Njoka & another v Republic (Criminal Appeal 59 of 2017)
[2025] KECA 127 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 127 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 59 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 7, 2025

BETWEEN

ASHFORD MWITI NJOKA ..... 1ST APPELLANT

MOSES MUREITHI MBAKA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Meru (R.V.P.Wendoh & J.A. Makau, JJ.) dated 1st October 2015 in HCCRA No. 316 of 2009 Consolidated with HCCRA No 57 of 2014)

JUDGMENT

1. Ashford Mwiti Njoka and Moses Muriithi Mbaka, the appellants, were charged before the Principal Magistrate's Court at Chuka, with the offence of robbery with violence, contrary to Section 296(2) of the Penal Code. The particulars of the offence were that, the appellants, on the night of 25th and 26th of September 2007 at Chuka Township in Meru South District of the Eastern Province, jointly with others not before court while armed with rungus robbed Martin Muia of cash Kshs.3,200 and immediately before the time of such robbery wounded the said Martin Muia.

2. The facts giving rise to this appeal as narrated by the prosecution witnesses are that Martin Matheka Muia, complainant, (PW1) was on 25th September 2007, about midnight walking home from a club called Club 700 when at about 10 metres from the club one person appeared and held him by the neck and two others appeared thereafter; they robbed him of his wallet which contained Kshs.3000, a national identity card and a Bank Card. The assailants also took Kshs.200 as they frisked and attacked him using a wooden plank.

3. PW1 testified that he screamed for help and a guard (PW2) from the nearby building came to his aid. He stated that he was not able to see the person who held him first but he was able to see the other two with the aid of electricity light from Good Hope Bar which was nearby. He testified that he sustained injuries and was bleeding from the mouth and his left hand had been wounded. He informed PW2 of his injuries and left to go home and sleep. The following day he woke up late and proceeded to his place of work where his branch manager called him and told him that his wallet, identity card, voter's card and bank card had been recovered and taken to the bank. He stated that he later identified his items and reported the matter to the police. He was then referred to the hospital where he was treated and a P3 form filled. He testified that the people who attacked him were all male, and that he did not know the appellants.

4. PW2 - Albert Murara Ngaruni was a guard at Good Hope Bar, Chuka. He told the court that on the night of 25th and 26th September 2007 at about midnight, he was at the corridor when he heard screams. He opened the door and at a distance of 20 metres he saw a man on the ground being beaten by three (3) men. He rushed to the scene and the on seeing him, the 3 men ran away. He said he was able to see the men clearly and recognized one of them who he knew by his nickname of "Mururu". He stated that PW1 told him that he was robbed of his wallet and money and he observed that he had also been injured. He testified that there was sufficient electricity light from Good Hope Bar; London Bar and adjacent butchery.

5. The witness went back to his workstation and 30 minutes later he heard commotion outside and heard people arguing about the money. He peeped and saw that there were two (2) ladies and three (3) men. He testified that he was able to recognize Mwiti, Mururu, a lady called Karendi and Kanyua and another boy and that the five (5) divided the money amongst themselves dropped the wallet and other documents and left after 20 minutes.

6. He proceeded to the scene and collected the documents and the following morning he took the items to KCB Chuka and told one clerk there what had transpired. PW2 further testified that he saw the 1st appellant on the day of the robbery and that he recognised the the 2nd appellant who he referred to by the name "Mururu" his nickname as he was from his area and he knew him very well. He stated that he attended an identification parade at Chuka Police Station where he was able to identify the appellants by touching them.

7. On cross-examination by the 2nd appellant, PW2 stated that he had known the 2nd appellant since childhood and even gave his parents' names as "M'buba and Harriet." He stated the appellant's nickname is "Mururu" which he is called by everyone in their area. He admitted he never made any report to police station as he left that matter to PW1 but he was summoned to give a statement to the police. He stated that he recognized the 2nd appellant as he was leaving the scene with the help of electric light from said Good Hope Bar and that the 2nd appellant was the last to leave the scene. He added there was light from the butchery that was adjacent and the incident occurred on the road 5 metres from the butchery. PW2 testified that he recovered PW1's property and took it to his workplace. He testified that in the identification parade he identified the 2nd appellant.

8. PW3 - Albanas Musembi No. 54332, recalled that on 26th September 2007 at 4.45 p.m. while at CID office Meru South District, PW1 reported that he had been attacked the previous night and robbed of Kshs.3,200, National Identification Card, Visitor Card, ATM and Business Card. He stated he did not know the robbers. He referred him to be attended to at the hospital; that the following day he visited the scene with the help of PW1. He later arrested the 1st appellant. He did not say how and by whom the 1st appellant was identified before the arrest.

9. He testified that the 2nd appellant had been named as a suspect but he was unable to arrest him but when another robbery was committed in Chuka, PC Kijara arrested the 2nd appellant and he managed to charge him alongside the 1st appellant and another.

10. Further, he testified that PW2 identified the appellants at an identification parade organized later by Inspector Sang. Further he stated that at the scene where PW1 was attacked there was security light.

11. On cross-examination by the 2nd appellant, he stated that when he commenced investigations, he was given the name of the 2nd appellant as "Mururu" being his nickname. He stated that he had sufficient evidence from the statement he had recorded to connect the 2nd appellant with the offence.

12. PW4 - No. 57497 Jackson Sang testified that on 1st October 2007, he conducted an identification parade as per the Force Standing Orders and that after carrying on the preliminaries and complying with the provisions of the Force Standing Orders, PW2 identified the 1st appellant by touching him. He testified that he came to know that the 2nd appellant was known to PW2 when he was about to conduct identification parade for the 2nd appellant and another and noted the same in the identification parade form. The Identification parade forms were produced in court as exhibits.

13. The 1st appellant gave unsworn defence and called no witnesses. He testified that on 23rd September 2007 he was summoned by his uncle to his home. He travelled home and was sleeping when police officers went to his home and arrested him. He was taken to the police station and later charged with the offence which he said he knew nothing about.

14. On his part, the 2nd appellant gave unsworn defence and called no witnesses. His defence was that he is a porter within Chuka Town and that he recalled on 10th November 2007 he woke up as usual and went to his place of work at the market; that at noon he was paid his money and he went to the pub and had a beer. He later went to the bus stage and on the road, he met with police officers who arrested him and took him to police station and later charged him with this offence. He denied having participated in the robbery.

15. In its judgment delivered on 21st February 2008 the trial court found that the ingredients of the offence of robbery with violence had been established, and the charge to have been proved beyond reasonable doubt. Both appellants were convicted and sentenced to death.

16. Both appellants challenged the conviction and sentence on appeal to the High Court at Meru. The appeals were heard by the learned R.V.P. Wendoh & J.A. Makau, JJ. who dismissed the consolidated appeal in its entirety.

17. The complaints by the appellants as contained in the amended supplementary memorandum of appeal dated 2nd June 2023 were, inter alia, that; the learned Judges of the High Court erred in law by finding that the prosecution had proved its case beyond reasonable doubt yet it had not and that the High Court erred in law by upholding the conviction of the appellants based on the unreliable and uncorroborated evidence of a single identifying witness.

18. At the hearing of the virtual hearing of the appeal, learned counsel S.N. Nganga and Ms. Nandwa appeared for the appellants and the State, respectively. Both counsel had filed written submissions which they relied on.

19. In brief, counsel for the appellants urged that the evidence of a single identifying witness, PW2, was unreliable due to the difficult conditions at the time of the offense, which occurred at midnight. The only light sources were from Good Hope, London Bar and an adjacent butchery. They further argued that PW3, the investigating officer, did not visit the scene at night to verify the lighting conditions. They

submitted that without proof of the nature and intensity of the lighting or the distance between PW2 and the crime scene, PW2's identification could not, therefore, be considered watertight and should not be the basis for the appellants' conviction.

20. The appellants urged that PW2's evidence regarding the distance from which he witnessed the attack was inconsistent. PW2 initially claimed he witnessed the attack from 20 meters away but later said it was 5 meters from the butchery adjacent to Good Hope London Bar. This inconsistency suggested a possibility of error in PW2's identification, which the prosecution did not eliminate. Reliance was placed on the case of Peter Mwangi Mungai v Republic [2002] eKLR.

21. Furthermore, it was submitted that although the Judges cautioned themselves about the risks of relying on a single identifying witness, they did not properly apply this caution to the evidence provided by the prosecution.

22. It was argued that PW2, the single identifying witness, recognized the 2nd appellant as "Mururu," a person from his area. However, the investigating officer, PW3, did not visit the 2nd appellant's home to verify if PW2 and the appellant were from the same area, whether he was known by the name "Mururu," and whether his parents were named "M'buba and Harriet," as stated by PW2. Visiting the appellant's home could have verified the reliability and truthfulness of PW2's recognition. We were urged to allow the appeal on the grounds that the prosecution did not prove the case beyond reasonable doubt. They highlighted that there were significant gaps in the investigations, making the evidence presented insufficient and unsafe to secure the conviction of the appellants.

23. In rebuttal, the respondent argued that the prosecution proved the case beyond reasonable doubt against the appellants. PW1 testified about the attack he suffered on 25th September 2007, which was witnessed by PW2, who confirmed seeing three men, including the appellants, beating PW1. This was corroborated by PW5, the clinical officer, who examined PW1 and noted his injuries, including a bruised shoulder and left knee.

24. Based on the evidence, it was submitted that the prosecution demonstrated that the appellants were armed with weapons, which they used to attack and injure PW1.

25. With regards to sentencing it was submitted that the sentence that was meted is within the law and was not excessive. Reliance was placed on Bernard Kimani Gacheru vs Republic [2002] eKLR and Stanley Kipkurui Maritim vs Republic [2022] eKLR. We were urged to uphold both the conviction and sentence.

26. This being a second appeal, our mandate under section 361(1)a of the Criminal Procedure Code is to consider only issues of law and approach with deference the concurrent findings of fact by the two courts below. The exception is where the conclusions on matters of fact are not supported by the evidence or where there is a misapprehension of the law. This principle has been stated by the Court in many of its decisions, including Adan Muraguri Mungara vs Republic [2010] eKLR, where the Court held that:

> "Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus

27. We have reviewed the record of appeal and the submissions of the parties and we find that the questions that fall for our determination are whether the charge against the appellants was proved; whether both courts below erred in relying on the evidence of a single identifying witness and if the conviction is sound and whether we should interfere with the sentence.

28. It is common ground that PW2 was the only witness called to say that he had seen and identified both appellants in the attack. The stolen items were not recovered on any of the appellants. PW2 did not describe any of the attackers to the police officers save to add at the time of the identification parade that he recognised the 2nd appellant whom he referred to as "Mururu" stating that he knew him as they came from the same place. Even for the 1st appellant it is curious how PW2 identified him during the identification parade as he was categorical during his evidence in court that he was only able to see the 2nd appellant at the scene, so it remains curious as to how he identified someone he had never seen either at the scene or before.

29. The learned Judges in confirming the conviction of the appellants observed that the appeal rested on the sufficiency of a single identifying witness. That witness was PW2. As was stated in R. vs Turnbull [1976] 3 ALL ER 549 and reiterated in many decisions of this Court, including Cleophas Otieno Wamunga vs R. [1989] eKLR and Roria vs Republic [1967] EA 573, a conviction can be based on the identification of the accused by a single witness. However, the evidence of such a witness must be tested with the greatest care. The trial court must carefully examine the conditions under which the witness identified the accused. It must be quite clear what was it about the accused's physical and facial features that made the witness identify him and such testimony should be supported by a properly conducted identification parade in which the accused is picked by the witness.

30. As was acknowledged by the learned Judges, the attack was at night and by about three (3) people. PW2 heard screams, opened the door and at a distance of 20 meters saw a man on the ground being beaten by three men and that there was sufficient light from Good hope, London bar and the adjacent butcheries. Further that PW2 rushed to the scene holding up a panga and that the assailants on seeing him ran away. He stated that he recognized one of them whose name he gave as "Mururu" which was a well known nickname. That he heard one calling the other "Mwiti" and he recognised "Mwiti, Mururu, Karendi, Kanyua" and another boy as he saw them share money and that they dropped the wallet and other documents and left after 20 minutes.

31. All this happened at night. It is in these circumstances that PW2 stated that he identified "Mwiti, Mururu, Karendi, Kanyua and another boy" who were haggling over money. What concerns us, however, is that he did not report the incident to the police and/or describe any of the attackers to the police or give their names. The only place he stated to have recognised the 2nd appellant as "Mururu" was at the identification parade conducted by PW4.

32. It is where a witness has given the police the description of an attacker that the police, using that description, can go out there and look for, and arrest, the person fitting that description. The arrested person will then be paraded in a properly convened identification parade along with other members of similar description to see whether he can be identified by the witness. (See Peter Mwangi Mungai vs Republic [2002] eKLR).

33. In the case of the 1st appellant, he was not known to PW2 and in the case of the 2nd appellant it was alleged by PW2 that he was known to him by the name "Mururu" and was a neighbor. We are perturbed that the learned Judges did not consider it unusual that PW2 did not immediately give out the 2nd appellant's name for him to be traced and arrested as he claimed they came from the same area and he knew him well before.

34. In the instant case, the circumstances leading to the 1st and 2nd appellants' arrest were not well explained by the Investigating Officer. He did not indicate who had identified the appellants during their arrest, yet PW 2 had not given the suspect's name to the police. With regard to the 2nd appellant, the investigating officer in his testimony stated that he was not able to arrest the 2nd appellant based on information given and only arrested him after he was arrested in connection with another robbery and taken to the police station.

35. We respectively differ with the learned Judge's finding that the 1st appellant was recognized by PW2 during the attack. PW2 was very clear that he only recognised the 2nd appellant at the scene of the attack.

36. We may add that, it is trite that once a witness states that the attacker was a person known to him, an identification parade is valueless. (See Fredrick Ajode Ajode vs Republic [2004] eKLR).

37. In total, having considered the grounds of appeal, the rival submissions and the law, we find that the learned Judges erred when they confirmed the appellants' convictions. The evidence of identification on which the appellants were convicted was not safe at all.

38. The consequence is that we allow the appeal, quash the conviction and set aside the sentence. The appellants shall forthwith be set at liberty unless otherwise lawfully held.

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

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR