Mwanzia alias Nzilai v Republic (Criminal Appeal 79 of 2020)
[2023] KECA 1135 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1135 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 79 OF 2020

MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA

SEPTEMBER 22, 2023

BETWEEN

JOHN MWANZIA ALIAS NZILAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mumbi Ngugi, J.) dated 14th February, 2019 in HC. CR. A. No. 49 of 2018)

JUDGMENT

1. This is a second appeal by the appellant, John Mwanzia alias Nzilai, from a conviction and sentence by the Magistrates Court. He was presented before the Chief Magistrates Court at Thika and charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* particulars being that on 9th day of May, 2013 at Nyasaba in Thika within Kiambu County while armed with dangerous weapons namely stones and a stick robbed Rose Mwikali Wambui of cash Ksh 500 and immediately before such robbery he used actual violence to the said person.

2. The prosecution called four witnesses; the appellant gave an unsworn statement and the trial court found that the offence had been proved to the required standard and he was convicted and sentenced to death. He filed a first appeal to the High Court of Kenya at Kiambu and in a Judgment by Mumbi Ngugi, J (as she then was) delivered on February 14, 2019 the appeal on conviction failed and was dismissed but the High Court interfered with sentence and awarded a sentence of sixteen years imprisonment from the date of sentence by the trial court.

3. The appellant is dissatisfied with those findings and has filed this second appeal through homemade Memorandum of Appeal where five grounds of appeal are set out. The appellant says that the Judge on first appeal erred in law when she upheld conviction and affirmed the decision of the trial court but did not re-analyze the entire record; that the High Court erred in not finding that identification

and recognition were not conclusively proved; that the High Court failed to find that Section 214 of the *Criminal Procedure Code* was not complied with; that the High Court erred in law when it upheld conviction while relying on conflicting evidence and, finally, that the Judge erred in law when she dismissed the appellant's plausible defence. We are asked to allow the appeal.

4. Our mandate in a second appeal like this one is limited to a consideration of issues law only and we must resist the temptation to consider matters of fact that have been considered by the trial Court and re-analysed on first appeal unless we find that the trial Court reached conclusions on matters of fact which a reasonable tribunal properly seised of such facts would not reach those conclusions or that the conclusions are perverse. That is the effect of Section 361(1) (a) *Criminal Procedure Code* which has been the subject of various judicial pronouncements by this Court in such cases as *Michael Angara Paul v Republic* [2021] eKLR where it was stated of that mandate:

> " Being a second appeal our jurisdiction is limited by Section 361(1) (a) *Criminal Procedure Code* where we are to consider only issues of law if any are raised in the appeal but must not go into a consideration of facts which have been tried by the trial court and re-evaluated on first appeal unless we reach the conclusion that the findings were not backed by evidence or are based on a misapprehension of the evidence or it is shown that the two courts demonstrably acted on wrong principles in making those findings or the conclusions are perverse – *Chemagong v Republic* [1984] KLR 611."

5. The facts of the case as discerned by the trial Court and confirmed on first appeal were that on May 9, 2014 Rose Mwikali Wambui (PW1 – Mwikali) left her business place at 5.00 p.m., took public transport and alighted at a place called Ndarugu. As she walked home she passed near a quarry where there was a maize plantation. She noticed someone walking behind her and he hit her twice on the head with a stick and she started bleeding. The assailant moved in front of her and hit her again but she held onto the stick and they struggled for the stick. When he hit her on the elbow the stick dropped to the ground. He asked her for money; she pointed to her handbag and he took the Ksh 500 that was in the bag. He asked her whether she knew him but she feigned ignorance fearing for her life. He threatened her with death if she reported what had just happened to her. She struggled home and when asked by her children including her daughter in law Emmali Wanjiku Wangui (PW2 – Wangui) what had happened and why her blouse was bloody she informed them that it was Nzilai, a person she knew before, who had attacked her. She described his clothing – he wore a black trouser, black sweater and a cap. She was treated at a local clinic and then proceeded to Nyasaba Police Post where she reported that the appellant had attacked her. According to her she used to see the appellant at Nyahu's place along the path where the attack took place. Challenged by the appellant in cross-examination she testified that:

> " ... I knew you very well ... I am sure you are the person who attacked me ... I never mistook you with any body else. It was not dark, I could not have told you, I know you since you would have killed me ..."

6. Wangui was at home on the material day when her mother in law Mwikali arrived covered in injuries and her clothes were bloody. She testified that Mwikali informed her that she had been attacked by Nzilai.

7. Dr George Maingi of Thika hospital produced P3 Form prepared by his colleague Dr Aliwani. The same showed that Mwikali, who had been attacked by a person known to her, had suffered a cut on her head 3 cm deep; there were injuries on the scalp area and elbow left joint, injuries which had been inflicted by a sharp object.

8. The last prosecution witness was PC Stephen Nyangesa attached to Thika Police Station who took over investigations from a previous police officer who had been transferred. He testified on how the events had taken place as he had seen in police records.

9. When the appellant was placed on his defence he stated in an unsworn statement that he was going to work on an unstated date when he was confronted by three people who arrested him for no apparent reason; he was taken to a police station and charged with an offence he knew nothing about.

10. As we have seen the appellant was convicted and sentenced to death which sentence was interfered by the High Court on first appeal.

11. When the appeal came up for hearing before us on a virtual platform on July 18, 2023 the appellant was present from Manyani Prison and was represented by learned counsel Mr Ongama who held brief for Mr Timothy Bryant. Miss Vitsengwa appeared for office of Director of Public Prosecutions. Both sides had filed written submissions which they fully relied on without finding it necessary to give any highlight. The appellant states in the submissions that he had filed a Further Supplementary Memorandum of Appeal. The proper course to take where such a Supplementary Memorandum of Appeal is filed is for counsel to apply to abandon the earlier document and rely on the latter document. As the appellant is represented by counsel in this appeal we will take it that the proper document is the Supplementary Memorandum of Appeal drawn by Bryant & Associates Advocates where there are five grounds of appeal raised. It is stated in the first ground of appeal that the High Court misdirected itself in finding that the sole identification by PW1 was safe while there was no description of the accused given to the police on the day of the attack; no identification parade was held and in convicting the appellant on such evidence is violation of his right to receive legal assistance; in ground 2 that the High Court misdirected itself in law by finding that the trial was conducted consistent with the *Constitution* and failing to find that the appellant's right to a fair trial was violated by the police who did not inform the appellant upon arrest of his right to communicate to a lawyer which violated national and international covenants on civil and political rights; that there was violation of the appellant's rights by the trial Court which did not inform the appellant of his right to choose and be represented by a lawyer which violated some conventions; that the appellant, who faced a serious offence which carried the death penalty was entitled to be represented by a lawyer at State expense; that the appellant's rights were violated because witness statements were not given to him in advance. In ground 3 of appeal the High Court is accused of misdirecting itself by failing to find that the trial Court had violated the fair trial rights of the appellant in further violation of the appellant's right to life pursuant to Article 26(3) of the *Constitution* and international covenants; right not to be arbitrarily deprived of freedom or punished in an inhuman manner pursuant to national and international covenants and the right to be treated in accordance with the rule of law. It is stated in the penultimate ground that the High Court misdirected itself in law by failing to find that the trial Court had violated the appellant's right to life pursuant to Article 26(3) of the *Constitution* and other international covenants, and, in the last ground, the High Court misdirected itself by conducting a first appeal in the absence of any counsel for the appellant in violation of the law. We are asked to declare that the appellant's constitutional rights to communicate with an advocate upon arrest had been violated "... by the Kenyan State and its agents, to the substantial prejudice of the accused, rendering the trial unfair ...", to declare that the appellant's rights to a fair trial (including an appeal) had not been held in accordance with the law; to declare that as a result of the violations of the rights upon arrest, at trial and on appeal, the appellant's rights to life and to not be arbitrarily deprived of freedom or punished in an inhuman manner have been violated. We are asked to:

> " D) Order that evidence:-

a. obtained in violation of the Appellant's right to communicate with an advocate in Art.49(c); and

b. admitted at trial in violation of the Appellant's right to counsel in Art.50(2)(g) and (h),be excluded on the basis of Art.50(4) of the *Constitution*, Art.2(3) of the *ICCPR* as read together with Art 2(6) of the *Constitution*, and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems as read with Arts. (2)(5) and (6) of the *Constitution*;

E. ORDER that the appeal succeeds, quash the conviction, set aside the sentence and set the Appellant at liberty unless otherwise lawfully held; and

F. ORDER that the Appellant is entitled to compensation in accordance with Art.23(3)(e) of the *Constitution*, and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems as read with Art. (2)(5) of the *Constitution*, for the breaches of his constitutional rights to life, to freedom and security of his person, including his rights not to be deprived of freedom arbitrarily or without justice cause, and not to be punished in an inhuman manner, his right to communicate with an advocate upon arrest, and his right to a fair trial and appeal."

12. The appellant in written submissions identified issues for determination as whether the High Court misdirected itself in upholding that sole identification evidence was safe; whether the appellant's right to be informed of his right to representation by an advocate was infringed by the trial Court and on first appeal; whether the appellant's right to a fair trial was adhered to by the trial Court and the High Court; whether the Kenyan Judiciary is bound by law to adopt and follow international covenants that Kenya has ratified and:

> " Has the Kenyan State ratified*ICCPR*? Is the Kenyan State bound to take measures to adopt the General comments under Art. 6(2) of ICCPR?"
>
> Further, whether the circumstances of the offence justified the imposition of a death sentence, vide Section 296(2) of the *Penal Code* "... under the rubric of permissible "most serious crimes"";
>
> whether, if the Kenyan Judiciary is so bound to adopt and follow
>
> Article 6(2) *ICCPR* and:
>
> > " ... individual judicial officers breach and/or blissfully and/or recklessly ignore Art 6(2) *ICCPR*, are those judicial officers complying with the rule of law? If not, can they be found to have violated Art.10(2) COK every time their judicial actions violate Art 6(2) *ICCPR*?"

13. Finally, the appellant identifies as an issue in this appeal whether he is entitled to an order for compensation for infringement of his constitutional rights.

14. It is submitted on the issue of identification that the stick used to attack Mwikali was not produced and that the High Court did not carefully re-analyse the evidence on identification as it was enjoined to as was held in *Hassan Abdallah Mohammed v Republic* [2017] eKLR. It is submitted that it was wrong for the High Court to believe the testimony of Mwikali on the issue of identification when the police did not conduct an identification parade for Mwikali to pick the person who had attacked her.

15. The rest of the submissions are on what the appellant says were breaches or violations of his constitutional rights and international covenants. We shall address these as one issue.

16. The respondent in written submission reminds us of our mandate in a second appeal and supported the conviction and sentence of the appellant.

17. We have considered the whole record, submissions made and the law.

18. The issue of identification is an important one in a criminal trial as no man should be convicted in such a trial if he is not properly identified as the perpetrator of the offence which he is charged.

19. The High Court on first appeal re-analysed the evidence and found that it was true that the only evidence linking the appellant to the offence was that of Mwikali but held that the law was that a fact could be proved by the evidence of a single identifying witness. The Judge recognized that a court must in such circumstances proceed with caution and relied on the case of *John Muriithi Nyagah v Republic* [2014] eKLR where it was held that evidence of a single identifying witness must be examined with considerable circumspection to ensure that it cannot but be true.

20. In the case before the trial Court Mwikali was confronted by the appellant, a person she knew before, and attacked. She spoke to the appellant as he demanded money from her and he even asked her whether she knew him. According to her she answered that she did not know him, an answer she gave because she feared that he would have killed her if he thought she could identify him later after the attack. The attack took place during the day at about 6 p.m. and Mwikali informed her children, including her daughter in law Wangui, on reaching home that it was the appellant, known locally as Nzilai, who had attacked her. When she later reported the attack to police she gave that name (Nzilai) as the person who had attacked her. Identification was proved to the required standard as there was no need for an identification parade as this was a case of recognition which, as held by this Court in *Anjononi vs Republic* [1980] KLR 59:

> "... "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."

21. Identification of the appellant was proved to the required standard and this ground of appeal has no merit and is dismissed.

22. The other grounds of appeal relate to alleged breaches of the appellant's fair trial rights and alleged violations of the *Constitution* and other international covenants or conventions.

23. We note that the appellant was presented before the Magistrate at Thika where the charge he faced was read to him. He did not request for legal representation but he took plea. When he appeared before the High Court on first appeal he stated that he was ready to proceed and addressed the Court in a highlight of written submissions which he had filed. He did not request legal representation.

24. The Supplementary memorandum of Appeal and written submissions before us raise substantial questions on whether the appellant's first trial rights were violated and whether there was non-compliance with the appellant's constitutional rights and violations of international conventions to which Kenya is a State party. These questions were not raised before the High Court. We are asked in Supplementary Memorandum of Appeal and in written submissions, for instance, to answer the question whether the Kenyan Judiciary is bound in law to adopt and follow international covenants that the Kenyan State has ratified; whether the Kenyan State has ratified *ICCPR*; whether the Kenyan

State is bound to take measures to adopt the general "comments" under Article 6(2) of *ICCPR*. We are asked to make various declarations.

25. The Court of Appeal is established by Article 164 of the *Constitution* of Kenya, 2010 and our jurisdiction under Article 164(3) of the *Constitution* is to hear appeals from:

> "(a) the High Court; and
>
> (b) any other court or tribunal as prescribed by an Act of Parliament."

26. That jurisdiction does not equip us to carry out investigations out of what is before us as a record of appeal. We cannot answer the questions we have been asked to answer by the appellant. We cannot go outside the record of appeal to investigate which continental and/or international covenants Kenya has ratified or which she (Kenya) is bound. Those questions should have been raised at the High Court whose Constitutional and Human Rights division is equipped to consider violations of rights in appropriate petitions where evidential material is placed before that court for investigations. The procedure for approaching that Court is well set out in The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, popularly known as "The Mutunga Rules". Having found that we have no jurisdiction to investigate alleged violation of constitutional or other covenants breaches those grounds of appeal fail and are dismissed.

27. The appellant was convicted of the offence of robbery with violence and was sentenced to death. That sentence was reduced by the High Court to 16 years imprisonment, that Court following the holding by the Supreme Court of Kenya in *Francis Kariako Muruatetu & Others v Republic* [2017] eKLR. The appellant is lucky to have received that benefit as the Supreme Court in the latter case of *Francis Kariako Muruatetu & Others v Republic* [2021] eKLR stated that its holding in the earlier case (today called Muruatetu 1) only applied to cases involving murder.

28. This appeal has no merit and we dismiss it in its entirety.

Dated and Delivered at Nairobi this 22nd day of September, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR