REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 114 OF 2015

K M M………...….…….…….…. APPELLANT

VERSUS

REPUBLIC …………...……… RESPONDENT

JUDGMENT

INTRODUCTION

1. This is a judgment on an appeal from the decision of the trial Court (Hon. T. A. Odera, PM) in Mavoko PMCC Criminal Case No. 189 of 2014 in which the appellant was on 10th February 2014 convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to suffer death. The trial Court had upon taking plea in the trial against the Appellant, who is alleged to have been a minor at the time of the trial, accepted a plea of guilty by the appellant, who was unrepresented, and convicted him on own plea of guilty and sentenced him to suffer death.

2. The appellant had been charged on the 10th February 2014 with the offence of 'robbery with violence contrary to section 295 as read with section 296 (2) of the penal Code' whose particulars were given as follows:

> ***"Particulars of Offence:*** *K M M. On the 4th day of February 2014 at City Cotton area in Athi River District within Machakos County, while armed with an offensive weapon namely a stone, robbed Dominic Mwaura off one phone Make Nokia 340 valued Ksh.1500/- and cash Ksh.300/- and at the time of such robbery with violence used personal violence to the said Dominic Mwaura."*

3. The appellant pleaded guilty to the charge and confirmed the facts read out and set out in the proceedings as follows:

> *"**Facts***
>
> ***Prosecution*** *– Facts are that on 4.2.14, at about 10.00p.m, complainant namely Dominic Mwaura was walking from City cotton in Athi River heading to London Distillers where he works as an electrician. He was followed from behind by accused. On the way, accused turned against complainant who was well known to him by hitting him on the forehead with a stone. Complainant lost consciousness. Accused robbed him a mobile phone make Nokia 340 valued at Kshs. 3,000/= and Kshs. 300/= cash money and his national identity card. Complainant gained consciousness*

and found accused missing. He reported the case to the village elder. The elder called the father to accused who came to the resident of the elder with accused. Accused was ordered to produce the stolen items but he never did. He only produced the sim card to the said phone which he broke. I produce the sim card as an exhibit herein (P.Exh. 1). He confessed to have stolen the phone and sold it at Kshs. 500/= to an unknown person. Complainant reported the case to Athi River police where accused was escorted to. He was treated at Athi River Health Centre and the P3 form which had been issued to him was filled. The injuries were assessed as harm. I produce the P3 form (PExh.2). Accused was charged with the offence herein."

4. Upon conviction and sentence the accused filed an application by Notice of Motion for bail pending appeal in HC Misc. Application No. 101 of 2015 attaching a Petition of Appeal dated 22nd June 2015 [subsequently refiled on 22nd July 2015 as HC Criminal Appeal NO. 114 of 2015]. The principal complaints against the proceedings and judgment of the Court were that the accused who was allegedly a minor at the time of the trial was not afforded representation by Counsel as required under section 77 and 186 of the Children Act and that he was illegally sentenced to death contrary to the provisions of section 190 (2) of the Children Act and Article 37 (a) of the United Nations Convention on the Rights of the Child (UNCRC). The grounds of the Petition of Appeal, which was subsequently refilled in HC Cr. Appeal NO. 114 of 2015 are set out below:

1. *"That the learned trial magistrate made a fundamental error of law in sentencing the appellant to death when he was a child contrary to Section 190(2) of the Children Act 2001 and Article 37(a) of the United Nations Convention on the Rights of the Child(UNCRC);*
2. *That the learned magistrate erred in law by allowing the taking of a plea and proceedings to be conducted before ascertaining the age of the appellant who was only 15 years old at the time of pleading guilty to a capital offence.*
3. *That the learned magistrate erred in law by failing to promptly inform the appellant of his right to be represented by Counsel at the state's expense as required by Article 50(2) (G) of the Constitution of Kenya;*
4. *That the learned magistrate erred in law by allowing the plea and proceedings to be conducted when the Appellant was not represented by counsel despite the Appellant being a child and facing a capital trial;*
5. *That the learned magistrate erred in law by failing to ensure that the state provided the appellant with an advocate when there was a real possibility of substantial injustice being occasioned on a charge of robbery with violence contrary to Article 50(2)(H) of the Constitution of Kenya Act; a(2010);*
6. *The plea taken by the minor appellant was unsafe, unsound, illegal and void ab initio;*
7. *That the appellant was born on the 27th of October, 1999, making him only 15 years of age when he took the plea in a capital offence and 17 years old presently as he serves on death row in an adults prison;*
8. *The trial herein did not comply with Section 185 of the Children Act;*
9. *The entire proceedings in this case were inept, incurably and fatally flawed, illegal and void ab initio;*
10. *That there occurred in this case a manifest miscarriage of justice.*"

5. With the consent of the counsel for the parties, and indication by the State that it would investigate the matter of the age of the accused and consider whether or not to support the conviction, the Court directed that the appeal proceeds to hearing and the Notice of Motion for bail was marked as withdrawn.

SUBMISSIONS

6. Counsel for the State, Ms. Njuguna, conceded the appeal on the grounds that the accused had not been provided with counsel during trial and that he was sentenced to a sentence of death contrary to law, but sought that the accused be retried contending that the trial was in the circumstances illegal and defective.

7. For the appellant, Mr. Kamau, urged that the appellant was entitled to an acquittal upon the state conceding the appeal and on the principle of ***autrefois acquit***, the appellant could not be tried again for

the same offence. He contended that it would be unjust to subject the appellant to a retrial on the same evidence for which he was convicted and sentenced to death previously in an illegal trial, and urged the Court to acquit the appellant and order his immediate release from custody.

DETERMINATION

8. principle of *autrefois acquit autrefois convict* is set out in section of the Criminal Procedure Code cap.75 as follows:

> *"**279.** (1) An accused person against whom an information is filed may plead-*
>
> ***(a) that he has been previously convicted or acquitted of the same offence;** or (b) that he has obtained the President's pardon for his offence.*
>
> *(2) If either of those pleas are pleaded and denied to be true, the court shall try whether the plea is true or not.*
>
> *(3) If the court holds that the facts alleged by the accused do not prove the plea, or if it finds that it is false, the accused shall be required to plead to the information."*

9. However, I consider that the principle applies where an accused is acquitted or convicted by a court after consideration of the merits of the case so that it is prejudicial to reopen the matter by trying him on the same facts upon which he has been convicted, or acquitted, for an offence previously. It does not apply, in my view where there is no determination on the merits of a case based on the facts thereof. Indeed, it is for this reason that when the court in considering an order for retrial the appropriate thing to do is to set aside the conviction upon the illegal trial and not to quash the conviction, as the merits of the case, on its facts, will not have been determined. In ***Otieno & Anor. v Republic*** (1991) KLR 493 the Court of Appeal (Gachuhi, Cockar, JJA & Omolo, Ag. JA) said:

> *"This case would appear to be an authority for the proposition that where the record of the trial court is indecipherable, which is the exact position in the appeal before us, a retrial ought to be ordered, of course bearing in mind the other factors such as whether the appellant has served a substantial portion of the sentence and whether in all the circumstances of the case, a retrial would be fair. In the case of **Zedekiah Ojuondo Manyala v Republic, Criminal Appeal No 57 of 1980, (unreported) this Court held that a retrial will only be ordered when the original trial was illegal or defective. The appeal was allowed on the ground that the trial was not illegal or defective, and it was the charge that was defective. We think this is the correct test and in the circumstances of this case no one alleged that the original trial of the appellants was illegal or defective.** It is the record of the magistrate which turned out to be defective in the sense that it is "gibberish and utterly incomprehensible".*
>
> *Again the appellants do not appeal to us against the quashing of their conviction and despite our having extended to the Republic time to reconsider its position no application to appeal out of time was made to us. We would accordingly have no jurisdiction to make any order in connection with the quashing of the convictions as no complaint is made against that part of the High Court order. **We are ourselves of the view that when ordering a retrial, the proper order to make is not to quash but set aside the conviction since the merits of the conviction have not been gone into.** Mr Okumu for the Republic in the end conceded the appeal. We allow the appeal and set aside the order of retrial made by the High Court. That shall be the order of the Court."*

10. In the present case, the appeal is conceded by the State not for any considerations on the merits of the case but on the illegality in the proceedings where a minor was tried without the benefit of representation by Counsel which is statutorily required under sections 77 (1) and 186 (b) of the Children Act and for the defective sentence of death on a minor in contravention of section 190 (2) of the Children Act. The said

provisions of law provide as follows:

> *"**77.** (1) Where a child is brought before a court in proceedings under this Act or any other written law, the court may, **where the child is unrepresented, order that the child be granted legal representation.***
>
> ***186.** Every child accused of having infringed any law shall-*
>
> > ***(b) if he is unable to obtain legal assistance be provided by the Government with assistance** in the preparation and presentation of his defence;*
>
> ***190.** (1) No child shall be ordered to imprisonment or to be placed in a detention camp.*
>
> ***(2) No child shall be sentenced to death.**"*

Factors to be considered in an order for retrial

11. Besides the first principle that a retrial will be ordered only when there has been an illegality or defect in the trial, there are other considerations whether the defective trial is the result of prosecution error, in which case retrial ought not be ordered or whether the defects are the caused by mistakes solely on the part of the Court in which case retrial will be ordered; that a retrial be prejudicial to an accused who has served the whole or substantial part of the sentence; where retrial would not be possible for want of witnesses for the prosecution or the defence; or where it otherwise be unfair to the accused to order a retrial.

12. These general principles were adverted to in **Makupe *v* Republic** Court of Appeal, at Mombasa July 18, 1984, Kneller JA, Chesoni & Nyarangi Ag JJ A (1984) KLR 523, where the Court said:

> > ***"In general, a retrial will be ordered when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in the evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for a 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 the appellant (or accused)."***

13. In making an order for retrial the appellate court must take the "*view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly be said to have resulted.*" A retrial will not be ordered where on the evidence before the trial court, the appellate court does not consider that a conviction is possible.

14. However, even the initial trial is illegal and defective, the decision to order retrial depends on the circumstances of the case as shown in ***Munyole v Republic*,** Court of Appeal, at Kisumu December 5, 1985 where the Court (Hancox, Nyarangi JJA & Gachuhi Ag JA) 1985 KLR 662 held:

> *"In these circumstances this Court has come to the conclusion that the only safe course is to allow the appeal, quash the conviction, set aside the sentences and order that the appellant shall be set at liberty unless he is otherwise lawfully held.*
>
> *We have considered the possibility of ordering a retrial on the principles of the decisions in Ahamed Ali Sumar v Republic [1964] EA 481, Horace Kiti Makupe v Republic Criminal Appeal No 93 of 1983 (unreported) Mohamed Rafiq v Republic Criminal Appeal No 56 of 1983 (unreported) and Bassan v. p [1960] EA 854 at page 867 it being our view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly be said to have resulted. **We feel however, that it would not be possible at this late stage for the prosecution to marshal***

their witnesses and exhibits so as to prosecute the case fairly and with any reasonable prospect of success. Furthermore, the appellant might be prejudiced in his defence if a retrial were to be held. For these reason, we have decided not to order a retrial."

15. No submissions were made on the evidence before the trial court in this appeal. However, having seen the record of proceedings, this appellate court is not able to hold that there was no evidence upon which a court properly directing itself could convict the accused person. Without prejudging the merits of the case, I consider that if the facts of the case read out to the appellant at the plea stage, as set out above, were proved there would be evidence upon which a court may in *a properly prosecuted trial* found a conviction for the offence of robbery with violence contrary to section 296 (2) of the Penal Code as charged.

FINDINGS

16. The appeal was based on the contention that "*[t]he entire proceedings in this case were inept, incurably and fatally flawed, illegal and void ab initio*". I agree and specifically find that the trial of the appellant by the trial court was illegal and defective for contravening the statutory provisions of section 77 (1), 186 (b) and 190 (2) of the Children Act relating to legal representation of a child and restriction on punishment. The errors in the proceedings and judgment were not caused by the prosecution nor can they be blamed on it.

Whether to order a retrial

17. As held in ***Makupe,*** supra, "***each case must depend on its particular facts and circumstances and an order for a 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 the appellant (or accused).***"

Best interests of the child

18. The court is in accordance with Article 53 (2) of the Constitution required to take the best interests of the child as paramount. The accused minor was in Form 3 at the time of arrest and trial. He has spent over one (1) year ten (10) months in custody since he was convicted on own plea of guilty and sentenced to suffer death on 10th February 2014, having been arrested on the 8th February 2014. The child's best interest must be in a fair trial in accordance with the provision of the Children Act. The said Act protects the rights of the child by provisions that he should be tried with the assistance of counsel and if convicted should not be sentenced to death or to an imprisonment term.

19. The appellant has already been in prison for one (1) year ten (10) months under an illegal process and order, which must be considered a great prejudice for a child who should have been attending his school either out of prison or in an appropriate institution had the trial been conducted and sentence imposed in accordance with the law (see section 191 of the Children Act). If it were the case of an adult for whom an imprisonment is be feasible, the period of one (1) year ten (10) months that the appellant has suffered may have been taken into account in any sentence of imprisonment that may be ordered upon a proper trial in accordance with section 333 of the Criminal Procedure Code.

20. Having already suffered such prejudice of an illegal and irreversible penalty of imprisonment for the period that he has been in custody, I think it would be unjust to order a retrial upon the same charge.

ORDERS

21. Accordingly, for the reasons set out above, I make the following Orders:

a. **The appellant's petition of appeal herein dated 20th July, 2015 is allowed, and his conviction for robbery with violence contrary to section 296 (2) of the Penal Code is quashed; and**
b. **The sentence of death passed on the appellant is set aside.**

22. The appellant will immediately be set at liberty unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 8TH DAY OF DECEMBER 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mrs. Nyaata for Mr. Kamau for the Appellant

Miss Njuguna for the Respondent

Ms. Doreen- Court Assistant.