REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 15 OF 2016

(Formerly Kisii High Court Criminal Appeals No. 2 and 3 of 2015 and Homa Bay High Court Criminal Appeal No. 1 of 2015)

ALEX NGUKO..1ST APPELLANT

ABRAHAM OTIENO OJALA......................2ND APPELLANT

HORRANCE OTIENO ANANA....................3RD APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. S. O. Ongeri, Senior Resident Magistrate in Homa Bay Chief Magistrate's Court Criminal Case No. 579 of 2013 delivered on 09/01/2015)

JUDGMENT

1. ALEX NGUKO, the first Appellant herein and **HORRANCE OTIENO ANANA,** the third Appellants herein were initially charged before the Chief Magistrate's Court's at Homa Bay in Criminal Case No. 78 of 2013 with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code**.** That was on 06/02/2013.

2. The particulars of the offence were as follows:

> '***On the 4th day of January 2013 at Osodo Area along Luanda-Nyamasare- Sindo murram road, Gembe Location in Mbita District within Homa-Bay County in the Republic of Kenya, jointly with another one not before court being armed with dangerous weapon namely pangas, rungus robbed GEORGE OKIRI ONYANGO of his motor cycle make Bajaj Reg. KMCS 803N, Nokia phone and Kshs. 3,000/= all valued at Kshs. 95,000/= and immediately before the time of such robbery wounded the said GEORGE OKIRI ONYANGO."***

3. The two appellants denied the offence and the trial began with the testimony of five witnesses before ABRAHAM OTIENO OJALA, the second appellant herein was also arrested and charged with a similar offence. The five witnesses were **GEORGE OKIRI ONYANGO** (the Complainant and **PW1**), **PAUL OUMA KOSAWA (PW2), JOHN OKETCH GOR (PW3), MOSES MARANDA OGUTU (PW4)** and **No. 239058 APC ORINDA KENNETH (PW5).**

4. The second appellant herein, ABRAHAM OTIENO OJALA, was charged on 18/10/2013, about eight months later, in the Chief Magistrate's Court's at Homa Bay in Criminal Case No. 1220 of 2013 with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code as well whose particulars were as follows:

> ***"On the 4th day of January 2013 at Osodo Area along Luanda-Nyamasare- Sindo murram road, Gembe Location in Mbita District within Homa-Bay County in the Republic of Kenya, jointly with others before court being armed with dangerous weapon namely pangas, rungus robbed GEORGE OKIRI ONYANGO of his motor cycle make Bajaj Reg. KMCS 803N, Nokia phone and Kshs. 3,000/= all valued at Kshs. 95,000/= and immediately before the time of such robbery wounded the said GEORGE OKIRI ONYANGO."***

5. On 04/12/2013 the prosecution made an application to consolidate the two cases and to recall all the five witnesses who had earlier on testified. The application was strenuously opposed by all the appellants herein but the trial court rightly allowed it and the appellants were then called to plead afresh to the consolidated charge whose particulars were as follows:

> ***"On the 4th day of January 2013 at Osodo Area along Luanda-Nyamasare- Sindo murram road, Gembe Location in Mbita District within Homa-Bay County in the Republic of Kenya, jointly being armed with dangerous weapon namely pangas, rungus robbed GEORGE OKIRI ONYANGO of his motor cycle make Bajaj Reg. KMCS 803N, Nokia phone and Kshs. 3,000/= all valued at Kshs. 95,000/= and immediately before the time of such robbery wounded the said GEORGE OKIRI ONYANGO."***

6. The appellants denied the charge and the trial court rightly so made an order recalling the witnesses who had earlier on testified. However that order was made for only PW1, PW2 and PW3. I have carefully perused the record but did not see the reasons why the trial court limited the number of witnesses who were to be recalled to only three and yet five of them had previously testified. The three witnesses were however recalled and were accordingly examined.

7. After PW1, PW2 and PW3 had been so recalled, the prosecution again came up with an application. This time round it was an application to amend the charge. That was on 16/01/2014. According to the prosecution the intended amendment was aimed at correcting the date on which the offence was allegedly committed from 04/01/2013 to 04/02/2013. As expected the application was opposed and in allowing it the trial court held as follows:

> ***'Under criminal procedure code the prosecution is allowed to amend the charge any time before the close of the prosecution [case] as long as the accused persons will not be prejudiced. The accused will have the liberty to recall the witness.***
>
> ***The application for amendment of the charge is allowed as I do not find any prejudice the prosecution [sic] will suffer.'***

8. The appellants were again called to plead to the fresh charge with the following new look particulars:

> ***"On the 4th day of February 2013 at Osodo Area along Luanda-Nyamasare- Sindo murram road, Gembe Location in Mbita District within Homa-Bay County in the Republic of Kenya, jointly being armed with dangerous weapon namely pangas, rungus robbed GEORGE OKIRI ONYANGO of his motor cycle make Bajaj Reg. KMCS 803N, Nokia phone and Kshs. 3,000/= all valued at Kshs. 95,000/= and immediately before the time of such robbery wounded the said GEORGE OKIRI ONYANGO."***

9. Upon taking the fresh pleas, the first appellant herein, who was the second accused person in the trial, made an application for the recall of PW3 for further examination. It appears like the trial court did not deal with that application since no order was made on the application.

10. Thereafter the trial proceeded on with the testimonies of PW4, PW5, PW6, PW7 and PW8 and the prosecution closed its case on 26/08/2014.

11. All the appellants were then found to have cases to answer and were placed on their defences. Upon tendering their respective defences the trial court rendered its well considered decision on 09/01/2015 where all the appellants were found guilty as charged and were accordingly convicted. They were then sentenced to suffer death.

12. It is on that background that the appellants filed their respective appeals which were later on consolidated. The appeals were in the first instance filed in the High Court at Homa Bay but the then Presiding Judge ***Majanja, J.*** disqualified himself as the Judge had previously dealt with an appeal by the first appellant herein relating to similar circumstances. The appeals were then transferred to the High Court at Kisii but were again returned to the High Court at Homa Bay. They were then transferred to this Court where they were heard.

13. The appellants hotly contested the convictions and sentences in their respective Petitions of appeal and submissions. At the hearing of the appeals, **Mr. Morigori** Learned Counsel appeared for the first appellant whereas the second and third appellants appeared in persons. Learned Counsel tendered oral submissions whereas the other appellants relied on their written and filed submissions.

14. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

15. I have carefully gone through the record, the submissions and the judicial decisions tendered as well. Predominantly the appeal revolved around four main issues being identification, amendment of the charge, inconsistencies in the evidence and the defectivity of the charge.

16. I will start dealing with the issue of the amendment of the charge since Mr. Morigori's vehemently submitted that the entire trial was a nullity in view of how the trial court handled that issue. To him, since the first appellant was unrepresented during the trial and made an application to recall PW3 after the amendment in vain then his right to a fair trial was infringed and the trial cannot stand in law.

17. I believe the argument is straightforward as it rests on a point of law, but first the record. I have already endeavored to trace the background of the appeals and in the process dealt with the amendment of the charge. It is not in doubt that the first and third appellants were in the first instance jointly charged as the second appellant was allegedly at large. The hearing then began and five witnesses testified. As that trial proceeded on the second appellant was arrested and was also charged with a similar offence. That led to the consolidation of the matters and despite the prosecution applying to recall all the witnesses who had already testified for further examination, the trial court, without ascertaining any reasons thereto, only made an order for the recall of only three witnesses being PW1, PW2 and PW3. It is worth noting that to that end the trial court erred. Since the appellants did not oppose the application which was reasonably made in the circumstances, the trial court was therefore under a duty to record its reasons for only recalling three out of the five witnesses who had earlier on testified. I can however vouch that to a great extent that was not intentional. The three witnesses were however recalled.

18. As the three witnesses who had been recalled finished their testimonies, the prosecution made an application to amend the charge with a view to change the date the offence was allegedly committed from **04/01/2013** to **04/02/2013**. The application was resisted by the first and the third appellants but it was ultimately allowed with liberty to the appellants to recall any or all of the witnesses who had by then testified. The first appellant then seized that moment and applied to recall PW3. The record is again silent on what came out of that application. The trial court simply did not make any kind of an order but proceeded on with the hearing where the testimonies of PW4,PW5,PW6, PW7 and PW8 were taken and

the court allowed the prosecution to close its case.

19 It is clear that the request by the first appellant to recall PW3 was not dealt with and again no reasons were attached to that. I however highly believe that it so inadvertently happened going by the clarity of mind in the ruling which the court had just made which ruling I have captured elsewhere above.

20. Be that as it may, the issue has now been taken up as one of the grounds of appeal. **Section 214** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya provides for instances where a charge can be amended and what ought to follow once the amendment is allowed. The section 214 (I) states that:

> **'214(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that -**
>
> **(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
>
> **(ii) 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.'**

21. Article 50 of the **Constitution of Kenya** provides for the right of an accused person to a fair trial. Relevant to this matter is **sub-article (2)(b)** and **(k)** which provides that:

> ***'(2) Every accused person has the right to a fair trial, which includes the right-***
>
> ***(b) to be informed of the charge, with sufficient detail to answer it;***
>
> ***(k) to adduce and challenge evidence.'***

22. The right to a fair trial extends throughout the entire trial and is among those rights under **Article 25** of the **Constitution** that cannot be limited in any manner whatsoever. It therefore means that any time the prosecution amended the charge, the appellants were entitled, as of right, to be informed of the amendment with such details as to be able to answer the amended charge. Further the appellants also remained at liberty to adduce their own evidence against the amended charge and to also challenge the evidence of the prosecution in support of the amended charge. That is a constitutional guarantee.

23. As I have stated above, although the first appellant rightly pleaded to the amended charge, he was not allowed to re-examine a witness of his choice, the PW3. This issue has also been considered on several instances by the Court of Appeal. In the case of **<u>Harrison Mirungu Njunguna v. Republic Criminal Appeal No. 90 of 2004</u>** (unreported) the Court of Appeal held that ***".......the right to hear the witness give evidence afresh on the amended charge or to cross examine the witnesses further is a a basic right going to a root of a fair trial".*** The appellate Court then found the proceedings before the trial court substantially defective and further explained that the failure of the trial court to inform the accused of his rights given to him by law was not a procedural technicality which could be cured under the provisions of **Section 382** of the Criminal Procedure Code.

24. The foregone case of **<u>Harrison Mirungu Njunguna</u>** (supra) was further discussed by a differently constituted bench in the case of **<u>Joseph Kamau Gichuki v. Republic (2013) eKLR</u>** where Hon. Justices ***Mwera, JBM Kariuki*** and ***M' Inoti, JJA***. on 26th day of July 2013 had the following to say:-

> ***'Before we leave this point, we would like to observe that the case of HARRISON MIRUNGU NJUGUNA V R (supra) relied upon by the appellant is not a relevant authority in the present appeal. That case involved amendment of a charge under section 214 of the Criminal Procedure Code. 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 a mended and to be cross-examined. '***

25. The Court of Appeal further considered the same issue in **Samwel Kilonzo Musau v. Republic (2014**) eKLR where a trial court had allowed a charge of defilement to be amended to include the words ***"intentional and unlawfully"*** in the particulars of the offence. The accused person in that case did not object to the application and the amendment was allowed. The appellant was called to plead to the amended charge after which he pleaded not guilty and a plea of not guilty was duly entered. The applicant did not indicate that he wished to have any of the witnesses who had already testified in court to be recalled and the trial proceeded. When he was convicted and sentenced, the accused person then took up the issue on appeal. The Court held that the trial court did not err in not giving the appellant an opportunity to recall any of the witnesses since the appellant did not apply to do so in the first instance. The Court also noted that the amendment was only meant to ensure technical compliance of the charge and that it did not impinge on the appellant's defence.

26. Turning back to the matter at hand and looking at the amendment in issue, I pose this question: **'What was the effect of the amendment to the appellants?'.**

27. It is clear that the effect of the amendment was to alter the case the appellants faced. I say so because the amendment changed the date of the alleged offence from 4th January 2013 to 4th February 2013. That was a clear difference of 30 days. The possibility that the defence the appellants would have taken in respect to the alleged events of 4th January 2013 could be different from the defence they would have taken relating to the alleged events of 4th February 2013 cannot be said to be remote. The amendment was therefore not meant to cure a technical compliance of the charge but it went to the root of the charge and no doubt impeached on the appellants' defences. The first appellant was therefore perfectly within his right to apply for the recall of PW3. The failure on the part of the court to order the recall of PW3 as requested by the first Appellant infringed on the first appellant's right to a fair trial. That rendered the trial substantially defective.

28. Having so found, would it be reasonably possible to sever the defective trial on the part of first appellant from other appellants? The answer is in the negative. That is because the trial was jointly conducted after the charges were consolidated. The effect therefore is that the entire proceedings were a nullity.

29. In view of the above finding the consideration of the other grounds of appeal will not add any value to this matter. I will however consider the possible way forward; that is If the appellants are to be set at liberty or be re-tried.

30. The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

> ***'...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where where the conviction is set aside because of insufficient 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;......'

31. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi v. R (2012)eKLR**:

> ***"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
>
> > *'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered………In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'*
>
> ***That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:***
>
> > *'…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.'"*

32. Applying these principles to this appeal and considering the nature of the evidence on record, the charge, the injuries sustained by PW1, the possibilities of the availability of the witnesses mostly of whom were from PW1's neighbourhood and given that the appellants were convicted barely one and a half years ago and since that eliminates the risks of faded memory, I am of the considered finding that this is a case for retrial.

33. Consequently the appeal is hereby allowed, the conviction quashed and the sentence set aside. The appellants shall be released into police custody and be produced before any other Court competent to try them except Honourable S. O. Ongeri within 10 days of this judgment.

Orders accordingly.

DELIVERED, DATED and SIGNED this 20th day of July, 2016.

A.C. MRIMA

JUDGE