



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 102 OF 2017

PAUL KORIR KIPTANUI alias LOMUTIE.....APPELLANT

VERSUS

REPUBLIC.....STATE

JUDGMENT

1. The Appellant, Paul Korir Kiptanui, was arraigned before the Chief Magistrate's Court in Nakuru in ***Criminal Case No. 679 of 2013*** faced with a single count of robbery with violence. It was alleged that on the 21st day of March 2013 at Nessuit Village in Njoro District within Rift Valley Province jointly with others not before Court while armed with offensive weapons namely rungus and knife robbed Stephen Mombosha of his Ksh 30,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Stephen Mombosha.

2. The Appellant pleaded not guilty and a fully-fledged trial followed.

3. The Appellant took plea on 28/3/2013. On 11/04/2013, during a routine mention, the Court directed that the Appellant should be supplied with a charge sheet and witness statements at his own cost. When the case came up for hearing on 09/05/2013, the Appellant complained to the Learned Trial Magistrate that he had not yet been supplied with the statements. The Prosecutor responded that the Appellant never went to collect the statements in order to photo copy them at his cost. The Appellant rebutted that he did not have the money to do so at the time but that he now had the cash for photocopying. The Learned Trial Magistrate ruled that the first witness, the Complainant, should testify and that if the Appellant, once he had obtained the statements and perused them formed the opinion that he needed to recall the witness for cross examination, he could do so.

4. With that ruling, the Complainant and PW2 testified. It would seem that the Appellant was supplied with statements after that. On 26/2/2015, after the Prosecution had failed to call witness a number of times, the Learned Trial Magistrate refused to adjourn the case hence forcing the Prosecution to prematurely close its case. The Learned Trial Magistrate then delivered a ruling placing the Appellant on his defence. However, that Judicial Officer, the Honourable J. Mwaniki, was transferred out of the station before the Defence hearing.

5. It eventually fell upon the Honourable F. Munyi to conduct the Defence hearing. The Learned Magistrate complied with section 200(3) of the Criminal Procedure Code on 18/07/2016. The Appellant elected to have the case start afresh, a request which was acceded to by the Learned Magistrate.

6. During the next scheduled eight or so hearing dates, the Prosecutor requested for an adjournment over non-availability of witnesses of the Police File. On 23/01/2017, clearly frustrated by the lack of witnesses, the Appellant offered that the case could proceed from where it had reached before Hon. Mwaniki provided that the Complainant was recalled for cross-examination. The Learned Magistrate acquiesced to the request clearly evincing that that was a reasonable proposition.

7. A few other requests for adjournments by the Prosecutor followed. Seven months later, on 07/07/2017, the Court issued a summons for the Complainant. He was directed to come to court on 27/07/2017. The Court, also, requested the Prosecutor to bring all his witnesses to finalize the case on that day.

8. On 27/07/2017, the Complainant was not in Court. The Prosecutor explained that he had had an accident. The Appellant objected and indicated that he wished the Court to be concluded on that day as earlier promised. The Court, then, declined the adjournment and ordered the remaining witnesses to testify. In doing so, however, the Court made a curious finding: "I assume the Accused does not mind if the Court relies on the previous evidence that had been given to the Court by PW1 [the Complainant]."

9. I have remarked this to be a curious finding because, as documented above, the Appellant had all along insisted that he needed to recall the Complainant (PW1) because he did not have the benefit of his statement when he testified before the Learned Honourable Mwaniki. Indeed,

the Honourable Mwaniki had undertaken that the Complainant will be recalled for cross-examination by the Appellant – which never happened.

10. This history is quite clear that the trial of the Appellant proceeded without him having been supplied with the witness statements when the two most critical witnesses testified. Despite the Court's undertaking to recall the two witnesses for purposes of further cross-examination, the trial concluded without the two witnesses being recalled. The Learned Trial Magistrate, then, ended up relying on the testimony of these two witnesses even though it was offered before the Appellant had been supplied with witness statements and, therefore, could not be said to have adequately prepared to cross-examine them.

11. There is no need to belabor the point: the trial, as conducted, fell afoul of the constitutional standards, and, in particular Article 50(2)(j) of the Constitution. Article 50(2)(j) of the Constitution of Kenya provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. Article 50(2)(c), on the other hand, provides for the right of the accused to have adequate time and facilities to prepare his defence.

12. Long before the promulgation of the Constitution in 2010, the Court of Appeal had explained the imperative nature of the duty of the Prosecution to supply witness statements in obeying this norm of fair trial in **Thomas Patrick Gilbert Cholmondeley vs Republic [2008] eKLR**. In that case, the Court held as follows:

We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under..... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.

13. Our Courts have uniformly interpreted the constitutional provisions on fair trial to include the duty of the Prosecution to furnish the Accused Person with witness statements and exhibits which the Prosecution intends to rely on in their defence in advance of the criminal trial.

14. In the present case, the Court was wrong, in the first place to place the burden of copying the statements on the Appellant. Beyond that, the Court proceeded to take testimony of two witnesses when it was aware that the Appellant did not have Witness Statements. Finally, despite promises to recall the two witnesses for cross examination, the Court ended up making a determination before the witnesses were recalled. The cumulation of these mis-steps amount to a substantial breach of fair trial rights of an Accused Person and fatally vitiates the guilty verdict from the trial. I, therefore, conclude that the trial was unfair and the conviction unsafe. Consequently, the conviction and sentence are both set aside.

15. I have looked at the other grounds of appeal proffered by the Appellant. Due to the orders I have given in the appeal, I will not delve into the other grounds of appeal.

16. Having set aside the conviction and sentence, I must now consider whether this is a fit case for re-trial. The principles governing whether or not a retrial should be ordered are now well settled. The East Africa Court of Appeal captured the principles succinctly in **Fatehali Manji v Republic [1966] EA 343** as follows:

In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.

17. The Court of Appeal added an important consideration in **Mwangi v Republic [1983] KLR 522**:

We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.

18. The main question here, then, is whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial. Given the nature of the offence; the interests of the victims of the crime; the availability of witnesses; and the reason for setting aside the conviction and sentence, after perusing the Trial Court record as part of this appeal, I have come to the conclusion that this is a fit case for re-trial.

19. Consequently, the orders and directions of the Court are as follows:

a) The conviction entered in Nakuru Chief Magistrate's Criminal Case No. 679 of 2013 is hereby set aside.

b) The sentence imposed on the Appellant is hereby consequently set aside.

c) The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates' Court for a retrial.

d) The Appellant shall be presented before the Chief Magistrate's Court, Nakuru on Monday, 4th February, 2019 to

take plea.

20. The Deputy Registrar is directed to send back the Trial Court file in *Nakuru Chief Magistrate's Criminal Case No. 679 of 2013* and a copy of this ruling to the Chief Magistrate's Court, Nakuru for compliance. It should be re-assigned to any magistrate with competent jurisdiction other than the Learned F. Munyi.

Dated and delivered at Nakuru this 31st day of January, 2019.

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JOEL NGUGI

JUDGE