to find that they had been identified as the ones that have committed the offence of robbery with violence.
  3. Whether complainant proved that any of the alleged recovered exhibits were hers
22. Complainant stated that among the items robbed from her and her husband was M/V KAT 395L and an ID card and electronic goods.
23. Of the exhibits allegedly recovered from the 1<sup>st</sup> Appellant was ignition keys for M/V KAT 395L and an ID card. Complainant did not tender any evidence before that court that any of those items belonged to her and evidence there was therefore no proof that they had been robbed from her.
  4. Key witnesses did not testify
24. In *Bukenya & Others. v. Uganda* (1972) EA 594, it was held that the prosecution is duty bound to make available witnesses necessary to establish the truth even if the evidence may be inconsistent with the prosecution's case.
25. The *Evidence Act*, Chapter 80, Laws of Kenya on the other hand provides at Section 143 THAT:

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”
26. This position was restated in *Julius Kalewa Mutunga vs Republic* Criminal Appeal No. 31 of 2005, where the Court of Appeal held,

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
27. Concerning the recovery of the firearm and ignition keys, PC Kariuki and PC Makabora who are alleged to have been in company of Sgt Ben Amboka during the recovery from the 1<sup>st</sup> Appellant did not testify to corroborate the evidence of recovery.



28. 1<sup>st</sup> Appellant having denied that the ignition key and firearm was recovered from him, the trial magistrate in view of the uncorroborated prosecution case ought to have given 1<sup>st</sup> Appellant the benefit of doubt and erred in not so doing.

### Accomplice evidence

29. Other than the foregoing grounds, I have added one more of accomplice evidence on the ground that the 2<sup>nd</sup> Appellant was implicated by the 1<sup>st</sup> Appellant.
30. The Court of Appeal in KINYUA VS REPUBLIC [2002] 1 KLR 256 stated as follows concerning accomplice evidence: -

The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the aid of assessors, on the dangers of doing so.

Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.

If the Court decides that the accomplice witness' evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence.

The trial judge did not explicitly direct himself and the assessors on the nature of accomplice evidence and the weight to be given to it as required by law. However, this omission would not invalidate the trial and the conviction in the circumstances of this case.

31. The judgment of the trial court reveals that the court convicted 2<sup>nd</sup> Appellant on the basis of the evidence of the 1<sup>st</sup> Appellant which was not corroborated. This kind of evidence is in my considered view unsafe to support a conviction.

(6) Defences were not considered

32. The standard of proof in criminal cases must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on Article 50(2) (a) of *the Constitution* which guarantees individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It cannot be gainsaid that this burden of proof rests on the State and does not shift to the Accused.

33. In the case of Michael Mumo Nzioka v Republic [2019] eKLR, , the court cited with approval the holding in Elizabeth Waithiengi Gatimu vs. Republic [2015] eKLR where Mativo, J (as he then was) stated that:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is



the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

34. Appellants faced serious charges that ought to have been proved as in all criminal cases, beyond any shadow of doubt.
35. From the totality of the evidence however, I find that there was no iota of evidence to link Appellants to the offences they were charged with, convicted and sentenced.
36. My finding is that the trial court erred in not giving the defences due consideration and thereby arrived at an erroneous decision.
37. In the end, both appeals succeed and it is hereby ordered:  
The conviction of both Appellants was unsafe and it is hereby quashed

The sentences against each Appellant are set aside

38. Unless otherwise lawfully held, it is ordered that the Appellants shall be set at liberty.

DELIVERED AT MERU THIS 25<sup>th</sup> DAY OF April 2024

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

**Court Assistants - Kinoti/Munene**

**1<sup>st</sup> Appellant - Present in person**

**2<sup>nd</sup> Appellant - Present in person**

**For DPP - Ms. Rotich (PC-1)**

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