



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 223 OF 2019

JIMMY AGURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. J. Kibosia (SRM) on 9th

August 2019 in Makadara Chief Magistrate's Criminal Case No. 552 of 2017)

JUDGMENT

1. The appellant, *Jimmy Agure* was initially charged with the offence of robbery with violence contrary to *Section 296 (2)* of the *Penal Code*. The particulars thereof alleged that on 24th October 2016 at Country Bus Stage in Nairobi within Nairobi County, jointly with others not before the court, he stole cash KShs.13,600 from *Allan Vuhasho* and at the time of such robbery used actual violence against the said *Allan Vuhasho*.

2. The appellant denied the charges and trial commenced. After *Allan Vuhasho* testified narrating how the alleged robbery occurred, the prosecution applied for amendment of the charge sheet which application was allowed by the trial court.

3. In the amended charge sheet, besides changing the name of the complainant in the first count in which the offence of robbery with violence was maintained, the prosecution introduced a second count in which the appellant was charged with the offence of grievous harm contrary to *Section 234* of the *Penal Code*. The particulars supporting the second count alleged that on 24th October 2016 at Country Bus Station in Nairobi County jointly with others not before the court, he unlawfully did grievous harm to one *Allan Vuhasho*.

4. In the charge of robbery with violence, the name of the complainant was altered to read *Samuel Mwangi Njeri* instead of *Allan Vuhasho*.

5. The record of the trial court shows that the charges in the amended charge sheet were read over to the appellant and he pleaded not guilty to each count. The case then proceeded to full hearing after which the appellant was convicted in both counts.

However, during sentence, the learned trial magistrate sentenced the appellant to 20 years imprisonment apparently in one count which she did not disclose.

6. The appellant was dissatisfied with his conviction and sentence. He proffered an appeal to this court through what he described as a "memorandum of appeal" filed on 14th November 2019. He subsequently filed supplementary grounds of appeal which he filed together with his written submissions.

7. In his supplementary grounds of appeal, which largely incorporated the initial grounds of appeal, the appellant mainly complained that the learned trial magistrate erred in law by: failing to comply with *Section 214* of the *Criminal Procedure Code* as PW1 was not recalled to either testify afresh or be cross examined after the charge sheet was amended; failing to find that the offences charged in each count had not been proved beyond any reasonable doubt and in disregarding his defence without any justification.

8. At the hearing, both parties chose to prosecute the appeal by way of written submissions which they both duly filed.

9. In his submissions, the appellant contended that he was wrongly convicted as the learned trial magistrate failed to properly analyse the evidence on record particularly that of PW2 and thus failed to appreciate that the prosecution case was contradictory and was insufficient to prove the charges in each count against him beyond any reasonable doubt. Further, he submitted that the learned trial magistrate erred when

she failed to inform him of the right to recall PW1 after the charge sheet was amended which resulted in a miscarriage of justice; that the trial court erred by rejecting his defence without assigning any reasons. He urged the court to find merit in his appeal and allow it.

10. The appeal is contested by the state. In opposing the appeal, learned prosecuting counsel *Ms Christine Ndombi* supported the appellant's conviction and sentence arguing that the prosecution had adduced evidence before the trial court which proved all ingredients of the offences charged in each count beyond any reasonable doubt.

11. Counsel further submitted that it was not necessary to recall PW1 after the charge sheet was amended since the amendment only related to the month the offence was committed and could not have caused the appellant any prejudice; that in any event the appellant did not apply for recalling of PW1. She however did not address the appellant's complaint that failure by the trial court to inform him of his right to recall witnesses after the charge sheet was amended contravened *section 214* of the *Criminal Procedure Code* and occasioned him a miscarriage of justice.

12. This being the first appellate court, it is enjoined to follow the principle enunciated in a long line of authorities regarding the duty of a first appellate court. I am obligated to reconsider and to re-evaluate the evidence presented before the trial court and draw my own independent conclusions bearing in mind that I did not see or hear the witnesses. See: ***Okeno V Republic, [1972] EA 32; Kiilu & Another V Republic, [2005] KLR 175.***

13. I have carefully considered the grounds of appeal, the rival submissions made by both parties and the evidence presented before the trial court. I have also read the trial court's judgment. Having done so, I find that the key issues arising for my determination are two fold, namely:

i. Whether the learned trial magistrate's failure to inform the appellant of his right to recall witnesses under the proviso to Section 214 of the Criminal Procedure Code compromised his right to a fair trial.

ii. If the answer to the above issue is in the negative, whether the charges in each count were proved beyond any reasonable doubt.

14. Turning to the first issue, *Section 214* of the *Criminal Procedure Code* empowers the trial court to allow amendment or substitution of a charge when in the course of a hearing, it emerges that there was a variance between the evidence and the charges facing an accused person. The provision proceeds to stipulate the steps the court ought to take after allowing amendment or substitution of the charge. It provides that after the charge sheet is amended or substituted, the court shall call upon the accused to plead to the altered charge. *Section 214 (1) (ii)* specifically gives an accused person the right to elect whether or not to recall witnesses who had previously testified to either give their evidence afresh or for further cross examination. It states as follows:

"Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

15. The above provision has been the subject of interpretation by both the High Court and the Court of Appeal. In ***Richard Kibet Busienei V Republic, [2020] eKLR***, *Ngugi, J* cited with approval the decision of *Lesiit, J* in ***David Abdalla Osma V Republic, [2010] eKLR*** and held as follows:

"... upon the amendment of the charge sheet after some witnesses have testified, the Court has a duty to, first, take plea afresh and, second, inform the Accused Person that he has a choice whether to recall the witnesses who had already testified. This is a fundamental right to fair trial which, if not adhered to, fatally taints the entire trial."

As the appellants in the above quoted cases were not informed of their right to recall witnesses after the charge sheet was amended, *Hon. Lesiit* and *Ngugi, JJ* proceeded to quash the appellant's conviction and set aside their sentences.

16. In ***Joseph Kamau Gichuki V Republic, [2013] eKLR***, the Court of Appeal *Mwera, Kariuki & M'Inoti, JJA* followed the court's earlier decision in ***Harrison Mirungu Njuguna V Republic, Cr A. No. 90 of 2004*** where the court referring to *Section 214* of the *Criminal Procedure Code* had expressed itself as follows:

"The Code requires that once a charge is amended, the accused person should be called upon to plead to the amended charge and further entitles him to demand the recall of witnesses who have already testified to give their evidence afresh or to be further cross examined. In that case the charge was amended but the accused person was not called upon to plead to the amended charge. This Court held, correctly in our view, that the trial was substantially defective. The effect of amending the charge was to alter the case that the accused person had to meet. Hence, he had to plead to the amended charge afresh and had to be informed of the right to re-call witnesses to testify on the charge as amended and to be cross-examined." [emphasis added]

The court went further and stated that:

"The failure to inform an accused person of rights given to him by law is not a procedural irregularity which can be cured under the provisions of Section 382 of the Criminal Procedure Code."

17. In this case, the charge sheet was amended after PW1 who had been named as the complainant in the initial charge of robbery with violence had testified. The amendment of the charge sheet was substantial since it totally changed the nature of the case the appellant was facing considering that besides changing the identity of the complainant in the initial charge, a second count was introduced in which the

appellant was charged with the serious offence of causing grievous harm to the witness who had already testified in support of another charge.

18. The record in this case shows that after amendment of the charge sheet, the learned trial magistrate only partially complied with the proviso to *Section 214* of the *Criminal Procedure Code*. She caused the new charges to be read over to the appellant and called upon him to plead to the new charges which he did. She did not however inform him of his right to recall PW1 if he so wished.

19. Given the nature and scope of the amendment and the fact that PW1 who was apparently the prosecution's star witness had already testified and was not recalled after the amendment, the trial court's failure to inform the appellant of his right to recall PW1 to either testify afresh or for further cross examination was in my view fatal and prejudiced the appellant's right to a fair trial especially when it is taken into account that the appellant was not represented by counsel during the proceedings and may not have been aware of the existence of that right. It is consequently my finding that the above omission by the trial court made the proceedings fatally defective and any conviction resulting therefrom was unsafe and cannot be allowed to stand.

20. As regards count 2, I find that the learned trial magistrate erred in entering a conviction in that count whereas it was very clear from the evidence that the offence charged in that count was committed in the course of the robbery subject matter of count 1. The personal violence inflicted on PW1 in the course of the robbery formed part and parcel of the charge of robbery with violence since the two offences were committed in the course of the same transaction. The two offences should not have been charged in two separate counts - See: *Section 135* of the *Criminal Procedure Code*. The learned trial magistrate failed to appreciate this basic principle of law and proceeded to wrongly convict the appellant in count 2.

21. For the foregoing reasons, I find that the appellant's appeal against his conviction in both counts is merited and it is hereby allowed. The convictions recorded against the appellant are consequently quashed.

22. Having made the above determination, I find it unnecessary to address the ambiguity in the sentence imposed by the trial court because with the quashing of the appellant's convictions, this sentence automatically falls by the wayside. The same is hereby set aside.

23. Having quashed the appellant's conviction, the next issue that I must now grapple with is whether I should set him free or order a retrial. The principles that guide a court in deciding whether or not to order a retrial have been enumerated in a string of authorities examples being *Muiruri V Republic, [2003] KLR 522* and *Mwangi V Republic, [1983] KLR 522* among others.

24. As a general rule, a retrial should be ordered if doing so would be in the interest of justice taking into account all the circumstances of the case including the nature of the offence charged and the evidence on record.

25. In this case, I would have proceeded to order a retrial considering that the convictions have been vitiated mainly due to errors of omission by the trial court. I am however persuaded to find that this is not a suitable case to order a retrial given that in my view, the evidence adduced by the prosecution in support of the charge of robbery with violence which is the only charge that was lawfully preferred against the appellant was weak and may not lead to a safe conviction if the case was remitted to the lower court for retrial.

26. The above finding is informed by my finding after re-appraisal of the evidence that one of the essential elements of the offence of robbery namely theft of KShs.13,600 was not sufficiently proved.

27. PW2 who was allegedly accosted by the appellant and his accomplices did not say in his evidence that any money was stolen from him at the material time. The first person who claimed that money had been stolen was PW3 who was not present when the offence was allegedly committed. His evidence on the alleged theft amounted to hearsay and had very little, if any, probative value.

28. In view of the foregoing, I am satisfied that ordering a retrial in this case will not serve the ends of justice. In the premises, I order that the appellant be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021.

C. W. GITHUA

JUDGE

In the presence of:

Appellant in person

Mr. Chebii for the respondent

Ms Karwitha: Court Assistant