



**Wanjiku v Republic (Criminal Appeal E012 of 2022)
[2024] KEHC 12270 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E012 OF 2022
GL NZIOKA, J
SEPTEMBER 26, 2024**

BETWEEN

JOHN NJOROGE WANJIKU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon. Esther Mburu Senior Resident Magistrate (SRM) delivered on; 14th February, 2022, vide Chief Magistrate's Criminal Case No. 1570 of 2019)

JUDGMENT

1. The appellant was arraigned before Chief Magistrate's Court at Naivasha charged vide Criminal Case No. 1570 of 2019 with the offence of attempted robbery contrary to section 297(2) of the Penal Code (Cap 63) Laws of Kenya in count one.
2. The particulars of the charge are that, on the 27th October 2019 at Kayole Estate in Naivasha Sub-County within Nakuru County, while armed with offensive weapons namely; an iron bar attempted to rob James Mbogo of cash Kshs. 150 and a mobile phone, and at the same time of such attempted robbery used actual violence on the said James Mbogo.
3. He is also charged in count two with the offence of abduction with intent to confine contrary to section 259 of the Penal Code. That, on the 27th day of October 2019 at Kayole Estate in Naivasha Sub-County within Nakuru County with the intent to cause Susan Wambui to be secretly and wrongfully confined, abducted her.
4. He pleaded not guilty to both charges and the case proceeded to full hearing with the prosecution calling a total of five (5) witnesses in support of its case.
5. The prosecution's case in brief is that, on 27th day of October 2019 (PW1) James Mbogo Njoroge, (PW2) his wife Susan Wambui and (PW5) Joyce Wairimu were travelling from their rural home at



- Maragishu. That upon arrival at the homestead of PW1 James Mbogo at around 11:00pm PW1, James Mbogo alighted to open the gate while PW2 Susan went to get a car seat for PW5's baby.
6. That as PW2 Susan was returning to the car she was ambushed by a male assailant who came from the fence prompting her to scream for help. At that point PW5 Joyce who was in the car drove off to seek help.
 7. In the meantime, PW1 James was attracted to PW2's scream and rushed to the scene. However, he ran into the assailant who was armed with a gun and was ordered to give out all the money he had. That he removed the money hidden in his socks and threw it on the ground and as the assailant was attempting to collect money, PW1 James subdued him. However, he hit PW1 on the face with the gun and ran away
 8. At this time, PW2 Susan ran towards the road screaming for help but did not get any assistance, she got tired and sat down but was confronted by the assailant who hit her on the face with a "chuma" (a piece of metal) and ordered her to follow him while threatening her with a knife.
 9. That PW2 Susan obeyed and followed the assailant and they walked for about 20 minutes until they reached a house and the assailant ordered her to wait outside. However, when the assailant entered the house, PW2 Susan took the opportunity and ran away.
 10. That she got help her to call her husband PW1 James who went with police officers rescued her and she went to Naivasha District Hospital for medical attention.
 11. It was the evidence of PW1 and PW2 that the following day they collected an identity card No. 3103811 in the name of John Njoroge Wanjiku at the scene of crime and took it to the police station.
 12. PW4 No. 42041 Corporal Margaret Mbulu the investigating officer, testified that on 28th October, 2019 PW1 James and PW2 Susan reported the incident at Kayole Police Post. That while still recording their statements, a village elder brought two (2) identification cards No(s). 3103811 in the name of John Njoroge Wanjiku and No. 9124291 in the name of George Munyuru together with five (5) appellant photographs which he retrieved from the house where the assailant led PW2 Susan.
 13. It is in evidence that, with the assistance of the public, the police officers were led to the arrest of appellant and subsequently an identification parade was conducted where he was positively identified and charged after investigation.
 14. At the conclusion of the prosecution case, the trial court ruled the appellant had a case to answer. He gave his defence vide a sworn statement and denied committing the offences levelled against him.
 15. He stated that he was arrested on 28th October, 2019 while on his way to work when four police officers ordered him to get into their motor vehicle and led him to his house. That, the police officers had his identity card and photographs. On arriving at his house, he found that it had been broken into.
 16. That he was taken to the police station where two (2) people alleged that he beat them and he was transferred to Naivasha Police Station. That an identification parade was conducted but he was not identified. However, a police officer by the name Ali said that he must be charged and was arraigned before the court.
 17. At the conclusion of the trial, the trial court delivered a judgment dated 14th February 2022, found the appellant guilty and convicted him on both counts. He was then sentenced to suffer death on count (1) and to serve a term of seven (7) years imprisonment on count (2).



18. However, the appellant is aggrieved by the conviction and sentence and appeals against it on the grounds as here below verbatim reproduced: -:
 - a. The learned trial Magistrate erred in law and fact in holding that the appellant was positively identified as the assailant contrary to the evidence adduced.
 - b. The learned trial Magistrate erred in law and fact in failing to award the appellant the benefit of the doubts that emerged during trial.
 - c. The learned trial Magistrate erred in law and fact in holding that the respondent had proved its case beyond any reasonable doubt contrary to the evidence adduced.
 - d. The learned trial Magistrate erred in law and fact in convicting the appellant against the weight of evidence adduced.
 - e. The learned trial Magistrate erred in law and fact in failing to consider the defence offered by the appellant.
 - f. The learned trial Magistrate erred in law and fact by misapprehending the facts, applying the wrong principles and drawing wrong inferences to the prejudice of the appellant.
19. However, the respondent opposed the appeal vide grounds of opposition dated 24th November, 2022 which states as follows: -
 - a. The appeal is misconceived and without merit.
 - b. The learned Magistrate's decision was appropriate and correct having complied with the provisions of the law.
 - c. In accordance with section 215 of the Criminal Procedure Code, the learned Magistrate's finding of guilt was based on an assessment of the material facts and evidence presented by both the State and the appellant as well as the mitigation of the appellant thereto.
 - d. The learned Magistrate exercised her judicial discretion fairly in accordance with section 297(2) and 259 of the Penal Code.
20. The appeal was disposed through filing of submission. The appellant filed submissions dated; 24th February, 2023 while the respondent filed submissions dated; 24th April, 2023.
21. The appellant submitted that, the prosecution failed to discharge the burden of proving the case beyond reasonable doubt. That, the conditions of his identification were not favourable in that PW1 James and PW2 Susan testified that they identified the appellant with the assistance of the light from PW5 Joyce's car and the security lights at the scene.
22. However, no evidence was led on the position of the security lights, whether they were inside the compound or outside the gate and its intensity. Further, neither PW5 Joyce nor PW4 Corporal Mbulu the investigating officer mentioned the security lights in their evidence.
23. Furthermore, PW5 Joyce testified that she could not see the assailant but only heard a voice despite the fact that she was inside the car, which raises doubt as to whether the headlights were illuminating the scene of crime.
24. The appellant argued that PW1 James gave contradicting evidence on whether or not he recognized him. That he stated that he was able to recognize him with the help of the security lights in the compound but in the same breath, testified that he identified him at the police station as a person he



- knew lived near his home. That at the same time, PW1 testified that he did not know him and that it was the police officers who informed him that he lived near PW1's home.
25. The appellant challenged the identification parade arguing that, PW1 James had been tipped off by the police officers as to the place he was living in the neighbourhood. Further the trial court failed to interrogate how the identification parade was conducted
 26. That, taking into consideration that he was not properly identified, the conviction herein was not safe. He relied on the case(s) of; Republic vs Valentine Maloba & 2 others Busia HCCR No. 1 of 2013; William M. Aringo vs Republic Nyeri CA No. 18 of 2001; and Fredrick Gitonga & 2 others vs Republic Voi HCCR No. 21 of 2020 & E003 & E068 of 2021 in support of his argument that where an identification parade is flawed and/or does not adhere to the laid out procedure such parade is of little evidentiary value.
 27. The appellant further submitted that the trial court violated his right to a fair hearing under Article 50(2) of *the Constitution* of Kenya and section 146 (4) of the *Evidence Act* (Cap 80) Laws of Kenya, in that he made an oral application on 19th August 2020 and 29th September 2020 seeking to recall PW1 James and PW2 Susan for further cross-examination.
 28. That the trial court dismissed the application on the grounds that, allowing him to recall and cross-examine the witnesses would give him an opportunity to amend his case. But the appellant argues that the court should not have shielded witnesses from further cross examination unless it could have been shown that there was ulterior motive.
 29. On the charge of abduction, the appellant submitted that, the evidence that "PW2 Susan was not bound or tied up by her assailant" and as there was no evidence of any intent to confine her these facts are inconsistent with the charge of abduction.
 30. That the appellant further submitted that the prosecution's case was marred with inconsistencies and contradictions. That, there were contradictions in the evidence of the complainants and, PW4 Corporal Mbulu regarding who between the complainants and the village elder found and presented appellant's identity card to the police station. That the contradiction goes to the credibility of PW1 James's evidence on the recovery of the identity card. Therefore, the prosecution should have called the village elder as a witness.
 31. Further, the source of the appellant's identity card was critical taking into consideration that the identity card was used by the police to arrest him and therefore any contradiction was fatal to the prosecution's case.
 32. Furthermore, PW4 Corporal Mbulu contradicted the evidence of PW2 Susan on the circumstances under which PW2 escaped from her abductor. Additionally, PW4 contradicted the evidence of PW1 James on whether or not the appellant robbed him of Kshs. 150.
 33. However, the respondent submitted that the identification of the appellant was one of recognition as both PW1 James and PW2 Susan were able to positively identify him with the assistance of the security lights and lights from the vehicle.
 34. Further, PW2 Susan was in close proximity with the appellant for about 20 minutes when he attempted to abduct her. That both PW1 and PW2 picked out the appellant in an identification parade by the clothes that he wore and by dreadlocks he had at the time.
 35. The respondent further submitted that the ingredients of the offence of attempted robbery under section 297(2) of the Penal Code were proved. That, evidence adduced indicated that the appellant



- attempted to rob both PW1 and PW2 while armed with a gun and/or a blunt object and hit them on the head, eyes and lower limbs as evidenced by the medical reports produced by PW3.
36. That in the case of; Johana Ndungu vs Republic 1995 KLR 387 the Court of Appeal stated that any of the elements of the charge are sufficient to prove a charge of robbery as per the Penal Code.
37. With regard to the offence of abduction, the respondent submitted that the evidence adduced showed that, the appellant hit PW2 Susan on the face with a metal object, threatened to kill her with a knife if she screamed and ordered her to follow him. That she only managed to escape after the appellant entered a mud house. Thus it is clear from the evidence that PW2 Susan was abducted by the appellant.
38. The respondent argued that the appellant was accorded a fair hearing in line with Article 50 of *the Constitution*. That he had an opportunity to cross examine the witnesses, and to counter their evidence through his sworn statement in his defence. However, the appellant did not give a reasonable explanation to warrant the recalling of the witnesses.
39. Further, the appellant's defence was a mere denial as he failed to explain why his identity card was at the scene of the crime and he did not counter the prosecution's case.
40. Lastly, the respondent submitted that, the sentence of death meted out by the trial court is prescribed under the law and cited the case of; Francis Muruatetu and Another vs Republic Supreme Court Petition No. 15 & 16 of 2015.
41. At the close of the arguments by the respective parties and in considering the appeal in the evidence and arguments by the respective parties I note the role of the 1st appellate court as held by the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32, is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that the court did not have the benefit of the demeanour of the witnesses.
42. In the instant matter, the appellant was convicted on the 1st count with the offence of attempted robbery with violence contrary to section 297(1) as read with (2) of Penal Code. The subject section states as follows:
- (1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.
 - (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
43. The elements of the offence of attempted robbery with violence were outlined in the case of; Philip Musyimi Ndeti & another v Republic [2018] eKLR where the Court of Appeal cited section 297 (2) of the Penal Code and stated as follows: -
- “It is also trite law that proof of any one ingredient in the offence under Section 297 (2) that (a) the offender is armed with any dangerous and offensive weapon or instrument or (b) the offender is accompanied by one or more other person or persons or (c) at or immediately before or immediately after the time of robbery the offender wounds beats or uses other personal violence to any person, is sufficient to establish the offence of attempted robbery which is punishable by death.”



44. In the instant matter there is no dispute that PW1 James Mbogo Njoroge, PW2 Susan Wambui Kinyanjui and PW5 Joyce Wairimu Kinyanjui were attacked on material date.
45. Further there is no dispute that the assailants attempted to be rob the victims of the items mentioned the charge sheet. Furthermore, there is no dispute that, the robbers were more than one and were armed with guns and metal bars.
46. Similarly, it is not in dispute that, PW1 James and PW2 Susan were injured during the robbery. The prosecution produced the P3 form filled by Dr. C. Kimani a clinical officer which showed that PW1 James was injured on the face and had two (2) stitched wounds. He classified the degree of injury as harm and indicated the probable weapon used to inflict the injury was a blunt object.
47. Similarly PW2 Susan was examined and a P3 form produced which showed that she sustained a cut wound on the left side of the eye and on both legs. The degree of injury was classified as harm with indication that the injuries were caused by a blunt object.
48. The key question to answer is whether the appellant was positively identified as one of the robbers. In that regard PW1 James testified that, he could identify the appellant with aid of security lights and lights from the headlamp of the motor vehicle which was about 12 metres away. That when he got into the compound, he put on the security lights.
49. He went on to state that, on the material date, the appellant was wearing a black jacket, trouser, a marvin and had rastas. Further the police officers told him that the appellant was living in his neighbourhood.
50. In cross-examination, he stated that there was enough light and that he saw the appellant well and maintained that the appellant was involved in the robbery. He further maintained that he positively identified the appellant on the identification parade.
51. PW2 Susan also testified that the appellant was wearing a marvin and had rastas and that there was enough light from the car and from their house. In cross-examination she maintained that she saw the appellant well during the robbery.
52. PW5 Joyce Wairimu on her part stated that, she did not manage to see or get to know who had assaulted or attacked them. That she could not identify the appellant as having been involved in the robbery as she drove of immediately they were attacked.
53. In addition to the afore evidence, PW1 testified that, after the robbery, they found an identity card No. 3103881 in the name of John Njoroge Wanyikoi at the scene and took it to the police station. Similarly PW2 Susan stated that, they found the subject identity card No. 3103881 Serial No. 230855663 at the scene of crime after the robbery.
54. PW4 No. 42041 Corporal Margaret Mbulu testified that, as the victims of crime PW1 and PW2 were reporting the robbery incident at the police station, a village elder went to the police station and reported that, they had gone to the appellant's house where PW2 Susan had been taken and broke into it. That, they found photos and two original identity cards No. 3103881 and 9124291 in the name of George Munyuru. That the photographs recovered belonged to the appellant. They were produced as prosecution exhibits 5(a)- (e).



55. Corporal Margaret Mbulu stated in her evidence in chief that: -
- “we followed public to identify the owner of the identity card picked at the complainant compound”
56. The witness went on to state as follows: -
- “We were lead to him and arrested him and charged him with the offence before court. The person I arrested is the one in the dock (points). I did not know him before the incident. An identification parade was done and the accused was positively identified”.
57. In cross-examination the witness responded that: -
- “it is not true your identity was taken from your house. It was brought to us by the complainant.”
58. Based on the fore evidence and the fact that, the identity card No. 31038811 was recovered at the scene of crime and belongs to the accused he cannot escape liability and/or involvement in the offence. The complainants had no justification to plant the identity card on him. Even if it was recovered at his house the fact that the witnesses led to the house where the assailant went to after abducting PW2 and his identity card was recovered from there and upon identification parade being conducted he was identified still places him at the scene
59. The argument of intensity of light and failure to establish the same does not arise in light of description given by the witnesses and identity on the parade. I therefore confirm conviction on the first count.
60. In relation to count 2 the appellant was charged with the offence of abduction with intent to confine, section 256 of the Penal Code defines abduction as follows: -
- “Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person.”
61. Pursuant thereto section 259 of the Penal Code provides that:
- “Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years”.
62. As regard the elements of the offence of abduction, the court in the case of; Singh v Republic (Criminal Appeal E034 of 2021) [2023] KEHC 20506 (KLR) (21 July 2023) (Judgment) stated that:
- “ 14. From the above section, the elements of the offence the accused was facing are that;-
- i. The complainant was abducted that is he was compelled by force, or induced by any deceitful means to go from any place.
 - ii. That the abduction was by the accused person (appellant herein)
 - iii. The abduction was with intent to cause that person to be secretly and wrongfully confined.



15. These elements were discussed by the court in *Wright Kinyatta v Republic* [2021] eKLR where the learned Judge held as thus:-

“75. The ingredients of the offence include kidnapping or abducting a person with intent to cause that person to be secretly and wrongfully confined. However, my reading of Section 256 indicates in my opinion, that the key ingredient in kidnapping and abduction is the forceful compelling of an individual or using of deceitful means to induce a person to go from any place. See, *Phidesio Nthiga Kithumbu v Republic* [2014] eKLR”

63. Thus the key elements of the offence is the forceful compulsion of a person to move from one place to another. PW2 Joyce detailed out how the appellant led her from her place of residence to an unknown place. It is clear therefore she moved without will and was forced. That proves the key elements of abduction. The conviction is confirmed.

64. As regard sentence, section 297(2) of the Penal Code provides the sentence of death for attempted robbery.

65. As regard the offence of abduction, section 259 of the Penal Code provides that:

Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years.

66. However, when the trial court pronounced the sentence on the first count it should have held the custodial sentence on count 2 in abeyance which I hereby order that the custodial sentence be held in abeyance.

67. Consequently, the appeal is dismissed in its entirety.

DATED, DELIVERED AND SIGNED THIS 26TH DAY OF SEPTEMBER, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Kinyanjui for the appellant

Ms. Mugoio for the respondent

Mr. Komen: Court Assistant

