

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 74 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 1028 of 2014 of Senior Resident Magistrate's Court at Hamisi)

EVANS AYIGA alias KUBARE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. CW Muleka, Senior Resident Magistrate, Hamisi, of robbery with violence contrary to Section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and was sentenced to death by hanging. The particulars of the charge against the appellant were that on 22nd October 2014 at Gawani Village, Gavudani Sub-Location, Gisambae Location in Hamisi Sub-County within Vihiga County, jointly with others not before the court, being armed with offensive weapons, namely *pangas* and *rungus*, robbed Beatrice Munyori of money Kshs. 30, 000.00, and a Nokia 1100 phone valued at Kshs. 2000, all valued at Kshs. 32, 000.00 and immediately before the time of the robbery wounded her by cutting her on the head and on her right hand with a *panga*.

2. He pleaded not guilty to the charge before the trial court, as a consequence of which the primary court conducted a full trial. The prosecution commenced on 29th October 2014 before Hon. JK Ng'arng'ar Senior Principal Magistrate, who heard four (4) witnesses before he was transferred. The matter was taken over by Hon. Muleka SRM. Directions were taken on 27th May 2015. The accused stated that he wished to have the matter start afresh, and the court directed that the matter would be heard *de novo*. Among the four witnesses who had testified before Hon. Ng'arng'ar SPM, only one was recalled, the complainant. She testified as PW1. Thereafter the court heard two fresh witnesses, John Aleye Sikoyo and PC Danstan Wayslan, who testified as PW5 and PW6, respectively. The state's case was closed, the appellant was put on his defence, he gave an unsworn statement, and eventually the court found against him.

3. The appellant being dissatisfied with the conviction and sentence appealed to this court and raised seven (7) grounds of appeal, particulars of which are set out in the petition of appeal on record.

4. The appeal came up for hearing on 27th September 2018. The appellant placed before me his written submissions, and urged me to rely on the same. The State, through Mr. Juma, Prosecution Counsel, conceded the appeal, pointing out that although the magistrate who convicted the appellant had ordered that the matter ought to start afresh he only ended up hearing one of the witnesses who had testified before his predecessor, yet in his judgement he still considered the testimonies of the other three prior witnesses.

5. I have perused through the record before me. As recited in paragraph 2 of this judgment, after Hon. Muleka SRM took over the matter from Hon. Ng'arng'ar SPM, he directed that the matter be heard afresh. Out of the four witnesses who had testified before Hon. Ng'arng'ar SPM only one was recalled. He then heard another two. The record is clear that after he ordered a fresh hearing, he only heard three witnesses, his record reflects that he heard PW1, PW5 and PW6, which suggests that he still treated the evidence recorded by Hon. Ng'arng'ar SPM from PW2, PW3 and PW4 as still valid. He then proceeded to convict and sentence the appellant based on the evidence of PW1, PW2, PW3, PW4, PW5 and PW6, yet he should have considered only the evidence of the three witnesses that he heard after he ordered a hearing *de novo*.

6. The effect of a direction that the matter would start afresh or *de novo* is that the proceedings conducted by the magistrate who has gone on transfer are rendered null and void. That would mean that the testimonies recorded from the witnesses heard by the said magistrate cannot be considered at the conclusion of the trial by the magistrate taking over while deciding the guilt or otherwise of the accused. The said testimonies, and any other evidence that goes with them, would have to be disregarded as they would have been rendered void or irrelevant.

7. For the purpose of the instant proceedings, the incoming magistrate ordered fresh proceedings. He was to start the trial *de novo*. That meant that the proceedings conducted before his predecessor, save for the plea-taking, were rendered irrelevant, including the testimonies by the four witnesses. That meant that the four had to testify afresh as their previous testimonies had been rendered irrelevant and of no value. Curiously, the trial court still treated the testimonies recorded by his predecessor as relevant and relied on or considered the same in his judgment. I agree with Mr. Juma that that was unprocedural, and was prejudicial to the appellant as he was convicted on the basis of evidence that was no longer valid, for it had been rendered null and void. That rendered the proceedings conducted by the incoming magistrate a mistrial.

8. I note that the appellant has not raised that issue in his grounds of appeal and in his written submissions. He appeal turns on other issues. However, the issue goes to the heart of the matter. It is a fair trial issue. The fact that the appellant was convicted on the basis of evidence that ought not to have been considered as it had been rendered irrelevant and ought, ideally, to have been expunged from the record, means that he was subjected to an unfair process. On that ground alone, the appeal should be disposed of without going into the merits of the grounds raised by the appellant in his petition of appeal.

9. I am persuaded that the appeal herein is for allowing for the reasons stated above. The trial in Hamisi SRMCCRC No. 1028 of 2014 was

faulty and is hereby declared to have been a mistrial. I hereby quash the conviction of the appellant and set aside the sentence of death imposed upon him. Given the seriousness of the charge he faced, I hereby direct that he shall be re-tried of the same charge by the Senior Resident Magistrate's Court at Hamisi by a magistrate other than Hon. Muleka SRM.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 10th DAY OF April 2019

W. MUSYOKA

JUDGE