



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 118 OF 2014

RICHARD ATAMBI OTISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate's

Court at Kikuyu in Cr. Case No. 5 of 2012 delivered by Hon. E. Michieka, Ag. PM, on 20th March, 2014)

JUDGMENT

The Appellant herein was the 2nd accused having been charged alongside Kennedy Monyancha Ndege with the offence of Robbery with Violence contrary to Section 295 as read with Section 296(2) of the Penal Code. It was alleged that on 17th April, 2012 at Rungiri Area in Kiambu County within Central Region, jointly with others not before court while armed with dangerous weapons namely, pistols robbed Samuel Mwangi Ndirangu of a motor vehicle Reg. No. KBQ 840W Toyota Corolla NZE Saloon, one computer CPU make HP, two HP ink printers, dispenser/Fridge make Ramtons, home theatre make Phillips, one digital camera make Sony, mobile phones make Ideos and Nokia 3250, CDs, VCDs and DVDs, Microwave make Ramtons, National Identity Card, a driving licence and cash Kshs.16,500/= all valued at Kshs. 1,334,199/= (One million, three hundred and thirty four thousand, one hundred and ninety nine only), the property of Samuel Mwangi Ndirangu and immediately before and after the time of such robbery used actual violence to the said Samuel Mwangi Ndirangu.

In the alternative, he was jointly charged with Kennedy Monyancha Ndege with handling stolen goods contrary to Section 322(2) of the Penal Code. It was alleged that on 18th April, 2012 at Mwakitau Police Road Block area, in Taita County within Coast Region, jointly with others not before court, otherwise than in the course of stealing dishonestly received and retained one motor vehicle Reg. No. KBQ 840W Toyota Corolla NZE Saloon, National Identity Card and Driving Licence knowing or having reason to believe them to be stolen goods.

The Appellant was tried, convicted and found guilty for the offence of robbery with violence and two alternative charges of handling stolen properties. He was dissatisfied with the conviction hence this appeal. In his Amended Grounds of Appeal dated 29th February, 2016, he was dissatisfied that his conviction was based on evidence of insufficient identification. He was also dissatisfied that the identification parade that purportedly pointed him out as one of the robbers was not conducted in a proper manner and the results of the same were inadmissible. He faulted the learned trial magistrate for holding

that the prosecution had proved all the elements of robbery with violence which was not the correct position. He also asserted that the trial court did not comply with Section 214 of the Criminal Procedure Code which provides for amendment of a charge sheet. He further faulted the trial magistrate for not adequately considering his defence. Finally, he contended that the prosecution did not discharge its burden in proving the case beyond reasonable doubt.

His written submission in a nutshell was that he was not properly identified, that the ingredients of the offences for which he was convicted were not proved, that Section 214 of the Criminal Procedure Code was not complied with in which case the prosecution ought to have amended the charge sheet after he complained that his name had been misspelled, that his defence was not properly considered, that the identification parade was not properly conducted and that the death sentence was harsh and excessive in the circumstances. In his further oral submission in court, he urged the court to look into the issue that the charge sheet was defective having been drawn both under Sections 195 and 196 of the Penal Code.

On the part of the Respondent, learned State Counsel Ms. Atina submitted that the Appellant was properly identified and that all the elements for the offence of robbery with violence had been established. She submitted that the Appellant's assertion that the charge sheet was not amended could not aid him since he had pleaded under the name written in the charge sheet which was Richard Otambo Otisi and that he had not made an objection to that name throughout the trial. Ms. Atina submitted that the Appellant's defence was properly considered, that the identification parade was properly conducted and that the death sentence imposed by the trial court was mandatory under the law and could not be varied by a trial court.

At a scrutiny of the entire proceedings I have noted a grave error occasioned by the trial magistrate at the conclusion of the trial. The Appellant together with his co-accused were presented to court on 20th April, 2014 to take plea. Before that could be done, the then presiding Officer Hon. Gitonga, SPM, noted the following:

“Court: I note that the charge sheet is not properly framed. The prosecution allowed time to amend the same. Mention on 23/4/2012 for plea.”

On this date, the charge sheet that was presented before the court was dated 20th April, 2012 and signed on the same date by the presiding officer. It bore two counts of robbery with violence and two alternative counts of handling stolen goods. In all the counts, the Appellant was charged jointly with another. On 23rd April, 2012, the Appellant was presented to court for plea taking. The prosecution presented before the court a fresh charge sheet and although at the bottom of page 1 was dated 20th April, 2012, it was admitted in court and signed by the presiding officer on 23rd April, 2012. The then presiding officer was Hon. C.A. Otieno, SRM. This charge sheet carried two counts, the main being of robbery with violence contrary to Section 295 as read with Section 296 of the Penal Code. In the alternative he was charged with handling stolen goods contrary to Section 322 (2) of the Penal Code. His co-accused was Kennedy Monyancha Ndege. The latter are the charges referred to in this judgment since that is what the Appellant pleaded to and no amendment was done thereafter. In a drastic move and without any further amendments to the charge sheet, Hon. E. Michieka, Ag. P.M., who finally took over the conduct of the trial and wrote the judgment, in his judgment referred to the charges which the Appellant did not plead to. Under the charge sheet presented to court on 23rd April, 2012, the complainant in the main charge is Samuel Mwangi Ndirangu. In the judgment, the learned trial magistrate referred the property stolen as belonging to Kijiji Management Limited but the person robbed as Samuel Mwangi Ndirangu who are the persons named in the charge sheet dated 20th April, 2012 and to which the Appellant did not plead. Incidentally, under that charge sheet, there were two counts of robbery with violence which again the learned trial magistrate did not refer to.

Another interesting scenario is presented by proceedings of 19th June, 2013. On this date, the prosecution had called all its witnesses but made an application to amend the charge sheet so as to reflect the actual name of the Appellant as Richard Atambo Otiso as opposed to Richard Atambi Otiso. Although the application was opposed by the defence as having come too late in the day, the trial magistrate

nevertheless allowed the same. In his ruling, Hon. E. Michieka indicated that the court reserved the Appellant's right to demand a recall of all the witnesses. At that point, the learned trial magistrate did not record if there was any comment from the Appellant on whether he wished to recall the witnesses. It is however clear that the Appellant indicated his wish to appeal against the ruling. Leave to appeal was granted accordingly. On 18th December, 2013, the Appellant informed the court that he had abandoned his pursuit for an appeal and the trial magistrate issued a hearing date. On the hearing date that was 19th March, 2014, the prosecution closed its case. At this juncture, I pose to note that the charge sheet which I have referred to in this judgment presented in court on 23rd April, 2012 names the Appellant as Richard Atambi Otiso. Therefore, even if the court allowed the amendment to the charge sheet, what was on record was not substituted with another charge sheet after which the Appellant with his co-accused would have been called to plead afresh. Thereafter, the trial court would have explained to the Appellant his right to recall the witnesses. None of the requirements were fulfilled.

Another anomaly is presented by the presence of yet another charge sheet which does not bear a signature or date appended by the presiding officer. A look at it has no nexus with the charges the learned trial magistrate referred to in his judgment. It neither comprised part of the Record of Proceedings. It is only found at the bottom of the original trial record. In that charge sheet, the Appellant together with another were charged with robbery with violence with an alternative count of handling stolen goods. In the main count, the complainant is named as Samuel Mwangi Ndirangu care of Kijiji Management Limited.

In all, it is vivid from the above chronology of facts that the trial was bungled. To say the least, the same amounted to a mistrial. This is majorly because from the summary of the judgment, the Appellant was convicted for offences he did not plead to which ultimately amounted to a miscarriage of justice. That ultimately would call for a retrial. I then grapple with the question of whether this is a good case for retrial. In the case of **EKIMAT VS REPUBLIC [2005] 1 KLR, 182** the Court of Appeal held that:-

“A retrial should not be ordered unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”

Also in **OPICHO VS REPUBLIC [2009] KLR, 369**, the Court of Appeal stated :-

“In general, a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was 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 was vitiated by a mistake of the trial court for which the prosecution was 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 retrial should only be made where the interests of justice required it.”

I have thoroughly examined the evidence on record and have no doubt in my mind that the Appellant was properly identified as one of the attackers against the complainant one Samuel Mwangi Ndirangu. After the carjacking, the complainant had sufficient time with the robbers who drove his car to his house where they carried away several goods. The assailants took their sweet time to ransack the complainant's house which gave him sufficient time to identify the Appellant. Within a fraction of a few hours, the Appellant was arrested in possession of the complainant's car. That makes me conclude that a retrial will not be aiding the prosecution to fill up any gaps in their case.

As regards the failure to fully comply with Section 214 of the Criminal Procedure Code, it is factual that the learned trial magistrate on allowing the application for amendment of the charge sheet ought to have called the Appellant to plead afresh. That is an error that is now well cushioned by the conclusion that a retrial is necessary. Again, the error occasioned by drafting the charge sheet under both Section 295 as read with Section 296(2) of the Penal Code is curable under Section 382 of the Criminal Procedure Code. I also do not think that a retrial would in any way prejudice the Appellant. He was sentenced to death

upon conviction whose length of period is numberless. Justice in the circumstances demand that the case for the complainant who lost a large amount of goods should be well canvassed in a proper trial to its logical conclusion. It is also justiciable that the final verdict be based on charges that the Appellant pleaded to. The interests of justice will be best served if a retrial be conducted.

In the result, this appeal partially succeeds with the orders that, I quash the conviction and set aside the death sentence. I order that a retrial be conducted. The hearing of the trial shall be on priority basis. The Appellant shall be escorted to Kikuyu Police Station not later than 22nd April, 2016 for purposes of preparing fresh charges. Thereafter, he shall be presented before a magistrate to take plea within the period provided under the Constitution. It is so ordered.

DATED and Signed this 8th day of April, 2016

G.W. NGENYE-MACHARIA

JUDGE

DELIVERED this 18th Day of April 2016.

L. KIMARU

JUDGE

In the presence of:

1. *The Appellant in person.*
2.for the Respondent.