



REPUBLIC OF KENYA



KENYA LAW
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**Pakwaniki v Republic (Criminal Appeal 43 of 2017)
[2025] KECA 135 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 135 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 43 OF 2017
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
FEBRUARY 7, 2025**

BETWEEN

PARMALAI OLE PAKWANIKI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Narok (J. M.Bwonwonga, J.) dated 27th March 2017 in HCCA No.31 & 31'A' of 2017)

JUDGMENT

1. Parmalai ole Pakwaniki, (the appellant), jointly with another person were arraigned before the Chief Magistrate's Court at Narok in criminal Case No. 456 of 2011 charged with two counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. In count 1, it was alleged that on the 3rd day of May 2011 at Enaapasha area in Narok North District within the Rift Valley Province, jointly with others not before the Court while armed with dangerous weapons, namely swords and rungus, they robbed Meitamei Sadera cash Kshs.64,400/= and at or immediately after the time of the said robbery, they used actual violence on the said Meitamei Sadera.
2. The particulars of count two were that on the above date and place, jointly with others not before the court while armed with dangerous weapons, namely swords and rungus, they robbed Simure Sadera, cash Kshs.5,700/= and at or immediately after the time of the said robbery, they used actual violence on the said Simure Sadera.
3. The appellant and his co-accused person denied the charges.

In support of its case, the prosecution called a total of five witnesses among them the two victims, while the appellant gave unsworn testimony and called one witness, that is DW5. After evaluating both the prosecution and the defence case, the learned trial Magistrate held that the offence was proved to the



required standard, convicted the appellant and his co-accused, and after considering their mitigation, he sentenced them to death.

4. The appellant and his co-accused appealed to the High Court of Kenya at Narok being criminal appeals numbers 31 of 2017 and 31A of 2017 which were heard and determined together. Bwomwonga J. found no merit in both appeals and upheld both their conviction and sentence. Undeterred, the appellant appealed to this Court faulting the learned judge for:
 - (a) failing to appreciate that evidence was both inconsistent and contradictory and it did not sufficiently satisfy the burden of proof;
 - (b) failing to appreciate that the evidence of identification against was insufficient;
 - (c) dismissing his defence without advancing any cogent reasons; and,
 - (d) upholding his conviction which was based on exhibits which did not point directly or indirectly to the robbery incident.
5. During the virtual hearing of this appeal on 23rd January 2025, the appellant was represented by learned counsel Ms. Wangari while learned counsel Mr. Omutelema appeared for the respondent. Both parties essentially relied of their written submissions dated 12th November 2024 and 13th November 2024 respectively.
6. In support of his appeal, the appellant submitted that his identification was not free from error because he was exposed before the parade by the investigating officers, therefore, the outcome of the identification parade should be disregarded. He relied on *Njihia vs. R* [1986] KLR 422 where this Court underscored the need for an identification parade to be properly conducted. He urged this Court to treat the identification evidence against him with caution and implored this Court to be satisfied beyond doubt that the identification evidence was free from error as was held in *Maitanyi vs. Republic* [1986] KLR .
7. In opposing the appeal, the respondent submitted that all the elements of the offence of robbery with violence were proved to the required standard. On identification, the respondent maintained that both the lower court and the first appellate court appreciated that the offence was committed at night when the conditions for identification were difficult. However, PW1 testified that he knew the appellant, while PW4 who escaped from the scene and hid himself was able to see clearly what was happening and he was able to recognize the appellant using light from the motor cycle's headlight and moonlight. Furthermore, PW5 who was the investigating officer in his evidence confirmed that PW1 when reporting the incident clearly stated that he knew the assailants and indeed the learned magistrate correctly found that the motor cycle headlight sufficiently illuminated the scene to enable positive recognition. Consequently, the concurrent findings of the trial court and the first appellate court ought to be upheld as was held by this Court in the case of *KECA553 (KLR). NK vs. Republic* [2022]
8. Addressing the question whether the complainant's evidence was corroborated, the respondent submitted that PW4 and PW5's evidence corroborated PW1's and PW2's evidence. Further, PW4 described the quality of lighting at the scene and also recognized the appellant while PW5 who was the first to receive the report of the robbery confirmed that the appellant was named as the assailant. To support this position, the respondent cited *K aranja & Another vs. Republic* [1990] KLR where this Court stated "it is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particularly tending to implicate the accused is enough and while the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime."



9. Addressing the contestation that the appellant's defence was not considered, the respondent submitted that the appellant gave unsworn statement in his defence and called one witness that is DW5, one Masiire Ole Pakwanik, his brother, whose testimony contradicted the appellant's evidence, and therefore, his defence was rightly disbelieved and rejected by the trial court and the first appellate court.
10. Regarding the sentence, the respondent contended that the appellant did not challenge his sentence in his appeal before the 1st appellate Court, therefore, he cannot appeal against the sentence to this Court.
11. This being a second appeal the jurisdiction of this Court is limited to consideration of matters of law only as stipulated under Section 361 of the Criminal Procedure Code. (See this Court's decision in David Njoroge Macharia vs. republic [2011] eKLR). Regarding concurrent findings of facts by the two courts below, as has been held by this Court in many decisions, this Court will not normally interfere with such findings unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are demonstrably shown to have acted on wrong principles in making the findings. (See Chemagong vs. R. [1984] KLR 611).
12. The germane issue urged by the appellant is that his identification was not free from error. The issue of identification was a live issue before the trial court and the first appellate court. The trial court had the following to say about the appellant's identification:

“On the 3rd element of identification, it was in the evidence of PW 1, 2 and 4 that when they were attacked, PW 4 jumped off the running motorcycle and dashed into the bush leaving the headlights on. And that they used the light from the headlights to see accused persons since the light was showing towards the direction that the accused persons emerged from. Besides the motorcycle headlights, PW 1, 2 and 4 stated clearly that there was moonlight which was bright enough to allow them see their attackers. And that they all saw accused 1 smashing the motorcycle headlamp when they had finished robbing PW1 and 2.

I believe the light from the motorcycle headlamp and moonlight was sufficient to enable positive identification of the accused persons herein. To add on that, the accused persons were well known to PW1, PW 2 and PW 4 herein. Accused persons are neighbours of PW1, a fact that is expressly admitted by accused 1 and 2 (DW 1 and DW 2) in their statements in defence. Identification by the 3 witnesses was also by recognition. I also find that the witnesses experience with the accused persons on the fateful day left a lasting impression on the witnesses in circumstances that were conducive to positive identification.

It is worth noting that there was no identification parade conducted in this case, however, I find that lack of identification parade in the circumstances of this case did not create any doubt in my mind to the correctness of the identification of the accused persons by the 3 eyewitnesses herein.”

13. The first appellate court after re-evaluating the evidence on identification came to the same conclusion as the trial court. It stated:

“In ground 2, the 2nd appellant has faulted the trial court for convicting him on the identification evidence which was not positive. In this regard, I find that this 2nd appellant was identified by PW1 and PW2 as one of the robbers. PW1 in particular testified that it was this 2nd appellant who assaulted him. He was able to do so because of moon light and light from the head lamp of the motor cycle. Furthermore, he testified that he knew this 2nd appellant before the commission of the robbery” He also testified that he had no grudge against this 2nd appellant. It is therefore clear that the 2nd appellant was positively recognized



by PW1. Additionally, there is the identification evidence of the motor cycle rider (PW4) who also identified the 2nd appellant due to the light from his motor cycle head lamp and moon light. In the circumstances, I find that the 2nd appellant was positively identified by 2 witnesses namely PW1 and PW4. It therefore follows that his defence of alibi, which was supported by Masire Ole Pankwanik (DW5) who was his brother was rightly disbelieved and rejected. This ground of appeal is without merit and is hereby dismissed.”

14. This Court in *Francis Kariuki Njiru & 7 Others vs. Republic* [2001] eKLR had the following to say on identification:

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see *R.v. Turnbull* [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all...”

15. We have examined the judgments of the trial court and that of the High Court and the record of appeal. There are concurrent findings of fact by the two courts below regarding the appellant’s identification. It is noteworthy that it was PW1’s evidence that he knew the appellant and his co-accused long before the incident and that they were employed in the same neighborhood and therefore he knew the appellant very well. PW1 further stated that there was moonlight and light from the motor cycle headlight which enabled him to see the assailants. We note that PW5 confirmed that PW1 first reported that he recognized some of his assailants, which led to the arrest of the appellant’s accomplice, while the appellant was subsequently arrested by members of the public. Furthermore, we note that PW1’s evidence falls to the category referred to evidence of recognition and this testimony was never shaken even on cross-examination by the appellant herein.

16. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is the most significant evidence of the prosecution. This Court has consistently held that evidence of recognition is more satisfactory and re-assuring than that of mere identification. In *Anjononi & Others vs. Republic* [1980] KLR Pg. 59 at Pg. 60, this Court stated: -

“...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. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v. The Republic* (unreported)”

17. Having found that the appellant was someone who was known to PW1 even before the incident, then an identification parade was inconsequential. Accordingly, it is our considered view that from the evidence on record, the appellant’s identification based on recognition was free from error. We find that the learned Judge did not err in his re-evaluation of the evidence on record. That ground of appeal fails.

18. Lastly, concerning the ground that the appellant’s defence was dismissed without advancing any cogent reasons, in addressing the said issue, the High Court had this to say:

“In ground 6, the 2nd appellant has faulted the trial court both in law and fact in convicting him on the weakness of the defence and not on the strength of the prosecution against him. In this regard, I find that the 2nd appellant was recognized as being one of the robbers by



PW1, who knew him before as an employee of his neighbour. PW1 further testified that he had no grudge against this 2nd appellant and that he knew him very well. This appellant was also positively recognized as one of the robbers by the motor cycle rider (PW4). PW4 testified that he saw that it was this 2nd appellant who assaulted PW1. In the circumstances, I find that the 2nd appellant was positively identified as one of the robbers. In the light of that positive identification the alibi defence of the 2nd appellant was rightly disbelieved. I therefore find that this ground of appeal is lacking in merit and is hereby dismissed.

19. Before us, the appellant has not demonstrated that the two courts below did not consider his defence or erred in law in their evaluation of his defence. The excerpts reproduced above clearly show that his defence was considered and disbelieved. The moment the two courts below concurrently disbelieved the appellant on his alibi and in light of his positive identification by PW1 and PW4, and the injuries sustained by PW1 and PW2 as a result of the robbery a factual conclusion was arrived at, which this Court is not at liberty to lightly interfere with unless it is demonstrated that the said conclusion was based on no evidence. The appellant did not surmount this legal requirement. We therefore agree with the two courts below that the appellant's defence did not dislodge the prosecution evidence.

20. The upshot of our findings herein above is that this appeal is devoid of merit and it is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF FEBRUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb

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JUDGE OF APPEAL

This is a true copy of the original.

Signed

DEPUTY REGISTRAR.

