



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL NO. 154 OF 2013
CONSOLIDATED WITH
CRIMINAL APPEALS NOS. 155 & 156 OF 2013

BETWEEN

DANIEL ODHIAMBO ACHILA.....1ST APPELLANT

PAUL MUYA OJWANG.....2ND APPELLANT

WILLIAM OMONDI OLANGA.....3RD APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. L.M. Nafula, SPM dated 14th August 2013 at the Senior Principal Magistrate's Court at Mumias in Criminal Case No. 917 of 2011)

JUDGMENT

1. On the night of 30th January 2010, the residents of Musoma Village, Bushieni Sub-location, Manyala Location, Butere District within Kakamega County were subjected to an orgy of violence by a criminal gang. Following concerted efforts by members of the public, local administration and police the appellants were arrested charged with several offences.

2. **PAUL MUYA OJWANG, DANIEL ODHIAMBO ACHILA and WILLIAM OMONDI OLANGA** were charged with several counts the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** for violently robbing **GODFERY OWISO ONGOLA, CATHERINE OMOLLO, SWALEH MNUNDI and MARY ATIENO**. Alternative to each of the robbery with violence charge, the appellants were charged with handling stolen goods contrary to **section 322** of the **Penal Code**. They also faced additional counts of assault causing actual bodily harm contrary to **section 251** of the **Penal Code** to **SOSPETER ATOKA, SHADRACK OTIENO ATOLLA**.

3. The appellant denied the charges and the trial ensued where the prosecution called 9 witnesses while the accused each gave sworn testimony. The trial magistrate convicted the appellant and sentenced them to death. It is the conviction and sentence that had precipitated this appeal.

4. In the judgment, the trial magistrate merely set out the charges before the court and the fact that the accused gave defences. In order to appreciate judgment, I will set out verbatim, the substantive part of the

judgment and conclusion of proceedings reflected in the typed and handwritten version.

JUDGEMENT

[Charges against the accused set out verbatim]

The prosecution's case.

1st, 2nd, 3rd accused identified by PW 2 from help of torches.

Prosecutor – We do not have their previous records, they may be treated as first offenders,

Accused 1 – in – Mitigation: I have a wife and three children who are full dependent on me for their livelihood.

Accused 2 in Mitigation: I care for my siblings as we are orphans,

Accused 3 in Mitigation: I pray for court's leniency. I did not commit this offence. I am also a first offender.

Court- Mitigation by the accused persons are considered also considered is the fact that the accused person are first offenders, however there is only one sentence prescribed for capital offences for which the accused herein are convicted, that is the death penalty. I proceed to sentence the accused to death.

14 days Right of Appeal

5. It is apparent from the judgment that this appeal must succeed. From the outline of the judgment I have set out, it is clear that the trial magistrate failed to comply with the mandatory requirements of **section 169 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which provides as follows:

169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.

6. **Section 169** aforesaid encapsulates an important principal in the delivery of justice and that is the duty to give reasons for a decision. Such a duty is not merely statutory but constitutional. Apart from the appellants being denied an opportunity to know why they were convicted, it is difficult for the appellate to determine whether the trial magistrate erred and if so, how.

7. It is also clear that trial magistrate failed to comply with **section 169(2)** of the **Criminal Procedure Code**. She did not state or specify the counts on which the appellants were found guilty and convicted given that they faced several principal and alternative charges. It is not even clear on what counts the appellants were sentenced. In **James Nyanamba v Republic [1982 – 88] 1 KAR 1165 [1983]eKLR** the Court of Appeal expressed following view;

Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and

the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code.

8. Since the trial magistrate did not even attempt to set out the facts of the case and a summary of the evidence, I cannot say that the judgment is curable. For all intents and purposes there was no judgment. In the circumstances, I have no option but to quash the conviction and sentence.

9. I must now turn to consider whether I should order a re-trial. The general principle on this issues, long settled, was stated 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 when the conviction is set aside because of insufficiency of evidence or for the purpose 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 own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.

10. At the end of the day the principal duty of the court is to strike a balance between the interest of justice on the one hand and those of the accused person on the other. In this case the trial magistrate did not express any view on the evidence, the appellants faced several counts of robbery with violence against several people. Whereas not all of them may be available, some of them would be able to testify. In addition, having read a record of the evidence, I cannot say that the case against them was without merit. In these circumstances, I will order a re-trial.

11. For the reasons I have set out, I make the following orders:

(a) The conviction and sentence is hereby quashed and set aside.

(b) The appellants shall be re-tried on the same charges before any other magistrate other than Hon. L. Nafula, SPM.

(c) The appellant shall remain in custody pending trial and shall be taken before the Magistrates Court at Mumias to take plea on a date directed by the court.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KAKAMEGA this 15th day of November 2017.

R. N. SITATI

JUDGE

Appellant in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.