Case Number:	Criminal Appeal 131 of 2008
Date Delivered:	20 Dec 2018
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Philip Nyamu Waki, Roselyn Naliaka Nambuye, Patrick Omwenga Kiage
Citation:	Patrick Ayisi Ingoi v Republic [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Cr. A. No. 96 of 2005
Case Outcome:	-
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 131 OF 2008

BETWEEN

PATRICK AYISI INGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi

(J. B. Ojwang, J.) dated 17th September, 2008

in

H. C. Cr. A. No. 96 of 2005)

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JUDGMENT OF THE COURT

About 14 years ago, on 21st May, 2004, a robbery was committed at the National Bank of Tanzania in Moshi and Tz Shillings in excess of five billion stolen at gun point. Some Tanzanian nationals were subsequently arrested within Tanzania in connection with the robbery and charged before the District Court in Moshi in **Criminal Case No. RM 16/2004**. Two Kenyans suspected of involvement in the robbery were also arrested - **Patrick Ayisi Ingoi (Ingoi)** who is the appellant before us, and one **Wilfred Onyango Nganyi (Nganyi)**. But they were arrested within Kenyan territory and so, at the request of the Tanzanian Government, extradition proceedings were commenced on 19th July, 2004 under ***section 13*** of the ***Extradition (Contiguous and Foreign Countries) Act,*** Cap. 76, Laws of Kenya, to have them taken to Moshi for trial by the Tanzanian court.

The application was considered before Nairobi Senior Resident Magistrate, Mrs. D. Kavedza Mochache (SRM) **[the Magistrate]** in **Miscellaneous Criminal Case No. 19 of 2004.** Before that court, evidence was adduced by the Attorney General **(AG)** through 18 witnesses drawn from Tanzania and Kenya, who were cross- examined at length, to establish the identity of the two suspects and their connection with the alleged offence. While the evidence relating to Nganyi was purely on his identification by a single witness and nothing else, Ingoi was not only allegedly identified at the scene of the crime, but also a large amount of money, in excess of KSh.170 million was recovered at his residence in Jacaranda Estate, Donholm, Nairobi. He was also found to have acquired property in Kenya in form of land and motor vehicles in suspicious circumstances soon after the robbery.

The two suspects were not required to testify and did not. However, through their counsel, they raised several technical objections asserting that the extradition proceedings were a nullity. They contended, *inter alia*, that the proceedings ought to have been made

under Cap 77, the **Extradition (Commonwealth Countries) Act** and not Cap 76; that even if Cap 76 was invoked, **Part III** (Reciprocal Backing of Warrants) was not applicable since **Legal Notice No. 95 of 1996** which had been issued by the Minister to give effect to Part III had not been laid before the National Assembly as by law required; that the Chief Magistrate who had issued the provisional warrants of arrest had no jurisdiction to do so; and that there was no extradition treaty between Kenya and Tanzania. The AG on the other hand insisted that the proceedings were properly before the magistrate under Part III of Cap 76 and drew the attention of the magistrate to previous similar cases on extradition of fugitive criminals between the East African countries, such as ***Toroha vs Republic*** ***(1989) KLR 630*** and ***Tanga Mundeke D. K. vs Republic*** ***[1998] eKLR.***

Upon considering the objections made on matters of law, the magistrate dismissed the objection that the proceedings were not under Cap 76. She held that the alleged offences were extraditable under Cap 76 and not Cap 77. In her view, however, Part III of Cap 76 was not applicable as there was no rebuttal by the AG, of the assertion that **LN 95 of 1996** had not been placed before the National Assembly. More importantly, the magistrate minutely dissected the evidence placed before her and made a finding that the witnesses were untruthful. On that basis, it declared that the two suspects would not get a fair hearing before the Tanzanian court. An order was accordingly made for their discharge on 21st February, 2005.

The AG was aggrieved and applied orally for certified copies of the proceedings which application was granted. He followed up with a written application on 22nd February, 2005 but was informed that the record was bulky and would take some time to prepare. On 2nd March, 2005, he wrote again informing the Principal Deputy Registrar that the window for appeal would close on 14th March, 2005 and sought permission to use the hand written copies to file the appeal pending preparation and certification of typed copies. The Deputy Registrar allowed the filing of the appeal *but only process the appeal after typed records are availed as per legal requirements'*. **Criminal Appeal No. 96 of 2006** was then filed.

The typed proceedings were ready and were placed before **Makhandia, J.** (as he then was) on 28th June, 2006. They were not certified however and the court's Executive Officer had to be summoned to explain why they were delayed. The explanation was made on 27th November, 2006 and the court found it *"reasonable and acceptable'*. Counsel on both sides also expressed their satisfaction and an order was made for the appeal to proceed.

Eventually it landed before **Ojwang, J.** (now a Justice of the Supreme Court), who considered the Attorney General's appeal. It was prosecuted against Ingoi only because Nganyi was reported to have travelled to Mozambique upon his discharge by the magistrate and was arrested and detained out there, hence his absence. The Attorney General complained in that appeal that the magistrate had taken the position of a trial court when there was no trial; misdirected herself in handling the extradition proceedings; erred in holding that suspects would not receive a fair trial in Tanzania; and improperly discharged the two suspects. Counsel for Ingoi on the other hand submitted that the appeal was in the first place incompetent because it was based on untyped proceedings; it was lodged against two respondents instead of one who was before the court; there were no warrants of arrest as they had lapsed when orders of discharge were issued by the magistrate; **Part II** of Cap 76, and not **Part III** was applicable; there was no extradition treaty between Kenya and Tanzania; no link had been established between the offence and the appellant; and that the magistrate was right in finding that there would be no fair hearing before the Tanzanian trial court.

Upon hearing counsel on both sides, the High Court made findings that Cap 76 was properly invoked; that there was no basis for distinguishing Part II and III of Cap 76 as they both deal with the core purpose of extradition of criminals; that want of form in using hand-written proceedings to file the appeal cannot nullify it; that the warrants of arrest were still subsisting during the pendency of the appeal; that the duty of the magistrate in extradition proceedings was to ascertain that a *prima facie* link existed between the

suspects and the criminal incident; that full ascertainment of that linkage belonged to the arena of trial; that there was *prima facie* evidence that the appellant had been identified at the *locus in quo*; that there was cause to suspect that the money recovered from the appellant soon after the incident was part of the proceeds of the robbery; that there was no basis for the declaration by the magistrate that a fair trial was not possible in Tanzania on the basis of assessment of credibility of witnesses; and that Tanzanian courts, in common with Kenyan courts, are guided by the common law and equity, as well as constitutional and legal principles just like other courts within the Commonwealth. The appeal was allowed, the warrants of arrest held to be in force and an order for extradition of both Ingoi and Nganyi issued.

It was Ingoi's turn to complain and he did so in a memorandum of appeal containing a whopping 33 grounds. Apart from their prolixity, however, several of them are repetitive and argumentative contrary to ***Rule 86 (1)*** of this Court's Rules requiring that grounds of appeal be stated *"concisely and under distinct heads, without argument or narrative"*. Some of the grounds also challenge findings made by the magistrate which had not been challenged by cross appeal to the High Court. It is no wonder therefore that in oral submissions, learned counsel for the appellant, **Mr. Kiraithe Wandugi** restricted the appeal to three main issues:

(i) Whether the appeal filed in the High Court was competent.

(ii) Whether Part III of Cap 76 was properly invoked owing to inapplicability of LN. No. 95 of 1996.

(iii) Whether the appellant would receive a fair trial before the Tanzanian courts.

We adopt those issues as matters of law and germane for our consideration. We now proceed to consider them *seriatim*.

The 1st issue was raised by Mr. Wandugi before the High Court on the basis that the ruling and proceedings constituting the record of appeal at the time of filing were hand-written and therefore could not form the basis of a competent appeal. According to him, the typed record was sneaked into the record irregularly and when he complained about it, he was overruled. The second reason for incompetence was because the appeal named two respondents when it was evident that the 1st respondent, Nganyi, was not before the court.

The response by the AG, through learned Senior Assistant Director of Public Prosecutions, **Mr. Moses O'Mirera,** was that the filing of the appeal using the hand- written record was explained and permission sought from and granted by the Deputy Registrar. It was the court, he pointed out, which prepares the record and not the parties. There was no reason to complain therefore, in his view, because the typed record was subsequently accepted by the court and the appeal proceeded on the basis of those proceedings. He submitted that there was no authority for supporting the argument that an appeal containing hand-written proceedings was a nullity. The AG said nothing about the joinder of the 1st respondent in the appeal.

The High Court considered the first part of the issue and held as follows:

"I have carefully considered the respondent's challenge to the integrity of the appeal, on the ground that it was not filed with certified copies of proceedings. The record, however, was so substantial in length, this Court would take judicial notice that the preparation of a typescript was bound to take a long time. I would commend the applicant for acting promptly and with due diligence, to ensure that an appeal was lodged. Therefore any want of form in the appeal papers, cannot be held to nullify the appeal."

The self same argument made before the High Court was advanced by Mr. Wandugi before us. Surprisingly, counsel did not point

out the relevant provision of the **Criminal Procedure Code** or **Cap 76** which rendered such an appeal as he complained about, a nullity. He was given time to file a list of authorities after closure of his arguments, which he did, listing three decided cases, but all of them were interlocutory decisions and none has any relevance to that issue. The reality of the matter is that there was urgency in finalizing the matter of extradition of the two suspects and therefore, the AG could not be blamed for moving with expedition. It cannot be argued that the appeal was not filed within time, as indeed it was. We understood Mr. Wandugi to complain only about the legibility of the proceedings of appeal first placed before the court. There was no complaint about the Ruling. Moreover, as we have seen above, the issue of certification of the proceedings was the subject of judicial decision after counsel on both sides complained before Makhandia, J. about the delay on 8th August, 2006, and the court summoned the Executive Officer of that court. We may reproduce the record of the proceedings before Makhandia, J. on 27th November, 2006:

"***27/11/06***

Coram: Makhandia, J. Court Clerk: Erick

No appearance for state

Wandugi for appellant/applicant

Mr. Njoka

I am the executive officer, chief magistrate court. I received SRA. The SRA required to me to come and explain the delay in availing certified proceeding in Misc. 19/04. I am new in the position having been transferred from the High Court. The Chief Magistrate submitted the record on 27th June, 2006. However it was found that the proceedings were not legible. The record was re-submitted to the Chief Magistrate on 6/7/06. I was transferred to the chief magistrate court in October, 2006. Some of the

secretaries who had typed the proceedings had retired and it was not easy to get the diskettes. I have now however managed to have the proceedings typed and availed. I took personal initiative to deal with the matter. I apologize to Court for the delay.

MAKHANDIA JUDGE

Wandugi

I was supplied with the proceedings late on Friday the proceedings are now ready and the appeal can now be set down.

MAKHANDIA JUDGE

Oriri

I also got my proceedings also on Friday. The appeal may be set down for hearing.

Court:

The explanation by the executive officer regarding the delay in availing the proceedings is reasonable and acceptable. He is

therefore discharged. In the meantime the appeal may now be set down for hearing by the Registry in the normal manner.

MAKHANDIA JUDGE."

The appeal was thereafter heard on the basis of a certified record of proceedings. In our view, there was no prejudice caused on either party and we have no reason to fault the High Court on its finding on the first part of that ground of appeal. We reject it.

On the joinder of the 1st respondent, the High Court said nothing about it, but in the end issued orders in the appeal which were binding on him. We have examined the record of proceedings made on 4th February, 2008 where Mr. Wandugi is recorded as appearing for both appellants and explaining that *"the 1st respondent was out of jurisdiction facing trial in Tanzania pursuant to extradition proceedings. He is in custody of Tanzania authorities."* There was also a reference of the 1st respondent having travelled to Mozambique after the decision of the magistrate. The 1st respondent was thus legally represented by counsel in the appeal and his absence was

explained. There was again no prejudice and we find no valid reason for the complaint, which we similarly reject.

On the 2nd issue, Mr. Wandugi attacked the reversal by the High Court, of the finding by the magistrate that ***LN. No 95 of 1996***, the ***Extradition (Application of Part III) (Tanzania and Uganda) Order*** made by virtue of the ***Extradition Act No. 7 of***

1966 had not been placed before the National Assembly. The magistrate had stated as follows:

"…[C]ounsel has taken this Court through the provisions of Part III of Cap.76. He contends that under s. 11 (1) of Cap. 76, the [instrument] has to be [laid] before the National Assembly. In his view, the prosecutor failed to discharge this burden placed on him by law, and the effect is that the Legal Notice has failed the test under Cap.76, and to that extent is null and void. That failure to comply with s. 11 (2)) is fatal and incurable…...On the issue whether [the] Legal Notice of 1996 was laid before the National Assembly, this Court has been urged to find that the same was not laid before the National Assembly…The defence counsel having made the allegation,…it was incumbent upon the prosecution to rebut the same. The prosecution…therefore has failed to discharge a burden imposed on it by law. It is beyond peradventure that the law has been flouted in these proceedings…On the basis of this [finding], the requirements of s. 14 of [the Extradition (Contiguous and Foreign Countries) Act (Cap.76] have not been complied with, and I find it unsafe to order extradition."

In reversing that finding, the High Court stated thus:

"As learned counsel Mr. Oriri submitted, the respondent's counsel had made a bald statement, that Legal Notice No. 95 of 1966 which laid the basis for the State's application for extradition, had not been laid before the National Assembly as required by law. Mr. Wandugi had no proof of any sort that the "laying" procedure, in the history of the subsidiary legislation, had not taken place; but he wanted the State to prove that it did take place, failing which it must be presumed not to have taken place. It is on such a controversial proposition, largely, that the learned Magistrate rejected the application for extradition orders. Such a contentious proposition, in my opinion, does not provide a foundation of law upon which the Magistrate could have acted, quite apart from the fact that her role, by the terms of the governing statute, was to verify certain matters, to ensure regularity, and to satisfy herself that there was some evidence connecting the respondents to the offence in question. I hold that

the learned Magistrate misdirected herself, by anchoring her decision on a controversial point which was not the question placed before her to decide. Since Legal Notice No. 95 of 1966 had been duly published, and it was duly stated to have the backing of the relevant statute, the learned Magistrate should have proceeded on the basis of the maxim, omnia praesumuntur rite et solemniter esse acta – all acts are presumed to have been done rightly and regularly."

Attacking those findings, Mr. Wandugi submitted before us that there was a mandatory requirement under ***section 11 (2)*** that:

"Every order made under this section shall be laid before the House of Representatives".

In his view, without proof that the section had been complied with, Cap 76 was not applicable, and the onus of so proving lay with the AG. The response by Mr. O'Mirera was that the role of the magistrate was to determine whether there was an extraditable offence under Cap 76, and the magistrate had found that Cap 76 was applicable.

We have considered the issue and, in the end, we do not espouse the view taken by the magistrate and supported by the appellant. In the first place, the assertion that the Legal Notice had never been placed before either the *'House of Representatives'* as the ***section 11 (2)*** states or the *'National Assembly'* as submitted by counsel, was made by the appellant. The onus therefore to prove the existence of that fact lay with him. ***Section 109*** of the ***Evidence Act*** is clear on that. Without proof that the legal Notice had or had not been handled in accordance with the section, the presumption of law that *'all acts are presumed to have been done rightly and regularly'* comes into effect. In all probability, Part III of Cap 76 was applicable otherwise the issue would have arisen in other extradition cases including the ***Toroha case*** (supra) which also involved a Tanzanian national, and was similar to the case before us.

In making its finding on the issue, the High Court relied on a previous decision, ***Republic vs The Minister for Transport & Communications & Others,*** *ex parte* ***Gabriel Limion Kaurai, H. C. Misc. Application No. 109 of 2004*** in which the same Judge held that ministerial instruments which are not laid before the National Assembly are not automatically void, especially where there was no evidence tendered to prove that the Legal Notice had or had not been laid before the National Assembly. In his view, the practical judicial attitude in such a situation is to look to fundamental issues only, and the more fundamental issue in this matter was whether a *prima facie* link had been made between the respondents and the criminal act alleged in order to warrant extradition.

With respect, we find favour with the above reasoning and reject the 2nd ground of appeal.

The 3rd and final issue is the more substantial one. Counsel criticized the reversal by the High Court of the finding that there would be no fair trial of the appellant in Tanzania. He contended that there was not only no extradition treaty between Kenya and Tanzania, but the evaluation of the evidence on record that most of the 18 witnesses put forward in support of the extradition were untruthful was unassailable. The magistrate who saw and heard those witnesses was in a better position to assess their credibility. Counsel, nevertheless, conceded what this Court had to say in the ***Toroha case*** (supra) about the fairness of Tanzanian courts that:

"Section 16 [of the Extradition (Contiguous and Foreign Countries) Act (Cap. 76, Laws of Kenya)] was complied with and in the entire circumstances of the case, we entertain no doubt whatsoever that in the neighbouring Republic of Tanzania, the appellant will receive a fair trial."

He submitted, however, that the issue in that case did not arise directly for decision as it did in this case.

On the other hand, the AG contended that Tanzania was a contiguous country covered under extradition proceedings based on Cap 76 and there was no need for a treaty. The offence of robbery with violence was also extraditable. In his view, the only issue was whether the magistrate had overreached herself in evaluating the evidence, and the answer was in the affirmative.

We have fully examined the record and considered both sides of the argument on the issue. The main reason why the magistrate declared that fair trial in Tanzania would not be guaranteed was because of her assessment of the witnesses whom she described in various adjectives including: untruthful, blatant liars, mysterious, absent minded, careless, contradictory, uncomfortable, malicious, self-interested, doctors of evidence, among others. As correctly observed by the High Court, however;

"Trial and the dispensation of justice, in the first place, is the remit of the Courts, and not of witnesses. Such witnesses are themselves subject to Court procedures, and stand checked by the Court's exercise of the contempt jurisdiction, in a proper case; and at the very minimal level, the Court is bound to determine, during the hearing, which witnesses have told the truth, from those who may have lied."

We agree that the magistrate misdirected herself by equating the capacity to render fair justice by courts to the number, nature or quality of witnesses who would appear before such court.

The High Court also examined and was persuaded by the reasoning of this Court in the ***Toroha case*** which it reviewed as follows:

"The facts of that case are, in many respects, similar to those in the instant matter. The High Court had allowed an appeal by the State, from a decision of the Chief Magistrate discharging and setting free a Tanzanian national who had been a subject of proceedings under s. 14 of the Extradition (Contiguous and Foreign Countries) Act (Cap.76). In the appeal then lodged against the State, the two grounds were that the High Court had misdirected itself on onus of proof, and on the question whether prima facie evidence of the commission of the relevant offence, had been necessary. The appellant had contended there was no evidence to connect him with the offences allegedly committed in Tanzania."

The Court of Appeal decided in relevant portions as follows:-

(i) "Before exercising his discretion to order the return of the prisoner, the Magistrate should peruse the entire evidence, and understand it, without taking the position of a trial Court. So, the degree to which the Magistrate has to be 'satisfied' is not expected to be as high as if any such satisfaction was derived from an analysis and evaluation of evidence adduced at a trial. The Magistrate is under no duty to [inquire] into the merits of the charges to be preferred. The Magistrate does not try or attempt to try any issue, because there is no hearing, Kinga v. Republic [1975] E.A. 155. If there is some evidence which discloses a connecting factor between the prisoner and the alleged offences the Magistrate should order the prisoner to be returned."

(ii) "Mr. Owino Opiyo submitted that the first appellate Court had no business [reconsidering] the evidence and that it was bound by the view of the Magistrate that there was no evidence in support of the return of the prisoner. We have no hesitation in rejecting outright that argument. It is important to bear in mind that a first appellate Court acts the same way irrespective of the substance or other authority to the contrary."

(iii) "In our view the evidence went far enough in establishing a link, a connecting factor, between the prisoner and the offences he will face at the trial. To our mind, one cogent reason why we think the High Court was right, is that there was communication between [the Tanzanian bank-employee in flight] and the appellant…In our judgement, the High Court directed itself correctly in

every respect, and so this appeal fails and must be dismissed."

Needless to say, that decision was binding on the magistrate but was unduly avoided though referred to. We agree with the High Court that it provided the correct guidelines.

Was a connecting factor between the appellant and the offence he will face at the trial established" We think it was, and the High Court had a proper basis for so holding. The court stated:-

"It could not be doubted that a certain number of witnesses had said they did see the respondents at the locus in quo. The veracity of those statements must await determination, after a full evaluation of all the evidence, before the trial Court. Similarly, the demeanour of witnesses must await determination by the trial Court. From the record, it is also clear that large amounts of money were recovered from the 2nd respondent very soon after the criminal incident in question; and there was cause to suspect that the monies thus recovered were proceeds of the robbery which took place at Moshi in Tanzania. Whether or not that suspicion was based on truthful evidence, is a matter to be determined by the trial Court."

We have no basis for disturbing the decision of the High Court as it was properly reasoned and supported by authority. The third ground of appeal therefore fails.

The upshot is that this appeal is lacking in merit and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 20th day of December, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR