



**Lolokuria v Republic (Criminal Appeal 14 of 2018)  
[2024] KECA 1791 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1791 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 14 OF 2018  
M NGUGI, FA OCHIENG & WK KORIR, JJA  
DECEMBER 6, 2024**

**BETWEEN**

**LESOPINA LOLOKURIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal from the judgment of the High Court of Kenya  
at Nakuru (M. A. Odero J.) dated 23<sup>rd</sup> March 2018.))*

**JUDGMENT**

1. The cause of death of the deceased, Ali Musa Noor, was not in contention. According to the post mortem report which was admitted into evidence by consent of the parties, he died as a result of cardiopulmonary arrest due to ‘hypovolumic’ (sic) shock as a result of a massive hemorrhage due to a gunshot wound. The person (or persons) responsible for inflicting the fatal gunshot, according to the respondent, was the appellant, Lesopina Lolokuria, together with five accomplices. They were therefore charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information against them stated that on 24<sup>th</sup> November, 2012, at Ilaut trading centre in Samburu District within Samburu County, jointly with others not before Court, they murdered Ali Musa Noor.
2. The appellant and his co-accused pleaded not guilty to the offence and their trial proceeded before the High Court sitting in Nakuru. At the end of the prosecution case, which was fully heard before Omondi J. (as she then was), three of the accused, including the appellant, were found to have a case to answer while three were acquitted. Before the hearing of the defence case could proceed, however, two of the appellant’s co-accused absconded, and he alone was placed on his defence. Odero J., who had taken over the matter following the transfer of Omondi J., found the appellant guilty as charged and sentenced him to



25 years' imprisonment.

3. Aggrieved by both his conviction and sentence, the appellant filed the present appeal in which he raises fifteen (15) grounds of appeal in his supplementary memorandum of appeal dated 6<sup>th</sup> November 2023. He impugns the decision on, primarily, the

basis that the trial court erred in law and fact in: failing to take

directions under section 200 of the Criminal Procedure Code; relying on the unsafe evidence of identification by PW4 and PW6; relying on the unsafe evidence of recognition by PW1; basing his conviction on an identification parade that was faulty and irregular; disregarding the fact that the appellant had similar facial features and wore Samburu moran ornaments akin to many men in the area; disregarding the fact that state witnesses did not give a description of the suspects; and putting undue reliance on the contradictory evidence of prosecution witnesses.

4. This being a first appeal, we are under a duty to re-evaluate the evidence before the trial court and reach our own conclusion, always bearing in mind that we have not had the opportunity to see and hear the witnesses, which the trial court had- see *Okeno vs. Republic* [1972] EA 32.

5. The prosecution evidence was presented through 10 witnesses.

Waitale Parsante (PW1), was standing outside the deceased's hotel where he worked on 24<sup>th</sup> November 2012 with Lekuman Leimang a colleague, when three morans, two of whom had guns, passed by the hotel, crossed the road and stood across from the hotel. The deceased went to the hotel and PW1

cautioned him about the three men and advised him to report

their presence to Mzee Lekurupon, an elder, who also had a shop in the area. PW1 and other hotel workers moved to the deceased's shop, a short distance from the hotel, where they found the deceased's wife and daughters, as well as the three morans. The morans said they wanted to buy goods and PW3 asked them to go to his shop. When the deceased went to his shop, the morans followed him. PW1 watched from the window as the morans followed the deceased, stood at the entrance to his sleeping door room which was attached to the shop, and one of the morans opened fire. He saw the deceased fall outside, and he and other workers fled, leaving the deceased's daughter, Halima (PW5), at the hotel. PW1 testified that he had seen the morans well and could identify them. He identified them as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused; that accused 1 and 3 had guns, and that it was the 3<sup>rd</sup> accused, the appellant before us, who shot the deceased. PW1 stated in cross-examination that he could identify the morans as they had not covered their faces; that he described their facial appearance to the police after their arrest, and he picked them out in an identification parade of morans, dressed in their traditional moran regalia, with the twisted rasta

hair style, as the same three people whom he had seen attack the deceased.

6. PW2, Leangeren Lelkelep, was a neighbour of the deceased in Ilaut. On 24<sup>th</sup> November 2012, the deceased had gone to see him regarding the deceased's goats which had been stolen. The people who had stolen the goats had been fined and had brought part of the fine to the deceased, which he rejected as he wanted full payment. PW2 stated that he saw the people who killed the deceased at about 5.30pm, two of whom had guns. The deceased had asked him to accompany him home after he came from the mosque as there were strangers in his home. PW2 went home with the deceased and asked the strangers who they were and where they came from, but they did not give a direct response. PW2 invited them to his shop and led the way, but they did not follow him. He later heard a loud gunshot and was later informed by the deceased's wife that the deceased had been shot. According to PW2, the theft of the deceased's goats, which had taken place in March 2012, had been perpetrated by the family of Lesialo.



He had not attended an identification parade but stated that the appellant was one of the attackers, and that he had carried a gun.

7. Like PW1 and PW2, PW3, Leimeli Lepulani, a resident of Ilaut, was at the deceased's home with the deceased's two daughters and Leparsante (PW1) when three morans, two of whom had guns, came to the deceased's hotel. They stood at a distance from the hotel, then moved to the deceased's shop. PW3 testified that they thereafter heard the sound of gunshots, and when they went to check, they found that the deceased had been killed. PW3 had participated in the identification parade at Baragoi Police station and had identified the appellant as one of the three morans. He did not, however, see who fired the shot at the deceased. He had also not described the assailants to the police before the identification parade.

8. Suleka Ismail (PW4), the deceased's wife, was at her shop on the material day with the deceased when one Leparakan Lesido and Maralimu Lesido came to see the deceased to pay compensation for the goats their brothers had stolen. The deceased rejected the compensation, asking them to wait for market day when elders and the chief would be present to witness the hand over. Later that day, at about 6.50 p.m., her daughter went to inform her that some morans, armed with guns, had come to the plot.

Her daughter then went to alert the deceased about the presence

of the morans while PW4 sat outside the house, watching the morans. PW4 saw one of the morans shoot the deceased in the shoulder and chest, then aim his gun at her as she moved towards the deceased, but his accomplice hit his hand and he fired upwards. It was her testimony that the morans remained in the shop for about an hour after shooting the deceased. After they left, PW4 rushed to inform Mzee Lekerepan (PW2), about the murder of the deceased. She had not seen the morans before the incident, but they had not covered their faces. She next saw them at Baragoi Police Station during the identification parade when she picked out the appellant and two of his co-accused at three different identification exercises. Her evidence was that two of the accused, the 2<sup>nd</sup> accused and the appellant, had guns. It was the appellant who shot the deceased, while the 1<sup>st</sup> accused hit his hand to stop him from shooting PW4.

9. PW4 stated in cross-examination that she had not described the assailants to police; that she told the police that the person who shot the deceased was slim and tall; that a little darkness was beginning to fall at the time of the incident; but she could make out the colours of the clothes they were wearing, which were

short sleeved khaki green shirts, with dark green shukas

around their waists. It was dark and she could not see the faces of the assailants clearly, but that during the identification parade, when she picked out the appellant as one of the assailants, they were dressed in the same clothes they were wearing on the day of the attack. The appellant had a headscarf on his head and had long rasta hair, but he was wearing a scarf on the head. She further stated that at the identification parade, he did not have a hat, and his hair was half rasta and the rest a natural afro.

10. The deceased's daughter, Halima Ali Nur (PW5) saw three men dressed in moran regalia and carrying guns approaching the deceased's hotel. She ran to tell her father but was told by her mother, PW4, to return. When she went back, she found the three men standing near their kitchen. They asked her where her father was, and she informed them that he had gone to the mosque. The deceased was alerted by some young men at the hotel about the men, and he asked an elder, (PW3), to talk to the three morans. The three morans informed the elder that they were hungry and he asked them to follow him to his shop. PW5 then saw the three men turn and run towards her and the

deceased, and she was pulled into the hotel by some young men.



She heard gunshots and when she came out of the hotel, she found the deceased lying dead in front of his shop.

11. Fatuma Ali Musa (PW6), another daughter of the deceased, was at home with PW4 when PW5 came to tell them about the three morans. She rushed outside with PW4 and saw the men drinking water nearby, then Mzee Lengelepe (PW3) came and spoke to them and they left with him. Though she saw the morans, two of whom had guns, it was evening and dark, so she could not describe their clothing. She then saw the morans running back towards the deceased, who had entered his shop. One moran, whom she identified as the appellant, took his gun and 'hit' the deceased on the shoulder, then 'hit' him on the right side of the chest, and the deceased fell down.
12. The evidence of Charles Leparsanti (PW 7), the assistant chief of Ilaut, related to the goats alleged to have been stolen from the deceased, and the abortive attempt to pay compensation for them. PW7 had received information regarding the death of the deceased on the material day at about 7.00pm. Hassan Musa Dirie, PW8, the deceased's younger brother, identified the deceased's body for the doctor who performed the post-mortem.
13. A critical plank of the prosecution case was the evidence of CIP Ahmed Noor (PW 9), who conducted identification parades on 23<sup>rd</sup> December 2012 at the request of the DCIO, Baragoi. His evidence was that he looked for 8 morans, who looked like the suspects, to join the identification parade. He explained the procedure of the parade to the suspects and the witnesses. He testified that the appellant was identified by PW1(Lelemile Lepolan); PW2 (Weita Leparsante); PW4 (Zuleka Osman); PW5 (Halima Ali); and PW6 (Fatuma Ali). He conducted the identification parade between 2 - 4 p.m.; that he used only the 8 morans he had at the beginning of the parade; and that those present at the parade were himself (PW9), the 8 parade members and the suspects.
14. CIP Lawrence Kimeu (PW10), was the investigating officer. He received instructions to investigate the murder of the deceased on 14<sup>th</sup> December 2012. He went to Ilaut and with other officers, interviewed the witnesses and took statements from them. He essentially narrated the evidence of the witnesses and the steps taken to apprehend the appellant and his co-accused.
15. In his defence, the appellant denied the charges against him, asserting that he did not know the deceased at all; that on the material day, he was in his village which is far from Ilaut, the scene of the murder, and had never been to Ilaut. He was arrested in December, 2012 from his home where police had gone to search for some three men, including his brother, Lolomung Lopedo. He was taken to the cells at Baragoi Police station from where he was taken out for the identification parade with Somali men who looked different from him.
16. In its decision, the trial court found that the 3<sup>rd</sup> appellant had been positively identified as the person who shot the deceased; that PW1 had spoken to the assailants, had interacted with them and had ample time and opportunity to see and identify the appellant; that PW 4 also identified the appellant as the person who shot the deceased; that he was stopped from shooting her by one of his co-accused; and that he was also identified by PW6 as the one who fired the fatal shots. The trial court concluded that:

“ The identification of the 3<sup>rd</sup> accused is given strength by the fact that the witnesses were able to positively identify the 3<sup>rd</sup> accused at an identification parade conducted at Baragoi Police Station. PW9 CHIEF INSPECTOR AHMED NOOR told

the court that on 23122012 he conducted three different identification parades. The 3<sup>rd</sup> accused was identified by PW1, PW3, PW4, PW5 and PW6. PW9 narrated to the court



the manner in which he conducted the identification He stated that he searched for eight morans of the same height and build as the suspects.”

17. The trial court noted that the appellant had not raised any complaints with respect to the manner in which the parade was conducted.
18. In submissions dated 24<sup>th</sup> January 2024 highlighted by his learned counsel, Ms. Sabaya, the appellant submits that though there were six accused persons and three were put on their defence, he was the only one in court at the defence stage. He submits that the charge sheet was not amended; he was not called upon to recall any witnesses; nor was he asked to proceed as the sole accused person. Accordingly, his trial, conviction and sentence should be declared a nullity for grossly violating his right to a fair trial under Article 50 of *the Constitution*, as well as for flouting the provisions of section 206 of the Criminal Procedure Code.
19. The appellant submits, secondly, that the trial court erred in failing to take directions under section 200 of the Criminal Procedure Code upon taking over conduct of the matter from Omondi J. who had heard the testimony of all the prosecution witnesses. He submits that as a result of this omission, he did not have the benefit of the judge who determined his case seeing and assessing the credibility of the witnesses.
20. The appellant submits, thirdly, that the trial court erred in relying on the unsafe evidence of identification by PW4 and PW6 without giving due regard to the fact that he was not known to them; and further, that it erred in relying on the unsafe evidence of recognition by PW1 without considering that PW1 had never met the appellant before. The appellant impugns the decision further on the basis that the trial court disregarded the fact that the appellant had similar facial features and wore Samburu moran ornaments akin to many men in the area, and the prosecution did not dispel the possibility of mistaken identity.
21. The appellant relies on the case of Francis Mbijiwe Itere & 5 Others V Republic [2013] eKLR with respect to the need to inquire as to the nature of light that enabled the witnesses to see the appellant and identify him later; and the decisions in Paul Etole & Another v Republic [2001] eKLR; Mungania & 2 Others v Republic & 2 Others [2022] KEHC 167 (KLR) (4 March 2022) as regards identification and recognition. The appellant submits that the witnesses were under a great deal of stress, the perpetrators were not previously known to any of them; it was evening and the quality of light was poor; they were of a different race from the daughter and mother of the deceased; they carried guns which diverted attention from their faces; they wore headgears and covered part of their faces; and more than 30 days had lapsed from the date of the murder to the date of the identification parade.
22. The appellant submits therefore that his identification was not safe. Finally, the appellant submits that the trial court erred in relying on and basing his conviction on an identification parade that was faulty and irregular; that the trial court disregarded the fact that the prosecution witnesses did not give a description of the suspects at all, and the prevailing circumstances were not favourable for positive identification of the appellant. It is submitted that before preparing an identification parade, a description of the suspects must have been given by potential witnesses in order to guide the police in preparing the parade line up. The appellant relies in support on the case of Peter Mwangi Mungai v. Republic [2002] eKLR.



23. The respondent filed submissions dated 18<sup>th</sup> March 2024 which were highlighted by Mr. Omutelema, Senior Assistant Director of Public Prosecutions. The respondent argues that the trial court properly considered the evidence of identification; appreciated that the conditions for proper identification were difficult; and directed itself properly on the need to consider such evidence with the greatest of care. The respondent notes the evidence of PW1, Waita Leparsante, in which PW1 testified that the incident occurred at 6.00 pm and there was enough light for identification; that he saw the appellant's face clearly when talking to him; and that he walked with the appellant to PW2's shop and spent sufficient time with the appellant to enable him correctly identify the appellant.
24. The respondent further submits that PW2, Leangeren Lelkelepan, also testified that he saw the assailants and confirmed PW1's evidence about the time of the incident; and that he spent 1½ hours with the persons who killed the deceased. The respondent further notes the evidence of PW3, PW4, PW5 and PW6, all of whom stated that they saw the appellant and identified him at an identification parade conducted by PW9. It is its submission that the trial court properly applied the legal principles regarding evidence of identification as set out in *Maitanyi v. Republic* [1986] eKLR.
25. It is the respondent's submission that the appellant was correctly identified by six witnesses who had interacted with him for over 1½ hours before the shooting; that the time was 6.00 pm and there was enough light, making it conducive for correct identification.
26. With regard to the appellant's contention that the court did not comply with section 200 of the CPC, the respondent submits that the appellant was represented by an advocate who did not indicate to the trial court the appellant's wish to have any witness recalled; that the advocate was prepared to continue with the hearing before the succeeding judge and requested for the proceedings to be typed to enable him prepare for the defence, and the failure to explain to the appellant his right to recall witnesses did not occasion a failure of justice and is curable under section 382 of the Criminal Procedure Code.
27. We have considered the record of appeal and the respective submissions of the parties. That the offence of murder of the deceased was committed as charged in the information against the accused persons before the trial court is beyond dispute. The persons or persons responsible for the murder shot him twice, in the shoulder and chest, in the presence of witnesses at about 00 p.m. The ingredients of the offence of murder set out in sections 203, 204 and 206 of the Penal Code were established.
28. The prosecution evidence pointed at the appellant as the person who pulled the trigger, and the trial court convicted him for the offence, his two accomplices having absconded prior to the defence hearing. While the appellant impugns the decision of the trial court on some fifteen grounds which we summarised earlier in this judgment, we take the view that the appeal raises four main issues:
- i. Whether the trial court erred in not taking directions under section 200 of the Criminal Procedure Code;
  - ii. Whether the trial court erred in relying on the recognition evidence of PW1;
  - iii. Whether the trial court erred in relying on the identification evidence of PW1, PW4, PW5 and PW6;
  - iv. Whether the court erred in relying on the evidence from the identification parade conducted by PW9.



29. The second, third and fourth issues are closely interlinked, and we shall consider and determine them together.
30. On the first issue, the appellant complains about non-compliance with section 200 of the Criminal Procedure. Under this section, where evidence has been partly heard and there has been a change in the judge or judicial officer hearing the case, the succeeding judge is required to explain to an accused person his right to recall witnesses, if he so requires. In this case, the record indicates that the counsel representing the appellant requested the court for proceedings to be typed so that the appellant could proceed with his defence. While there was no explanation of the provisions of section 200 given to the appellant by the trial court indicated on the record, we agree with the respondent that in the circumstances, there was no prejudice caused to the appellant.
31. The second issue relates to the court's reliance on the recognition evidence of PW1. In its decision, the trial court observed that:

“As stated earlier, this incident occurred between 6-7pm. It was still daylight and no doubt visibility was good. From his evidence it is clear that PW1 was in the company of the three morans for a substantial period of time. He had seen them when they first came to the hotel while the deceased was away at the mosque. PW1 spoke to the men and had a brief conversation with them. Later when deceased returned from the mosque and met the three morans PW1 was still there. This witness interacted with the men for about one hour. He had ample time and opportunity to see and identify the 3<sup>rd</sup> accused.

32. In our view, the trial court properly addressed its mind to the principles applicable when considering evidence of recognition or identification. In its decision in *Borris Ken Solomon v Republic* [2017] KECA 737 (KLR). This Court stated:

“Invariably in the majority of criminal trials the question of identification will be central and sometimes the only issue. Depending on how it is resolved a conviction based on a flawed identification can have devastating consequences. This fear was recognized way back in 1765 in the famous Blackstone's ratio, so named after William Blackstone, a leading English jurist, who famously expressed thus;

“better that ten guilty persons escape than one innocent suffer.” The courts are permitted to err on the side of innocence. This has been emphasized by a series of judicial decisions that warn of the dangers of basing a conviction on a contested identification evidence. The time-honoured dictum was developed as the Turnbull Guidelines, or directions, by the English Court of Appeal following its decision in the locus classicus case of *Regina v Turnbull & Others* [1977] QB 224. The nine guidelines on identification, laid down by Lord Widgery were adopted in *Reuben Taabu & Others vs. Republic Criminal Appeal No. 208, 209 and 480 of 1978*. “How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or press of people?

Had the witnesses ever seen the accused before? How often? If occasionally, had he any specific reason for remembering the accused? How long elapsed (sic) between the original observation and the subsequent identification to the police?

Was there any material discrepancy between the description of the accused given to the police by



witnesses when first seen by them and his actual appearance?”

33. The Court cited the case of *Maitanyi v R* (1986) KLR 198 in which the Court explained the rationale for the above considerations in the following terms:

“That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its 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 known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves.”

34. While the trial court considered and applied the correct principles in evaluating the evidence of PW1, we are not satisfied that the facts before it satisfied the requirements. PW1 stated

that he was in the presence of, and interacted with, the appellant for about an hour. He did not know him before, and he described him and his co-accused as having been dressed in their ‘traditional moran regalia, with the twisted rasta hair style.’ He picked out the appellant and his co-accused at an identification parade conducted over a month after the murder. In our view, the evidence of recognition of the appellant by PW1 as a basis for conviction was unsafe. We shall return to this issue shortly, but we have similar reservations about the evidence of PW3, PW4, and PW5.

35. PW3 stated in his evidence that he did not describe the assailants to the police. PW4 had not seen the appellant before the murder of the deceased. She stated that she saw him shoot the deceased. He also raised his gun and threatened to shoot her but was stopped by one of his accomplices. It does not appear from the evidence that she described him to the police, but she nonetheless picked him out in an identification parade.

36. The trial court also relied on the evidence of PW5 and PW6, daughters of the deceased. PW5 stated that she saw the three ‘morans’ but did not describe them. PW6 stated that the morans wore dark clothes, and it was evening and dark. She too, picked out the appellant at the identification parade conducted by PW9, and the trial court found her evidence a basis for conviction of the appellant.

37. In *Mwangi Mungai v Republic* [2002] eKLR cited by the appellant, this Court underscored the importance of prior description of a suspect by a witness. It stated:

“That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade.”

38. We are constrained to agree with the appellant that the trial court erred in relying on the purported recognition of the appellant by PW1 and identification by PW4, PW5 and PW6. The only certain description of the assailants by all the prosecution witnesses was that they were Samburu morans; they were dressed in traditional ‘moran’ regalia; they had ‘rasta’ hairstyles. One has, perforce, to ask: could that not be a description of any moran in Ilaut, Baragoi and beyond? On a stress-filled dark evening,





filled with fear in the presence of menacing, armed morans, it would have been difficult for the family of the deceased to observe and clearly identify the assailants.

Additionally, perhaps with the exception of PW1, none of the witnesses described the assailants to police before they participated in the identification parade.

39. Which brings us to the last issue for determination: whether the trial court erred in relying on the identification parade conducted by CIP Ahmed Noor (PW 9) on 23<sup>rd</sup> December 2012 at the request of the DCIO, Baragoi. PW9 testified that he looked for 8 morans who looked like the suspects to join the identification parade. PW9 requested the witnesses to pick out the assailants, whom they had seen more than a month before and had not described to the police, except to state that they were ‘morans’. More importantly, in his own words, PW9 used only the 8 morans he had at the beginning of the parade. The appellant, according to PW9, was identified by PW1, PW2, PW4, PW5 and PW6.
40. We must ask, however: can an identification parade in which the same 11 people, including the three suspects, are present in the line-up; in which some of the persons in the parade, as contended by the appellant, were of Somali ethnic origin and therefore distinctly different in appearance from the appellant; and in which, again according to the uncontroverted evidence of the appellant, he wore no shirt, be safe identification and a sound basis for a conviction? We think not.
41. We agree with the appellant that the trial court erred in basing its conviction on unsafe identification evidence. We accordingly allow the appeal, quash the appellant’s conviction and set aside the sentence of 25 years’ imprisonment meted out on him. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT NAKURU THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024.**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

**W. KORIR**

.....

**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

Signed

DEPUTY REGISTRAR

