REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

HCCR APP NO 15 OF 2016

JOSEPH GACHUKIA WAITHERA ALIAS CHAMPEZ.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment dated 18th February, 2016 by Hon E. Kimilu Principal Magistrate in CMCR Case No. 385 of 2014, Naivasha,)

JUDGMENT

1. The appellant was charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 295** as read with section **296(2)** of the **Penal Code**. The brief facts were that on 3rd February, 2014, at Kayole estate Naivasha, with another not before the court and while armed with a metal bar and *rungu*, he robbed George Githinji Kabiru of safari boots valued at Kshs 2,200/- and cash of Kshs 2,000/-, and killed him.

2. During trial, the prosecution called five witnesses who testified. In his defence, he opted to give an unsworn statement.

3. Dissatisfied with the judgment of the trial magistrate, Hon. Gesora, the appellant filed a petition of appeal on 1st March 2016 and later filed a supplementary memorandum of appeal with submissions. His grounds of appeal are as follows:

> *1. That the learned trial magistrate erred in convicting and sentencing the appellant with evidence on record which was insufficient, full of contradictions and uncorroborated in crucial and material aspects.*
>
> *2. That the learned trial Magistrate erred in law and facts in failing to consider that the proceedings were a nullity as the honorable court that took the plea had no jurisdiction.*
>
> *3. That the learned trial Magistrate erred in law and facts in shifting the burden of proof to the Appellant which is against the law.*
>
> *4. That the learned trial Magistrate erred in law and facts in failing to explain to the appellant the rights he had under section 214 CPC and or indicate the erection of the erection of the appellant took if any.*
>
> *5. That the learned trial magistrate erred in law and facts in not finding that the evidence of Purity Wanjiku PW4 was unreliable, incredible and contradictory to the prosecution case.*
>
> *6. That the learned trial magistrate erred in law and in facts in failing to consider the fact that the prosecution failed to call three crucial and material witnesses namely JJ, David Gitau and Wamuciri and the said failure was prejudicial to the Appellants case.*
>
> *7. That the learned trial magistrate erred in law and facts in finding that the deceased mentioned the name of his assailants in the initial report at the police station when the said initial report was never produced in court as evidence.*
>
> *8. That the learned trial magistrate erred in law and facts in accepting the statement purportedly alleged to have been made by the deceased without first ascertaining that the statement had formed part of the police record of the case herein.*
>
> *9. That the learned trial magistrate erred in law and facts in finding that the Police Officer PW3 knew the appellant well by his names and by his nickname when there is evidence on record by the same officer that he did not know the appellant.*

10. That the learned trial magistrate erred in law and facts in relying on the statement purportedly made by the deceased when there is no credible evidence that the deceased is the maker of the statement produced by the police officer.

11. That the learned trial magistrate erred in law and facts in finding that the deceased mentioned the name of the appellant when in the purported written statement, the deceased never mentioned the name of the appellant.

12. That the learned trial magistrate erred in law and facts in accepting the evidence of the investigating officer that the deceased came to police station alone twice on the same day when there is clear evidence from the deceased father PW1 that the deceased was taken home by two persons.

13. That the learned trial magistrate erred in law and facts in failing to appreciate the fact that it was not possible for the deceased to have gone to police station to make the alleged statement particularly alone having suffered injuries among them fracture and dislocation of the bones of the back bone at C3-C4 level and other injuries to the chest as is provided in evidence.

4. From the grounds the issues are clustered as shown below. This Court's role is to re-evaluate all the evidence and come to its own conclusions taking into account that it did not have the benefit of hearing the witnesses and seeing their demeanour. The issues are dealt with as follows.

Insufficient identification, contradictory and uncorroborated evidence - Grounds 1,5,7,8,9,10 and 11

5. The appellant argued, under this head, that the evidence of PW1 was contradictory in the sense that when the deceased came home on 4/2/2014, he told PW1 that he was assaulted by Joseph Gachukia and Maina with whom they were drinking in Volcano Club. However, on cross examination, PW1 stated that he did not know the accused before, and that the accused was known by a nickname 'Sabi' in Kayole area. Further he submitted that PW3 and PW4, both of whom also testified that they did not know the appellant nevertheless stated that the appellant was known by the name 'Champez'. Thus, he argued, the police arrested the wrong person, and that the circumstantial evidence was insufficient.

6. The state's answer to this criticism was that PW1 said he was told by the deceased that he was attacked by appellant and Maina, and that the appellant was known as "Champez" in Kayole. As for PW3, the Investigating Officer, counsel said he knew the appellant as "Champez and also knew him physically. Finally that PW4, Purity Wanjiku who was a bar attendant had known the accused for five months as a customer known as "Champez".

7. The record shows that PW1, the deceased's father, stated that he was told by his son he had been assaulted by one Maina and the accused at Volicano Club. This is what he reported to the police. Only in cross examination did he say that the accused was known as "Sambi"; but he also said he had not known the accused previously.

8. PW3, stated that the deceased reported that the accused and one Maina assaulted him at Green Bar Kayole. He filed the deceased's statement as PEXB 1. PW3 stated he knew the accused physically but did not know his name. However, he also asserted that the accused was known by the name "Chabezi" or "Champez"in the estate. He discovered this because when he arrested another person, that person said he was not Champez, and led him to the accused.

9. PW4, said she worked at Green Garden Bar and knew the accused as a customer at the club for five months; that his name was Champez; andthat on the material night she saw Champez and Maina come into then bar. They had drinks and later, around midnight, Maina, the deceased and Champez left the bar.

10. From the proceedings, it is clear that after the evidence indicated the accused was called Champez, the state applied to amend the charge sheet to indicate his alias, so as to ensure the evidence was referring to the named accused. I will revert to this issue later when dealing with the appellant's complaint that the proceedings were a nullity

11. As far as the identification of the accused is concerned, no doubt there is contradictory evidence. I am not persuaded, however, that PW1 knew the accused as Champez. PW3's evidence on identification relied entirely upon the fact the he arrested someone who stated he was not Champez, but that person led him to the appellant known as Champez. That person who had been arrested and allegedly led the police to Champez was not called to give evidence.

12. Finally, with regard to the dying statement of the deceased, the trial court appears to have taken it on board as gospel truth, and did not warn itself that it must proceed on such a dying declaration with caution and get the necessary assurance that a conviction founded on it is indeed safe. The trial court treated the deceased's statement as formal verified evidence and found:

"The deceased statement shows that the accused and Maina begun to fight him. They overwhelmed him and robbed him of Kshs 2,000/- and a pair of safari boot shoes that he had worn that night.....

The deceased was the only person who directly mentioned his attacker as accused and Maina who is at large. His evidence was corroborated by the evidence of bar attendant (PW4)"

13. The trial magistrate treated the dying declaration as "evidence" which "was corroborated by the evidence of PW4. In **Philip Nzaka Watu v Republic [2016]eKLR** relied on by the state in support of the adduction of the dying declaration of the deceased, the Court of Appeal clearly stated the importance of caution before relying on a dying declaration. The court stated:

> ***"The decisions of TARIKABI V UGANDA [1975] EA 60 and KATO v UGANDA [2002] EA101...reiterate the principle of caution in relying on a dying declaration..."***

Equally, the Court of Appeal of Kenya stated as follows in **Achira v Republic (2003) KLR 707**, after reviewing the case law on dying declarations:

> ***"A trial judge should approach the evidence of a dying declaration with necessary circumstances. It is generally speaking very unsafe to base conviction solely on the dying declaration made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration"***

14. In my view there are doubts about the identity of the accused in the circumstances.

The burden of proof was not discharged; there was failure to call crucial witnesses and the deceased's incapacity – Grounds 3, 6, 12 and 13

15. I have already adverted to the failure to call the person arrested by the police who led them to the appellant. The appellant also complained that JJ who is said to have told PW4 that deceased was attacked by Champez, was not called. The appellant also submitted that the prosecution failed to call the evidence of David Gitau and Wamuciri who escorted accused home; the watch man or owner of the bar who could have corroborated evidence of PW4 and also failed to call Thus, that the magistrate shifted the burden of proof the appellant when she stated that the appellant failed to challenge the prosecution evidence.

16. The appellant also submitted that it is highly doubtful that the deceased went by himself to Kayole Police post since, according to the doctor's (PW5) report, he had fracture and dislocation on the neck.

17. It is trite law that there is o requirement for the prosecution to call every witness to testify. That is the prerogative of the prosecution and it is for them to prove the case beyond reasonable doubt.

18. In this case however, it is surprising that the key identifying witness who was arrested and directed the police to the accused was not called to give evidence. It is not suggested that he was an informant. It is not suggested that he left the jurisdiction or could not be traced. He knew and recognized the accused. His presence would have assisted the court in understanding and discovering the truth. The Court of Appeal in **Wamunga v Republic (1989) KLR 426** held:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

19. **Further, in Roria v Republic [1967] EA 573,** the Court of Appeal for East Africa also held that:

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."***

20. In light of the above authorities, and given that there is no evidence as to when PW4, the bartender, recorded her statement or why she was not involved in identifying the accused, I think in this case there was need to avail the evidence of the person who led the police to arrest the accused.

Whether the proceedings were a nullity - Ground 2

21. The appellant submitted that the plea in this case was taken by a Resident Magistrate S.M Muchungi who had no jurisdiction, since cases of robbery with violence are supposed to be presided over by a Chief Magistrate or Senior Resident Magistrate.

22. The record shows that plea was taken on 21/2/2014 by S Muchungi, then Resident Magistrate. Thereafter mentions were presided over by two other magistrates before the hearing commenced presided over by Kimilu, Acting Principal Magistrate. The learned Acting PM heard four witnesses between 12/9/2014 and 26/2/2015 when the prosecutor substituted the charge to include the alias "Champez" on the charge sheet.

23. After the charge sheet was substituted, the trial magistrate correctly took plea afresh, and entered a plea of not guilty. However, the trial magistrate did not notify the accused of his right to re-call all or any of the witnesses in terms of **section 214** of the **CPC**.

24. There are two issues that arise here: the effect of a plea taken by an incompetent court; and the effect of failure to notify an accused person of his right to recall witness upon substitution of a charge.

Plea taking by incompetent court

25. The Magistrates Courts are established under **Art 169(1)** of the Constitution, and **Art 169(2)** provides that:

> ***"Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1) of the constitution."***

In obeisance to the Constitution, Parliament enacted the **Magistrates Courts Act** and the **Criminal Procedure Code.** These statutes set out the various categories of Magistrates courts and the various limits of their jurisdiction

26. Under **Section 3(1) Penal Code** it is provided that:

> ***"All offences under the Penal Code shall be inquired into, tried and otherwise dealt with according to this Code"***

To this end, Parliament included the **Fifth Schedule** in the Code pursuant to **Sec 4 CPC.**

27. Under **section 4** of the **CPC** only the High Court – exercising its original jurisdiction under the constitution – and a Subordinate court of the class mentioned in the **First Schedule** of the **CPC** have jurisdiction to try the offence of robbery with violence. In practice the High Court rarely exercises its original jurisdiction in robbery cases. Jurisdiction equates to competence and authority, so it is clear that the plea was taken without due authority. Prosecution witnesses PW1- PW4 were heard in pursuance of such incompetent plea.

28. **Sec 207(2) CPC** requires that the substance of the charge "shall" be stated to the accused person by *"the court and he shall be asked whether he pleads not guilty, guilty, or guilty subject to a plea agreement*". The language used is mandatory and "the court" must be a court with jurisdiction

31. In **Thomas Muhina v Republic [2016] eKLR,** plea was taken by a Resident Magistrate contrary to the law. Kamau J found that the irregularity was cured in that case because the accused was asked to choose whether or not to start the case de novo, but he declined. The Judge determined:

> ***"…although there were irregularities at the time the Appellant took his plea before the said Resident Magistrate, the proceedings were regularised and/or sanitised when the Learned Trial Magistrate caused the Charge to be read afresh to the Appellant and he sought to know from him if he wished to start the case de novo when the Charge was subsequently substituted and read to the Appellant who pleaded "Not guilty." The mere fact that the Appellant opted to proceed with the case from where it had reached more so after the particulars of the initial and substituted Charges were read to him and he took pleas, barred him from raising the issue of jurisdiction"***

29. Had the accused not been presented with a substituted charge and ann opportunity to plead afresh, the plea would have been incompetent, in that case as in the present one.

Failure to notify accused of right to recall witnesses following substitution of charge

30. **Article 50** of the **Constitution** provides for the right to a fair hearing. Under **Article 50 (2)** an accused person is imbued with the right to fair hearing which includes the right : -

> ***"(a) to be presumed innocent until the contrary is proved;***
>
> ***(c) to have adequate time and facilities to prepare a defence;***
>
> ***(g) right to choose and be represented by an advocate;***
>
> ***(k) to adduce and challenge evidence"***

31. In this case, the accused was facing the capital offence of murder, and a potential death sentence if found guilty. He should have been accorded all the available facilitation to enable him to defend himself.

32. **Section 214(ii) CPC** provides that:

> ***"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."***

33. In the case of **Moses Ndichu Kariuki v Republic Nyeri Criminal Appeal No. 228 of 2008 (2009) eKLR**, one of the grounds of appeal before the Court of Appeal was that the appellant was not accorded a fair trial under **section 77 (2)** of the former constitution which is the equivalent of the new **Article 50**. The Court of Appeal upheld that ground and stated as follows:

> **"In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. On our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section (Article) 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly the failure to recall the**

complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant."

34. In **Joseph Kamau Gichuki v Republic [2013] eKLR** Mwera, Kariuki and M'inoti, JJA's cited the case of **Harrison Mirungu Njuguna v R,** ***CR App. No. 90 of 2004*** which involved amendment of a charge under **section 214 of the Criminal Procedure Code**. The court there said:

> ***"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"***

The Court further stated that:

> ***"…failure to inform an accused person of his 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."***

35. In **Dennis Calvin Birumba v Republic [2010] eKLR** Justices Warsame and Ochieng faced a similar situation as in the present case, where the charge was substituted after several prosecution witnesses had been heard, and the accused was not informed of his right to recall the witnesses. The court held:

> ***"That being the position in law, we must now conclude that the failure by the trial court, in this case, constituted a substantial defect to the trial proceedings. Accordingly, and for that reason, we do now quash the conviction and set aside the sentences."***

36. In the **Harrison Mirungu Njuguna** case, the Court of Appeal declined to order a retrial because the appellant had already been in custody for over five years. In **Dennis Calvin Birumba**, the appellant had been in custody, for over five years, since his arrest, and the court was not told whether or not the witnesses would be available to testify, if a retrial was ordered. The court therefore declined to order a retrial.

37. The failure to uphold the accused's right to a fair trial by not informing him of such right is a serious violation thereof.

Disposition

38. In light of all the foregoing, I determine that the plea was taken by an incompetent court and the trial of the first four witnesses proceeded under such incompetent plea.

39. I further determine that whilst the fresh plea regularised the incompetent plea, the failure to notify the accused of his rights to recall witnesses on the altered charge compromised and prejudiced the accused's right to fair trial. The lower court trial was therefore a mistrial, and I so declare.

40. In this case, the appellant was arraigned in court on 21st February, 2014, and thereafter released on bond. He has and will not suffer any prejudice should a retrial be ordered.

41. Accordingly, the appeal succeeds to that extent and the conviction and sentence are hereby set aside and the accused set free pending re-trial, unless otherwise lawfully held.

42. Orders accordingly.

Dated, Signed and Delivered at Naivasha, this 29th day of July, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Gichuki for the Appellant

2. Ms Abuga for the State

3. Joseph Gachukia Waithera - Appellant - present

4. Court Clerk - Quinter Ogutu