**Njoki v Republic (Criminal Appeal 96 of 2016)**
**[2025] KECA 1520 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1520 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CRIMINAL APPEAL 96 OF 2016**

**S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA**

**OCTOBER 3, 2025**

**BETWEEN**

**JOHN MAINA NJOKI ............................................................................ APPELLANT**

**AND**

**REPUBLIC ......................................................................................... RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Kerugoya (Limo, J.) dated 27th October, 2016 in HC.CRA No. 65 of 2014.)***

**JUDGMENT**

1. The appellant, John Maina Njoki was charged alongside one Paul Mburu (hereinafter co-accused) in the Principal Magistrate's Court at Baricho, to wit, Criminal Case No. 2 of 2014 with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that the appellant and his co-accused, on 23rd November, 2013 at Makutano market in Mwea West District within Kirinyaga County, jointly robbed Joseph Nthuri Nzei of a motorcycle registration no. KMDB 407N make Skygo valued at Kshs.75,000/- and at or immediately before or immediately after the time of such robbery beat the said Joseph Nthuri Nzei.
2. The prosecution called four (4) witnesses.
3. The facts of the prosecution case were that PW1, Sylvester Mutheu had employed Joseph, PW2, to operate his motorcycle registration number. KMDB 407N as a taxi (bodaboda). On the material day, both of them agreed to meet at Motel Paradise in the evening so that PW2 would drop him home. When PW1 arrived at the venue at about 10 p.m., as agreed, PW2 was not there and was unreachable on the phone. PW1 decided to go home by other means.
4. At about 4 a.m., PW1 was woken up by his mother and, upon going outside his house, found PW2, who had been brought to his home by a Good Samaritan. He was unconscious. PW1 took him to Kimbimbi Hospital for treatment. When he regained consciousness that night, PW2 told him that he

was hired by the appellant and another man he did not know before. He said that the two requested to be taken to Mulango, which he agreed to, thinking it was a short distance and that he would make it back in time to meet him (PW1). He said that he noted the appellant was carrying a paper bag. When they arrived at their destination, the appellant asked him to stop, which he did. The appellant then tied a rope around his neck and, with his accomplice, whom he identified in court as the appellant's co-accused, they strangled and wrestled him down to the ground. He was beaten on the ribs and strangled until he lost consciousness.

5. PW1 and PW2 reported the matter at Makutano Police Station same night. The appellant was arrested on 31st December, 2013 at a motel in Makutano. Two weeks after his arrest, the appellant sent for PW1 from the prison, and when he visited him, the appellant informed him that one, Paul, was his accomplice in the crime and that he (Paul) knew the whereabouts of PW1's motorcycle. PW1gave that information to PW4, P.C. (W) Ann Achieng, the investigating officer of the case.

6. In the proceedings before the trial court, PW1 produced the receipt and a logbook proving he was the owner of the stolen motor cycle. PW2, on the other hand, told the court that he knew the appellant very well as he was his regular customer. On the material evening, he said that the appellant approached him at the Motel and talked to him before he took them to Mulango, where they robbed him of his motorcycle.

7. PW3 was John Ngatia Githaiga, a Clinical Officer at Baricho Health Centre. He produced the P3 form he signed on 15th July, 2014 in respect of PW2, after examining him. PW2 had sustained injuries on the neck and chest, had blood clots around the neck and small cut wounds and tenderness on his chest. He approximated the age of the injuries as six (6) hours and the probable type of weapon used to inflict the injuries as blunt object. He assessed the degree of injury as harm.

8. PC. Ann Achieng (PW4), the investigating officer stationed at Sagana Police Station told the court that she was on duty when she received information that the appellant had been arrested by a police officer from Makutano Police Station. After conducting investigations into the incident that occurred on the night of 23rd November, 2013, she preferred the charge against the appellant and later his co-accused, who was arrested later. PW4 confirmed that the stolen motorcycle was not recovered.

9. In their defence, both the appellant and Paul gave unsworn evidence. Paul stated that he had no idea about the offence and did not know why he was arrested. The appellant, on his part, said that he had visited his mother in Limuru from 22nd to 24th November, 2023 and had not stolen any motorcycle.

10. In his judgment dated 24th December, 2014, Hon. Jalang'o, SRM, convicted the appellant of the charge. However, he acquitted his co-accused for lack of sufficient evidence. The appellant was sentenced to death.

11. Aggrieved and dissatisfied with both the conviction and sentence, the appellant preferred his first appeal to the High Court, to wit, Criminal Appeal No. 65 of 2014. He raised several grounds inter alia that; the prosecution was biased; the charge sheet was defective; the evidence of recognition was not proved beyond reasonable doubt; the language used in court was not interpreted; that there were contradictions in evidence; and, his defence was not considered.

12. The appeal was canvassed by way of written submissions. Limo, J. in his judgment dated 27th October, 2016 found that the trial court considered the evidence presented to it and came to the inevitable conclusion that the appellant was guilty as charged. The learned Judge therefore found no merit in the appeal and dismissed it, upholding both the appellant's conviction and sentence.

13. Aggrieved and dissatisfied with the said judgment, the appellant has now preferred a second appeal to this Court. The appellant relies on the amended Memorandum of Appeal dated 1st August, 2024, which Mr. Mahugu, for the appellant, urged was a merger of the grounds of appeal filed by the appellant into two grounds as raised in the amended Memorandum of Appeal. The two grounds are, to quote verbatim;

    a. The learned Judge erred in law in concluding that an Identification Parade was not necessary; and,

    b. The severity of the sentence as a matter of Law was manifestly harsh and excessive.

14. At the virtual hearing of the appeal, Mr. Mahugu learned counsel was present for the appellant, while Mr. Naulikha learned Prosecution Counsel was present for the respondent. Both Mr. Mahugu and Mr. Naulikha relied wholly on their written submissions dated 31st January, 2025 and 7th February, 2025, respectively, with brief oral highlights.

15. Being a second appeal, our mandate is circumscribed by section 361 (1)(a) Criminal Procedure Code to deal with matters of law only, if we find any raised in the appeal. We must resist the temptation to deal with facts of the case which were tried by the trial court and retried on first appeal. That mandate was recognized in Stephen M'Irungi & Another vs. Republic [1982-88] 1 KAR 360 as follows:

    > "Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

16. We have considered the submissions by counsel and the cases relied on by both sides.

17. Regarding the issue of identification and whether there was a need to conduct of an identification parade, Mr. Mahugu submitted that the Judge erred in law in finding that an identification parade was not necessary because PW2 said he knew the appellant before the incident. He urged us to note the appellant's own defence in cross-examination by the prosecution that he did not know PW1 or PW2. Counsel submitted that the prosecution relied on the evidence of a single witness and that the trial court should have exercised great caution. He urged that the circumstances existing at the time the offence occurred were difficult, as it was in the dead of the night. He urged that an identification parade was necessary in those circumstances. Counsel relied on the case of Mwanyengela vs. Republic [2024] KECA 561 (KLR) and argues that the High Court failed in its duty to properly re- evaluate the evidence, thereby justifying intervention by this Court.

18. In the written submissions, Mr. Mahugu submits that the conviction was based on the uncorroborated testimony of a single witness under difficult nighttime conditions where lighting was neither confirmed nor described adequately. In support, he relies on the case of Martin Mudaki Embue vs. Republic [2006] eKLR, where the Court emphasized that identification by a single witness in difficult conditions must be tested with the utmost caution and must be absolutely watertight. This case quoted the cases of Roria vs. Republic [1967] EA 583, Anjononi & Others vs. Republic [1980] KLR 59, and Jackson Muia Kimaku & Another vs. Republic (Criminal Appeal No. 152 of 2005) (unreported), all affirming the need for credible and cautious identification, particularly in capital offences where no stolen property is recovered.

19. Mr. Mahugu challenged the trial court's reliance on dock identification, which he argues is inherently unreliable. He placed reliance on Gabriel Kamau Njoroge vs. Republic [1982-88] 1 KAR 1134 for the proposition that dock identification is generally worthless unless preceded by a properly conducted identification parade. He maintained that the absence of such a parade and the flawed evidence of identification rendered the conviction unsafe.

20. On sentence, Mr. Mahugu for the appellant asserted that since the conviction was entered in error, the sentence is unlawful and should be quashed alongside the conviction.

21. Mr. Naulikha opposed the appeal and submitted that the evidence of identification used to convict the appellant was that of recognition that did not require an identification parade. He argued that PW2 knew the appellant before the incident and also interacted with him before transporting him to the scene of the attack. He urged that the facts and circumstances of the case ruled out the necessity of mounting an identification parade for purposes of identifying the perpetrator of the crime. Citing M'Riungu vs. Republic [1983] KLR 455, counsel submitted that the conviction and sentence of the appellant were proper and lawful, and that deference should be given to the factual findings of the two lower courts.

22. On sentencing, the State relies on this Court's decision in Bernard Kimani Gacheru vs. Republic [2002] KECA 94 (KLR) for the proposition that sentencing is at the discretion of the trial court and ought not to be disturbed on appeal unless it is manifestly excessive or based on wrong principles. He submitted that the sentence imposed was lawful and proportionate to the gravity of the offence.

23. The conviction of the appellant rested on the evidence of PW2, a single identifying witness. In the oft-cited case of R. vs. Turnbull & Others [1976] 3 All ER 549, Lord Widgery C.J. had this to say:

> " First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications…"

24. As this Court expressed itself regarding evidence of a single witness in the case of James Tinega Omwenga vs. Republic [2014] eKLR:

> " We are of the considered view that the crux of this appeal is whether the evidence on identification was proper and safe to warrant the conviction of the appellant…Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult…"

25. We have examined the manner in which the trial court and the first appellate court handled the issue of the identification of the appellant. The trial magistrate observed as follows:

> "PW II Joseph Nzuli Nzei was able to recognise the second accused person (read appellant). He knew him very well. He stated that he used to carry and ferry the second accused to his home on numerous occasions. A fact never disputed by the second accused both in his cross examination and his defence.

I believed the said witness when he said that on the material night he met the second accused at Paradise Motel. He stated that they talked and thereafter the second accused requested him to ferry him and another man to Mulango.

At that point, it is clear that the said Joseph Nzuli Nzei knew the person or passenger whom he had carried enroute to Mulango. He stated that the passenger was the second accused and another person unknown to him."

26. The learned Judge on his part considered the issue of lighting at the Motel where PW2 picked up his passengers and found: "I do agree that the evidence tendered by the prosecution did not explain clearly the source of light or the intensity of it outside the motel where the complainant picked the appellant... I am however persuaded from the evidence tendered that there was sufficient light at the scene where the Appellant was recognized and picked. This is due to the following reasons; The complainant (P.W.2) told the trial court that the Appellant was

" carrying a black paper bag'' indicating that the light was sufficient to enable complainant see what the Appellant was carrying and even tell the colour of the paper bag."

27. The Judge considered the analysis and evaluation of the evidence by the trial magistrate and concluded thus: "In my view the evidence of identification was clearly proved beyond any reasonable doubt. The learned magistrate had basis to find that it was safe based on the evidence tendered before the learned trial magistrate, though he did not specifically state so."

28. As both courts recognized, where the evidence of identification is by a single witness and is made at night, the law requires that such evidence be carefully weighed to ensure that it is safe to be relied upon. In this case, the evidence was by a single witness and was made at night. However, as the trial court observed, PW2 stated clearly in evidence that the appellant was his regular customer and that he carried him home severally before this incident. Further, on the date in question, PW2 said that the appellant approached him in person and had a conversation before walking with him and another to the motorcycle, which all three rode off in. We are satisfied of two things which are pertinent to the issue of identification. First is that PW2 was approached in a friendly manner and had a discussion with his client before he agreed to take them to their destination. That approach means that PW2 had an opportunity to see and identify the person who had requested for his services. The second point is that this was a person he knew before, so that by holding a conversation with him gave PW2 an opportunity to see him clearly.

29. The evidence by PW2 was not dock identification as counsel for the appellant put it. Further, being identification of a person known before, it did not require the mounting of an identification parade.

30. We note that when he gained consciousness, he gave the name of his attacker to his employer, PW1. He also told PW3, the doctor who filled the P3 form, that he was attacked by a person known to him. That was evidence of consistency, showing that PW2 stated from the very first time he had an opportunity that he knew his attacker before.

31. We find that the circumstances of identification by recognition were reasonable given the fact that the appellant was in close proximity to PW2 as he requested the ride, and further, the conversation held rules out any possibility of mistaken identity. We find that the two courts below properly analyzed the evidence on identification and came to the right conclusion. They cannot be faulted.

32. On the sentence, the appellant was clear that the basis of challenging it was based on his view that conviction was wrong for lack of proper identification of the appellant. We find the conviction was right. That notwithstanding, we shall consider the issue of sentence and state that the Supreme Court

in Muruatetu & Another vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (herein after 'Muruatetu 2'), has given clear directions that its decision in Muruatetu & Another vs. Republic Petition 15 & 16 of 2015 only applied to the mandatory death sentence for the offence of murder under sections 203 as read with section 204 of the Penal Code. The Supreme Court stated categorically:

> "We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

33. At paragraph 15 in Muruatetu 2, the Supreme Court directed:

> "To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297
>
> (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly led, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

34. As the issue of the constitutionality of the mandatory death sentence under section 296 (2) of the Penal Code is yet to be addressed as recommended by the Supreme Court, the death sentence under section 296(2) of the Penal Code is not unconstitutional as it remains valid under the law. The trial magistrate properly imposed the death sentence upon the appellant and the learned Judge was right in upholding the sentence.

35. Consequently, the appellant's appeal fails in its entirety and is dismissed.

**DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025.**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**