Njoroge v Republic (Criminal Appeal 149 of 2017)
[2024] KECA 1076 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KECA 1076 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 149 OF 2017

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

JUNE 20, 2024

BETWEEN

STEPHEN MICINJI NJOROGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nyeri (Ngaah, J.) dated and delivered on 6th October, 2017 in H. C. Cr. A. No. 187 of 2012)

JUDGMENT

1. This is a second appeal arising from the judgment of the High Court of Kenya at Nyeri (Ngaah, J.) dated 6th October 2017 in Criminal Appeal No. 187 of 2012.

2. A background of this appeal is that the appellant was charged, with another, before the Principal Magistrate's Court at Othaya, in Criminal Case No. 497 of 2011, with three counts of robbery with violence contrary to Section 296 (2) of the Penal Code.

3. The particulars of the charges alleged that on 8th October 2011, at Othaya Township in Nyeri South District, within Nyeri County, the appellant and his co-accused, jointly with others not before court, while armed with offensive weapons namely knives, robbed: (i) Agnes Wangui Mengere of a laptop make Toshiba, one modem, two mobile phones make Nokia E72 and Nokia C 1000 and cash Kshs.12,450/=, all valued at Kshs. 58,150/=; (ii) Consolata Gichuki of Kshs. 2,500/= and a mobile phone make Nokia 1210, all valued at Kshs. 4,500/=; (iii) Stellamaris Wambui Waweru of cash Kshs.5,000/= and a mobile phone make TT-V8, all valued at Kshs. 13,500/=; and immediately before and immediately after the time of such robbery used personal violence against the three complainants.

4. The appellant denied the charges in the three counts, prompting the trial in which the prosecution called a total of seven (7) witnesses. The brief facts of the case according to the prosecution are that the three complainants were nuns who lived together in a three-bedroom house located within Othaya

Catholic Parish. Two of the complainants testified as PW1 and PW2. PW2, Consolata Gichuki, told the court that on 8th October 2011, at about 2.00 a.m., she was asleep in her bedroom when she was woken up by a man armed with a kitchen knife who demanded for money. The man took Kshs.2,000/= which was on her bedside table. He demanded for more money and threatened to kill her if she did not oblige. He ransacked her handbags but did not find anything. He then ordered her to take him to the other sisters' rooms. PW2 took him to Stellamaris Wambui's room (PW1).

5. It was PW1's evidence that she was asleep in her room on the fateful night when, at about 2.00 a.m., she heard a knock at her bedroom door. The person at the door identified herself as PW2. When she opened the door, a man who was holding a knife and a torch entered the room with PW2. He demanded money from her and she gave him Kshs.550/= which was on her bedside table. She switched on the electricity lights in her room. The man then ransacked her handbags and robbed a further Kshs.5000/=.

6. The assailants then proceeded to Agnes's room (the third nun).

   The man took a laptop and two mobile phones from Agnes. He then took PW1 and PW2 back to their rooms where they were ordered to surrender their mobile phones. The man then led the three complainants to the kitchen. PW2 stated that the electric lights in the kitchen had been switched on. She saw a short brown man armed with an iron bar. They were ordered to lie down. They could hear voices of other assailants. The assailants locked them in a toilet. After the assailants left, PW1 went to her bedroom where she got another phone which she used to alert the parish priest of the robbery. The police came to the house a few minutes later.

7. PW1 described the assailant that came to her room as dark and slender, with protruding ears. She stated that during an identification parade conducted on 31st October 2011, she was able to pick out the appellant as the said assailant. She testified that she saw him very well as the electric lights in her bedroom were switched on.

8. PW2, on her part, stated that the lights in her bedroom were switched off. She stated that she saw the assailant in sister Agnes's room as her bedroom lights were on. She described the assailant who was inside the house as tall, dark but not very dark, and that he spoke in Kikuyu and Kiswahili languages. PW2 stated that she was able to pick out the appellant as the assailant during an identification parade that was conducted a week after the robbery incident. The two witnesses did not identify the appellant's co-accused.

9. PW3, IP George Opere, was the arresting officer. He told the court that on 31st October 2011, he was on patrol duty at Othaya town together with his colleague Sgt. Ndirangu. He received a call from an informer who told him that a most wanted criminal was at Mathews Bar and Restaurant, located near KPLC offices at Othaya town. He was informed that the suspect was tall, slim and had protruding ears, and a mark on his forehead. They proceeded to the said bar where they arrested the appellant, who went by the alias "Loketo". PW3 stated that he called DCIO, CIP Stephen Mutua (PW4), to inform him of the arrest. The DCIO told him that Loketo was the most wanted criminal in Othaya and that he was involved in a robbery with violence incident which took place at a Catholic church. PW3 took the appellant to Othaya Police Station where he was detained.

10. PW4's evidence was to the effect that he conducted the identification parade with respect to the appellant's co-accused, Isaac Wachira, on 31st October 2011. He stated that one of the complainants, Agnes Wangui Mengere, picked out the appellant's co-accused from the parade, and identified him as one of the assailants who had robbed them. The appellant's co- accused was arrested by PW6, Senior Seargent Pascal Wambua, on 29th October 2011, at 3.30 a.m.

11. PW5, CIP Jackson Kiema, conducted the identification parade with respect to the appellant, upon instruction from CPL Oyalo, on 1st November, 2011, at 9.00 a.m. PW1 and PW2 were the identifying witnesses. He testified that he fetched the appellant from the cells and informed him the purpose of the identification parade. He selected nine members, who were of similar height to the appellant to participate in the parade. The appellant stood between the sixth and seventh person. PW1 went in first and identified the appellant by touching him on his shoulder. PW2 went in afterwards and identified the appellant. PW5 stated that the appellant stood in the same position when the two witnesses identified him. He stated that the appellant remarked that he was not satisfied with the parade as the witnesses had seen him that morning before the parade was conducted. PW5 produced the identification parade form as evidence before the trial court.

12. PW7, CPL Patrick Oyalo, was the Investigating Officer in this case. It was his testimony that on 8th October 2011, at about 8.30 a.m., he was informed by PW4 that a robbery had occurred at the Catholic church. He went to the scene where he met the three complainants. They informed him that earlier that night, at 2.00 am, they had been attacked by robbers who gained access to their house through the kitchen door. They listed the valuables that had been stolen from them. They informed him that they were able to recognize the two assailants who were inside the house as one of them had a torch, and that electric light in one of the bedrooms, as well as the lights in the kitchen where they had been taken were switched on.

13. The complainants told PW7 that one of the robbers was tall, and the other one was short. PW7 stated that in the course of his investigations, he received information that the appellant and his co-accused were overheard discussing the robbery at a local pub. They were identified to him as 'Loketo' and 'Wachira'. PW7 spread the word to his colleagues. He stated that 'Loketo' was well known to the law enforcement officers.

14. On 29th October 2011, PW7 was informed that the appellant's co-accused (Wachira) had been arrested. He interrogated him but got no information regarding the robbery. The accused denied robbing the complainants. PW7 stated that he requested PW4 to conduct an identification parade. On 31st October 2011, PW4 informed him that the appellant had been arrested. PW7 interrogated the appellant. He denied participating in the robbery. He instructed PW5 to conduct an identification parade with respect to the appellant. He was later informed that the appellant had been positively identified by the complainants. After concluding his investigations, he made the decision to prefer the charges against the appellant and his co-accused before the trial court.

15. After close of the prosecution's case, the trial magistrate found that the prosecution had established a prima facie case to warrant both the appellant and his co-accused to be placed on their defence. They both gave sworn evidence. DW1, Isaac Wachira, told the court that on 26th October 2011, at about 6.00 a.m., he was walking home when he met with police officers who arrested him. He was arraigned before court on 29th October 2011, where charges were read out to him. Later that day, an identification parade was conducted. He stated that the identifying witness who was a nun did not identify him at first.

    The DCIO then paraded them for a second time and forced the nun to identify him as one of the assailants.

16. The appellant gave evidence as DW2. He stated that he was arrested on 1st November 2011, and detained at the police station. It was his testimony that on the day of the parade, he met two nuns who were together with one Sergent Wambua. He was then taken back to the cells. After about ten minutes, he was called to join eight men in an identification parade. The two nuns identified him at the said parade. He stated that he told the OCS that he was not satisfied with the identification parade as the

two witnesses had seen him before the parade was conducted, and further, that he was tallest person among the people who participated in the parade.

17. The trial court (Hon. Macharia –PM) upon assessing and analyzing the evidence tendered before it, found that the appellant was properly identified by PW1 and PW2 as one of the assailants who robbed them on the fateful night, with respect to the charges in counts 2 and 3. Since the complainant in count 1 was not availed to testify, and it was the evidence of PW4 that she was the only witness who identified the appellant's co-accused during the identification parade, the learned trial magistrate found that the prosecution failed to discharge its burden of proof, with respect to the appellant's co- accused. He was acquitted of all the three counts. The appellant was found guilty as charged in counts 2 and 3. He was sentenced to death with respect to count 2. The sentence in count 3 was held in abeyance.

18. The appellant, aggrieved by this decision, filed an appeal before the High Court at Nyeri. His appeal was founded on three grounds. He argued that the identification parade as conducted on the material day was flawed and that the entire evidence of identification was insufficient to sustain a conviction. He faulted the learned trial magistrate for failing to find that there was no nexus between his arrest and the alleged robbery. Lastly, he complained that the trial court disregarded his alibi defence without giving cogent reasons.

19. The learned first appellate court (Ngaah, J.) after re-evaluating the record of the trial court and the submission tendered before it, saw no reason to disturb the conviction and sentence awarded against the appellant by the trial court. The learned Judge determined that the appellant was properly identified by PW1 and PW2.

20. The appellant is now before this court seeking to overturn the decision of the High Court. He has proffered five (5) grounds of appeal. In summary, the appellant faulted the learned Judge for upholding his conviction on the basis of evidence of identification which was pegged upon an irregularly conducted identification parade. He was aggrieved that the learned Judge failed to find that his arrest was based on suspicion, and that the arresting officer was not availed to testify during trial. The appellant was of the view that the learned Judge erred by finding that his defence was properly rejected without giving cogent reasons.

21. The appeal was canvassed by way of written submissions, duly filed by both parties. The firm of Mshila Shuma & Company Advocates was on record for the appellant. Counsel for the appellant was of the view that the identification parade with respect to the appellant was not conducted in accordance with National Police Service Standing Orders. Counsel faulted the first appellate court for failing to discharge its mandate of re- assessing and re-evaluating the evidence tendered before the trial court, and failing to come up with its own independent conclusion.

22. Counsel submitted that the evidence by the prosecution, and especially the evidence of identification, was insufficient to sustain a conviction. With respect to the sentence, counsel urged that the death sentence was declared unconstitutional by the decision of the apex court in Francis Karioko Muruatetu & Another v Republic [2017] eKLR. Counsel stated that although the said decision applied to murder convictions, the principle ought to be made applicable to other offences punishable by death. Counsel urged that the appeal is merited, and invited us to set aside the decision of the first appellate court on both conviction and sentence.

23. In rebuttal, learned Prosecuting counsel Mr. Naulikha, submitted that the appellant was positively identified by PW1 and PW2 as one of the robbers. He stated that PW1 and PW2 had ample time to observe the assailant who was inside the house as the electric lights were on when the assailant was ransacking their bedrooms for valuables. He explained that the two identifying witnesses gave a physical description of their assailants to the police. They further identified the appellant during

an identification parade conducted by the police. It was Mr. Naulikha's submission that the first appellate court properly re-evaluated the evidence tendered before the trial court and came to the correct conclusion.

24. Regarding the sentence, Mr. Naulikha submitted that the Muruatetu decision (supra) outlawed the mandatory nature of the death sentence with respect to convictions under Section 204 of the Penal Code. The apex court had subsequently given directions spelling out the applicability of the said decision. He explained that the Supreme Court was categorical that the Muruatetu decision was only applicable in respect of sentences after convictions for murder. Learned Prosecution counsel urged us to affirm the decision of the first appellate court.

25. This is a second appeal. The mandate of this court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Kaingo vs Republic [1982] KLR 213 at page 219 this Court stated thus:

> " A second appeal must be confirmed to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did (Reuben Karoti S/O Karanja versus Republic [1956 17EACA 146]."

26. We have carefully considered the record, and the rival submissions set out above, in light of this court's mandate. The issues arising for our determination can be summed up as follows:

    i. Whether the evidence of identification was sufficient to sustain a conviction; and

    ii. Whether the learned Judge erred in affirming the death sentence meted by the trial court.

27. As regards the first issue, the appellant's conviction was based solely on the evidence of identification by PW1 and PW2, and his subsequent identification by the two witnesses at an identification parade, which evidence the appellant challenged in his grounds of appeal. In such a case, where the only evidence against an accused person is the evidence of identification, the trial court has a duty to thoroughly examine such evidence before basing a conviction on the same.

28. These were the sentiments of this Court in Cleophas Otieno Wamunga v. Republic [1989] eKLR, where the Court observed as follows:

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

29. Similarly, in Paul Etole & Another v. Republic [2001] eKLR this Court stated the following with regard to evidence of identification:

> " Evidence of visual identification can bring about a miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness on one or more identifications of the accused, the court should warn itself of the need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each

of the witness came to be made. Finally, it should remind itself of the specific weaknesses which had appeared in the identification evidence."

30. The robbery incident in this case, took place at night at about 2.00 a.m. The appellant was not known to the identifying witnesses prior to the robbery incident. The conditions under which the appellant was said to have been identified by PW1 and PW2 were far from favourable. The first stop the assailant made was PW2's bedroom. PW2 stated that the electric lights in her bedroom had been switched off. The assailant, who was armed with a knife, then asked her to take him to PW1's room.

31. PW1 stated that the assailant had a torch, and that since his torch did not have sufficient light, she used her torch to get money from her bedside table, which she gave to the assailant. PW1 stated that she afterwards switched on the lights, after which the assailant started rummaging through her handbags looking for money. PW1 stated that the assailant was wearing a cap. The Court was not informed how long the witnesses were exposed to the assailant in PW1's room, before they were taken to the kitchen where they were ordered to lie down. Further, the assailant brandished a knife. He was walking behind them as he led them to the third bedroom.

32. PW1 and PW2 recalled that when the electric lights were switched on in PW1's bedroom, they were able to identify the assailant. PW1 described the assailant as dark and slender, with protruding ears. Upon cross-examination, PW1 added that the assailant was tall, and that she could identify his voice. She further testified that she could not see his eyes, as he was wearing a cap. PW1 testified that she gave this description to the police. PW2 described the assailant who was in her bedroom as tall, dark, but not very dark, and that he was speaking in Kikuyu and Kiswahili. Upon cross- examination she added that he was slim and had protruding ears.

33. The appellant was arrested one month after the robbery incident. The appellant's arrest by PW3 was on the basis of a tip from an informer. The informer told PW3 that a most wanted criminal had been sighted at a local pub. PW3 stated that he did not know the appellant prior to arresting him. He testified that the informer said that the suspect was tall, slim, and had protruding ears, and a mark on his forehead. He was told that the suspect was known by the alias "Loketo". After arresting the appellant, PW3 informed PW5 who was the DCIO. He stated PW5 told him that "Loketo" was a most wanted criminal in Othaya, and that he had been involved in a robbery incident at the Catholic church.

34. After the appellant was arrested, PW5 conducted an identification parade. PW1 and PW2 were the identifying witnesses. It was the appellant's contention that the parade was not conducted in accordance with guidelines contained in the National Police Standing Orders.

35. Chapter 42 Paragraph 7 of the National Police Service Standing Orders gives guidelines on how the police should conduct an identification parade. Paragraph *7* (5) (c) and (o) provide as follows:

"(c) the witness or witnesses shall not see the accused person before the parade;

...

(o) the parade shall be conducted with utmost fairness, otherwise the value of the identification parade as evidence shall be nullified."

36. This Court in David Mwita Wanja & 2 Others v Republic [2007] eKLR, had this to say with respect to identification parades:

> " The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get

it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad of other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

> 'It is not difficult to arrange well- conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime'."

37. The appellant contended that he was exposed to the identifying witnesses prior to the parade being conducted. We have carefully considered the appellant's claim in light of the evidence adduced. We have perused the identification parade form and noted that the appellant indicated that he was not satisfied with the parade as the witnesses had seen him on the morning of the parade. His exact words were that "Aliniona asubuhi leo".

38. PW5, who conducted the parade, testified that indeed the appellant complained that the witnesses had seen him on the morning of the day the parade was conducted. We further observe that the appellant, while cross examining PW1, put it to her that she had seen him at the OCS office before the identification parade was conducted. According to the identification parade form, the two witnesses were kept at the OCS' office before they were taken to the identification parade.

39. It is our holding that the two courts below failed to properly evaluate the evidence adduced by the appellant in light of the appellant's complaint that he had been seen by the identifying witnesses prior to the identification parade and therefore came to a wrong conclusion.

40. Taking into consideration the entire circumstances of the case including the fact that the DCIO had, upon the arrest of the appellant labelled him as a most wanted criminal and the fact that he started that it was the appellant who had robbed the complainants even before he had interrogated him, we are inclined to believe the appellant when he testified that he was exposed to the identifying witnesses prior to the identification parade being conducted.

41. Such exposure greatly weakened the probative value of this evidence of identification. Given that the appellant was arrested a month after the robbery incident, and that his arrest was not directly linked to the robbery in question, the evidence of identification, which was the only evidence linking the appellant to the robbery, needed to be watertight. His conviction based on this evidence of identification was unsafe. We are not persuaded that in the hectic circumstances of the robbery the complainants could have been positive that they had identified the appellant. It is our finding that reasonable doubt was raised with regard to the evidence of identification.

42. There was no other evidence that was adduced to directly connect the appellant to the robbery. None of the robbed items were recovered in his possession. The appellant in his defence denied involvement

in the robbery. From the foregoing, the evidence of identification, taken into totality, is not watertight and free of error or the possibility of mistaken identity to support the conviction of the appellant.

43. In the premises therefore, we find merit in the appeal lodged by the appellant. The appeal is hereby allowed. His conviction is quashed and death sentence set aside.

44. Accordingly, we order that the appellant be set at liberty forthwith and released from prison, unless otherwise lawfully held.

45. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF JUNE, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR