Njoki v Republic (Criminal Appeal 172 of 2014) [2021] KECA 127 (KLR) (5 November 2021) (Judgment)

Neutral citation: [2021] KECA 127 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 172 OF 2014

RN NAMBUYE, AK MURGOR & S OLE KANTAI, JJA

NOVEMBER 5, 2021

BETWEEN

LUKAS WANYENYE NJOKI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from a Judgment by the High Court of Kenya (F.N. Muchemi & G. V. Odunga, JJ.) dated 11th December, 2011 in Nairobi HC CRA. No. 676 of 2010)

JUDGMENT

1. This is a second appeal from the judgment of the High Court (F. N. Muchemi and G. V. Odunga, JJ.) dated 11th November, 2011 in Nairobi Criminal Appeal No. 676 of 2010.

2. Lukas Wanyenye Njoki the appellant herein, was tried with six others before the Chief Magistrate's court at Nairobi, on five (5) counts of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*, one (1) count of attempted murder contrary to section 220(a) as read together with Section 388(1) of the Penal Code and one (1) count of kidnapping of a person with intent to secretly and wrongfully confine contrary to section 259 of the Penal Code. Cumulatively in the 1st, 2nd, 3rd, 4th and 5th counts it was alleged that the appellant jointly with others not before the court being armed with dangerous weapons, namely, AK 47 rifles and pistols: in count I robbed Anthony Mwangi Kamau of his Motor Vehicle registration number KBA 781H Toyota Corolla 110 valued at Kshs.500,000.00, in count II, robbed Nelson Ochieng Odhek of his wallet, Kshs 500.00 and mobile phone make Nokia all valued at Kshs.12,500.00, in count III robbed Jeremiah Odhiambo Okoth of his driving licence and Kshs.12,000.00, in count IV robbed Eugine Nelson Mandela Ochieng of his wallet, Kshs 500.00, in count V, Kalvin Onyango Otieno of his Standard Chartered ATM card, wallet, 3 US dollars, Kshs.600.00 all valued at Kshs.834.00. In all the incidences mentioned in counts I, II, III, IV and V respectively, it was stated that the appellant jointly with others not before court at or

immediately before or after the time of such robbery threatened to use actual violence to the persons robbed in the said respective counts.

3. In count VI, the appellant was charged with the offence of attempted murder contrary to section 220(9) as read with section 388(1) of the Penal Code. The particulars were that on the same date and place jointly with others not before the court attempted unlawfully to cause the death of George Atai by shooting him on his left side chest. Lastly, in count VII, the appellant and those others were charged with the offence of kidnapping of a person with intent to secretly and wrongfully confine contrary to section 259 of the Penal Code. The particulars were that on the same date and place, jointly with others not before the court kidnapped Eugine Nelson Mandela with intent to severely and wrongly confine the said Eugine Nelson Mandela.

4. The offences were allegedly committed on 30th June 2009 at Dandora Phase 1, Nairobi and at Saika along Kangundo Road in NairobiDistrict within Nairobi Province (as it was then known, now Nairobi County). At the conclusion of the trial, appellant's co-accuseds were acquitted on all counts while the appellant was acquitted on count I and II, and convicted on counts III, IV, V, VI and VII.

5. The brief facts of the case relating to the counts in respect of which the appellant was convicted were that on the material day of 30th June, 2009 at 5.50am Atai George, PW3 the complainant in count VI was on his way to work at National Bank from Saika estate where he resides driving in his own vehicle when suddenly he was blocked by two vehicles immediately he left his gate. He suddenly heard a bang and slumped on the steering wheel. That is when he realized that he had been shot. He did not identify any of the attackers.

6. On the same day of 30th June, 2009 at 5.40am, Jeremiah Odhiambo Okoth, PW4 the complainant in count 3 was in the company of Kalvin Onyango, PW5 and his son Eugene Ochieng Mandela, PW9 in Kalvin's car Reg. No. KAN 177F headed to town when they were blocked by a car just as they were joining Kangundo road. Three men emerged from the car that had blocked them, one of whom was armed. They were ordered to lie down and variously robbed of items enumerated in the respective counts in which they are named as complainants.

7. Both PW4 and PW5, did not identify the appellant in connection with the robberies separately committed against them. PW9, Eugene Nelson Mandela Ochieng who was a minor at the time of the incident confirmed the testimony of PW4 on how the robbery occurred. It was also his testimony that after the robbery, he was ordered into the robbers' car driven along Kangundo road into Juja road in the courseof which he noticed that one of the abductors had an AK47 rifle which he normally sees on T.V but he was not able to see the robbers/abductors clearly. He was finally taken to Dandora, blindfolded before leaving the car and could not therefore identify the abductors. They walked for a short distance before he was ushered into a house where he remained with only one of the abductors guarding him. In the evening he was taken to another house where he slept with two other men who he was not able to see clearly. The next day when he woke up he found nobody else in the house. It was sometimes later that other people came into the house. He was not allowed to look at them. He tried to escape but he was ordered back into the house. He was not able to identify the men who ordered him back into the house. He was beaten, told to change clothes, ordered into another car at around 5.00pm and taken to a third house, where he was left with two men guarding him. He spent the night there. Those guarding him were coming in shifts.

8. At 7.30pm on this same date he was taken to the fourth house where he slept. At about 12.00 midday of the next day he heard a knock on the door of the house which had been locked from the outside. The door was forced open. He was rescued by policemen who took him to the police station where he met his parents who took him home. He went back to the police station the following day and recorded a

statement. A week later he went to the police station to identify the suspects. He was able to identify the suspect who he said he had seen when he was recording his statement. This is the man he was told had the gun. He stated that as they lay down he would raise his head and look at him. In the house he was blindfolded. He did not know the people who were there. He saw the appellant before going to the parade.

9. In cross-examination PW9's responses were inter alia that the car he was travelling in and that of the robbers were facing each other. He could see people in the car that had blocked them. He was frightened. When being taken to the estate he was blindfolded so he never identified those who were with him in the car. All the houses where he was detained had no electricity lights. He saw the appellant at the police station. He was with five (5) other men. They were of different physical appearance. He had not been shown the appellant before the parade.

10. The appellant's unsworn testimony was that he was arrested from his house on 2nd July, 2009. His house was searched but nothing was recovered therefrom in connection with the offences he faced at the trial. He was taken to the police station where he was jointly with others paraded before the media on 5th July, 2009 during which parade time police said that him and those others jointly paraded with him had been involved in robberies and kidnapping incidences. On 6th July, 2009 he took part in an identification parade where he was picked by witnesses.

11. At the conclusion of the trial, the trial magistrate G. W. Ngenye Macharia, P.M. (as she then was) analyzed the record, identified issues for determination and made findings in relation to the recognition/identification of the appellant in connection with the offences he was found guilty and convicted of counts III, IV, V, VI and VII, respectively and sentenced accordingly.

12. The appellant appealed to the High Court against the above decisionraising various grounds of appeal. The learned judges (F. Muchemi, G.V. Odunga JJ.) analyzed the record in light of the rival submissions before them, reminded themselves of their role as a first appellate court as enunciated by the predecessor of this court in *Pandya vs. Republic [1957] E. A 336*. The Judges also took into consideration the case of *Coghlan vs. Cumberland (3) [1898] I Ch. 704* on the same threshold for the exercise of a first appellate court's mandate. The Judges applied the above threshold to the conclusions reached by the trial court and ruled inter alia that the appellant's convictions in respect of the counts he was convicted of were solely founded on the evidence of PW9, who was a single witness.

13. They therefore faulted the trial court for the failure to appreciate that PW9 was not only a single witness but also did not know the appellant prior to the incident. The trial court's holding that the evidence of PW9 was evidence of recognition was therefore erroneous. According to the Judges, recognition would only have applied if PW9 had known the appellant prior to seeing him at the scene of the robbery, hence the Judges opinion that PW9's evidence would either stand or falter depending on their appreciation of the said evidence with regard toPW9's identification of the appellant in connection with the offences for which he had been found guilty and was convicted.

14. In light of the position taken above, the Judges took into consideration the following cases namely, Peter Musau Mwanzia vs. Republic [2008] eKLR on the distinction between recognition and identification which is that a witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him/her; *Anjononi & Others vs. Republic [1980] KLR 59* for the holding inter alia that recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger;*Stephen Karanja vs. Republic [2011] eKLR* for the holding inter alia that in an instance where an accused person was known to the witness prior to the incident, evidence tendered through such a witness is more of recognition than identification; *Nathan Kamau Mugwe vs. Republic [2009] eKLR* for the holding inter alia that failure of a witness to describe to police

the person to be identified does not necessarily render an otherwise properly conducted parade vitiated; and lastly, *Muiruri & Others vs. Republic [2000] 1 KLR 274* in which the court approved Abdulla bin Wendo vs. Rep (1953) 20 EACA 166, Roria vs. Republic [1967] EA 583, and Charles Maitanyi vs. Republic (1986) 2 KAR 76, among numerous others for the principle on the need to test with the greatest care evidence of a single witness to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction.

15. Applying the above various thresholds to the evidence of PW9, the Judges made observations thereon inter alia that: PW9 had stated in his testimony that he went to the police station after one week and identified the appellant as the person he had seen at the scene of crime holding a gun; the fact that PW9 was a single witness did not per se render the conviction based on his evidence fatal and expressed themselves thereon inter alia as follows:

> " ...in this case PW9 had occasion to see the appellant at the police station as the person who robbed them on the mentioned day. There was no evidence that the appellant concealed his identity at the time when PW9 was being beaten. PW9 described the appellant's features before the parade and the mere fact that his initial statement was not produced is not necessarily fatal..."

16. Turning to the appellant's defence, the judges took into consideration the case of Muiruri & Others vs. Republic [supra] and the case of *Isaac Njogu Gichiri vs. Republic [2019] eKLR* and ruled that having reconsidered the totality of the record in the discharge of their mandate as a first appellate court, they found no reason to differ with the position taken by the trial court that the appellant's defence was a mere denial which had not dislodged PW9's evidence and accordingly affirmed the appellant's conviction.

17. Turning to the sentence, they took into consideration the case of *John Kinyua Mirii vs. Republic [2011] eKLR* and F*anuel Makenzie Akoyo vs. Republic, Criminal Appeal No. 45 of 2006 (unreported)*and set aside the multiple death sentences meted out against the appellant by the trial court. In lieu, thereof they sustained the death sentence with respect to count III and suspended the sentences in the respect of the other counts of conviction.

18. The appellant was aggrieved and is now before this Court on a second appeal raising a litany of nineteen (19) grounds of appeal which may be condensed into the following: that the learned judges of the High Court erred in law when they failed to:

    i) Exercise their mandate properly.

    ii) Appreciate that evidence of identification was not only erroneously converted into evidence of recognition but that applicable principles of law were misapplied to the said conversion thereby arriving at an erroneous conclusion on the matter to the detriment of the appellant.

    iii) Appreciate that the burden of proof was shifted on to the appellant.

    iv) Appreciate that appellant's alibi defence was never considered.

    v) Appreciate that the prosecution case was never proved to the required threshold of proof beyond reasonable doubt.

    vi. Appreciate that the sentence meted out against the appellant was unlawful and ought to have been interfered with.

19. The appeal was canvassed via the Go-To-Meeting platform due to the Covid-19 pandemic challenges through the appellant's written submissions orally highlighted by Mr. Swaka appearing for him and oral submissions by M/s Margaret Wanjiku Matiru the learned PPC appearing for the State.

20. Mr. Swaka faults the judges for erroneously turning evidence of identification into evidence of recognition without any hint of adherence to the provisions of the law of evidence. Counsel submits that the judges not only misapprehended but also misapplied the record that was before them, and the principles enunciated in the case of Pandya vs. Republic [supra]; Coghlan vs. Cumberland [supra]; Peter Musau Mwanzia vs. Republic [supra]; Anjononi & Others vs. Republic [supra]; and Nathan Kamau Mugwe vs. Republic [supra] that guide the court on the evaluation, reevaluation, admission and viability of the evidence of identification of an accused person in connection with perpetration of a crime, which in counsel's opinion rendered the appellant's conviction unsafe. Counsel also faults the Judges for the failure to fault the trial court firstly, for the failure to warn itself of the dangers of acting on the evidence of a minor child who was also a single identifying witness as the basis for the appellant's convictions in the absence of corroboration of that evidence; and second for the failure to appreciate that PW9's evidence had been weakened by the trial court's discounting of the evidence of the identification parade.

21. Turning to the defence, counsel submits that the judges failed to appreciate that the prosecution had neither discharged its mandate under section 111(1) of the Evidence Act nor dislodged appellant's alibi defence.

22. On sentence, counsel submitted that it is manifestly harsh in terms of the Supreme Court's decision in *Francis Karioko Muruatetu & Another vs. Republic, [2017] eKLR* and merits interference andsubstitution with an appropriate sentence taking into consideration the eleven (11) years the appellant has been incarcerated since he took his plea.

23. In rebuttal, the State opposed the appeal in its entirety. According to the State, the appellant was properly recognized in connection with the offences that led to his conviction, whose ingredients the State contends were established to the required threshold in law of proof beyond reasonable doubt based on well corroborated evidence. The convictions were therefore safe and were correctly affirmed by the first appellate court, hence they should not be interfered with.

24. In reply to the State's submission, Mr. Swaka reiterated his earlier submissions.

25. This being a second appeal, our mandate is as set out under section 361 (1) of the Criminal Procedure Code namely it is limited to considering matters of law only. In *Dzombo vs. Republic [2014] eKLR*, the Court stated inter alia as follows:-

> " As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court. See Okeno vs. Republic [1972] E.A.32.
>
> By dint of the provisions of section 361 1(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below consider or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.
>
> "Accordingly, we must not "interfere with the decision 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 that the decision is bad in law."

See also *Njoroge Macharia vs. Republic [2011] eKLR* and *Chemagong vs. Republic [1984] KLR 213.*

26. We have considered the record in light of the above mandate and the rival position herein. The issues that fall for our consideration are the same as those condensed above. Starting with the first, we have already set out above the approach the learned judges took in determining the appeal before them which in our view is sufficient demonstration that they indeed were alive to the principles they were obligated in law to apply in the exercise their mandate as a first appellate court which we find no reason to reproach. We therefore decline appellant's invitation to do so.

27. On alleged failure to call crucial witnesses, the position in law is that enunciated in section 134 of the *Evidence Act* Cap 80 Laws of Kenya which is explicit that no particular number of witnesses in the absence of any provision of law to the contrary is required to prove any fact. In *Mwangi vs. Republic [1984] KLR 595*, the court held inter alia

> " that as to whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it is shown that the prosecution was influenced by some oblique motive to withhold such a witness from court".

28. In *Bukenya vs. Uganda [1972] E. A 549* the predecessor of this Court placed an obligation on the prosecution to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. A corresponding obligation was placed on the court to call witnesses whose evidence is essential for the just decision of the case.

29. The above position notwithstanding, it is also trite law that the power donated in the Bukenya vs. Uganda case [supra] is no licence for either the prosecution or the court to call a superfluity of witnesses. The power exists solely for purposes of calling only such witnesses as are sufficient and necessary to establish the charge to the required threshold. *See Keter vs. Republic [2007] 1 E. A 135.*

30. We have applied the above threshold to the appellant's complaint herein and find that he did not specify which crucial witness was not called. However, if the appellant's complaint is in respect of the failure of the prosecution to call the officer who conducted the identification parade in which PW9 allegedly identified him in connection with the offences for which he was convicted, the record is explicit that the evidence relating to the said identification parade was discounted by the trial court and did not therefore form part of the evidence on the basis of which the appellant's convictions were founded. The appellant therefore suffered no prejudice as a result of the prosecution's failure to call that evidence. This complaint is also rejected.

31. On the third issue, excerpts of the trial court 's appreciation of PW9's evidence as affirmed by the first appellate court are as set out at page 59 of the typed proceedings of the record of the trial court as follows:

> " In the car I saw four thugs. We were all five-including me. I was not able to see them clearly and was not able to identify him later.
>
> By then I could not identify the abductors as my face was covered
>
> .....
>
> Both houses had no lighting. I slept together with two other men. I was not able to see them clearly." Page 60

> "During the day I was not allowed to look at them. I was not able to identify the man who told me to return to the house …."
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> Page 61
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> "After one week I went to police station to identify suspects. I found people in a straight line. I was able to identify one of them. I had seen this man where I was recording my statement. This is the man I was told he had the gun. As we lay down I would raise my hand and look at him. In the house, I was blindfolded. I did not know the people who were there. My family took me to Nairobi Hospital. I can see the people in court. I saw accused 1 before going to the parade."

While those for the cross examination at page 61, of the same typed proceedings were as follows:

> " On the morning of the robbery the sun had not set (sic). The headlights of the car were on. I never went ahead of the cars. The car we were in and that of the thieves were not far from each other. I would see some people. I was frightened. When being taken to the estate, I was blindfolded. So I never identified them in the car …
>
> All houses had no electric lighting. I recorded my statement on how the robbery occurred. That it was during the night. Accused 1 is brown (noted is light chocolate in complexion). I saw him at the police station. The 1st accused was with other men. They were of different physical appearance. I had not been shown accused 1 before the parade."

32. We have considered the above excerpts in light of the principles that guide the court on the admission and acting on evidence of recognition and identification of an assailant in connection with an alleged perpetration of a crime firstly, as basis for finding a conviction following a trial and second, for sustaining a conviction on a first appeal as already highlighted above. Key of these is that for evidence on recognition to be sustained, the witness is obligated to state that he/she knew the assailant prior to the incident, state the length of time he has known the assailant, give reasons as to why he/she was sure the assailant was the person he/she knew before and that there was no mistaken recognition. While that on identification is that it is imperative for the complainant to state among numerous others, the circumstances surrounding the identification, the source of light, any striking features that made him/her register the appearance of the assailant, if at night the source of the lighting, proximity from the assailant to the victim, any possible impediments to positive identification, and lastly, giving a description of the assailant to those who either responded to the victim's distress call or to the police at the earliest opportunity.

33. In light of the above principles, it is our position that recognition did not apply in the circumstances of this case as PW9 did not know the appellant prior to the incident. The Judges were therefore right in our view when they ruled that recognition of the appellant by PW9 in connection with the offences he was found guilty and convicted of did not arise.

34. Likewise, evidence on identification of the appellant in connection with the same crime is also not sustainable for the reason that going by the excerpts of PW9's evidence both in examination in chief and cross-examination highlighted above, his identification of the appellant in connection with the crimes allegedly committed against him and the co-complainants in the counts for which the appellant was found guilty and convicted of was doubtful and which doubt in law is required to be resolved in favour of an accused person which we hereby do resolve in his favour.

35. It is also our position that the two courts below failed to appreciate that PW9 was a single identifying witness. The two courts below were therefore obligated in law to warn themselves on the dangers of

acting on the evidence of PW9 as a single identifying witness before acting on that evidence either as a basis for convicting the appellant; or as a basis for affirming the appellant's conviction on the first appeal and give reasons, none of which the two courts below did. It is therefore our finding in the circumstances that the appellant's convictions were unsafe in the circumstances demonstrated above. PW9's evidence being the sole basis upon which the appellant's convictions were founded, once it falters there is no other basis for sustaining the appellant's convictions. They therefore stand vitiated for reasons given above.

36. Our conclusion on the determination of the above issue in essence determines the appeal. We therefore find no need to interrogate the other issues raised by the appellant on appeal namely, issue with regard to shifting of the burden of proof on to the appellant to prove his innocence and second on want of proof of the prosecution's case to the required threshold of proof beyond reasonable doubt which we feel are ably dealt with by the conclusion reached above.

37. Likewise, having vitiated the concurrent findings of the two courts below with regard to the appellant's conviction, we find no need to address the issue on the legality and or fairness of the sentence as handed down by the trial court and revised by the first appellate court as in doing so would be tantamount to an exercise in futility.

38. In the result and for the reasons given in the assessment of the appeal, the appeal has merit. It is accordingly allowed, the convictions and sentences handed down by the trial court and affirmed by the first appellate court against the appellant are accordingly set aside. The appellant is ordered to be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

Signed

DEPUTY REGISTRAR