REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 361 OF 2009

REPUBLIC …….RESPONDENT

VERSUS

DANIEL CHEGE MAGOTHO….……..APPELLANT

[Being an appeal from the original conviction and sentence by Hon. C.W. Meoli, C.M. dated 13th August 2009 in Thika CMCCR Case No. 5040 of 2008]

JUDGMENT

1. The appellant Daniel Chege Magotho was charged, tried and convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code. The prosecution case before the trial court was that the appellant (then accused) together with another not before court while armed with pangas and a piece of wood, stalked then robbed the complainant, one Elizabeth Wangui Nyoike of Kshs.20,000/- and a mobile phone valued at 4,000/- and at the time of the robbery used actual violence against her. The offence was committed on 10th November 2008 at Kagaa Trading Centre in Muranga South District within Central Province.
2. After hearing the prosecution evidence the court put the appellant on his defence. He gave an unsworn statement. The court found him guilty and sentenced him to suffer death as by law provided. The appellant has now appealed against both conviction and sentence.
3. In his petition of appeal dated 24th August 2009, the appellant sets out several grounds which when condensed are to the effect that there was no proper identification; that no exhibits were produced in the case; that the witnesses gave contradictory evidence and that the trial court rejected the defence evidence without reason. At the hearing of the appeal however, the appellant abandoned all the aforelisted grounds and instead chose to introduce a new ground *to wit* that the trial court denied him a chance to prepare his defence by not enforcing his right to access witness statements despite him having made the request several times in court.
4. This appeal has been conceded by the Republic. **Mr. Kadembe,** learned counsel for the Respondent submitted before us that the appellant's right to a fair hearing was violated and that the same vitiates the outcome of the trial. Counsel however submitted that should the court arrive at such a finding and quash the conviction, it should order a retrial as there was overwhelming evidence to secure the conviction of the appellant.
5. Despite the concession of the appeal by the respondent, we consider it our duty as a first appellate court to reconsider the record and re-evaluate the proceedings to arrive at our independent decision whether or not there was such violation of the appellant's fair trial rights as to vitiate the trial. We consider this the import of the duty succinctly set out by the court of appeal in **Pandya Vs. R. [1957] E.A. 336** and **Okeno Vs. Republic [1972] E.A. 321.**
6. After hearing submissions of both parties we consider that the first issue for our determination is whether or not the appellant's fair trial rights were violated during the trial and whether as a result

of such violation (if any), the appellant suffered such prejudice as to vitiate the trial. The second issue is whether we should order a retrial in the event that we quash the conviction.

7. Section 77 of the old Constitution provided what is popularly called fair trial rights in the following terms;-

> *77 (i) If a person is charged with a criminal offence…..shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
>
> *(2) Every person who is charged with a criminal offence –*
>
> > *(c) shall be given adequate time and facilities for the preparation of his defence;*
> >
> > *(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.*

These provisions have been carried over into the present constitution perhaps with greater clarity under Article 50. The following are particularly relevant:-

50(2) (c) – the right to have adequate time and facilities to prepare a defence:

> *(a) to be presumed innocent until the contrary is proved;*
>
> *(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;*
>
> *(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.*

8. The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence has over time crystalised notwithstanding the lack of a specific provision in the old Constitution.

In Thomas Patrick Gilbert Cholmondeley Vs. Republic [2008] eKLR, the Court of Appeal stated categorically that;

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under Section 71 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively **R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508;** and, the Kenyan Case of **George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001).**

9. Of relevance to this appeal is "the right to have adequate time and facilities to prepare a defence" and "the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence". We have scrutinized the record to evaluate the proceedings to see if the same were conducted in accordance with the law.

10. The record shows that the appellant was arraigned in court on 17th November, 2008 when he pleaded 'not guilty'. The court then fixed the case for mention on 27th November 2008 and ordered that *"witness statement(s) and charge sheet to be supplied at defence cost."*

11. .On 18th December 2008 when the case was to proceed to trial the accused told the court that he had not got the witness statements. In response the court ordered *"The accused has an order for statements. Let him get them in usual way"* and adjourned the hearing to 11th February 2009. We have scrutinized the record to evaluate the proceedings to see if the same were conducted in accordance with the law.

On 11th February 2009 the accused still did not have statements. He told the court *"I do not have the statements. The order was given but I did not get statements."* The court's order this time read *"Accused to obtain statements from the police station"* The hearing was adjourned to 24th March 2009. Still on 24th March 2009 the accused sought an adjournment on account of not having got the statements. The prosecutor at that point who all along had had witnesses in court prayed that the court directs that it be the last adjournment.

It does appear from the record that the court was by that time tired of adjourning the case for the same reason. It gave a final adjournment and directed *"No further adjournment for statements"*

12. On 15th April 2009 the accused informed the court that he still did not have statements. The court proceeded with the trial and two witnesses testified on that day. On the 4th June 2009 one more witness testified. On the same day, the accused expressed a wish to recall PW1 and PW2 for cross-examination. The court acceded to his request.

13. The trial resumed on 30th June 2009 with two more witnesses PW4 and PW5. The prosecution then closed its case. There is no evidence on record that the witnesses whom the accused desired to have recalled were indeed recalled. Subsequently the accused was put on his defence. On 20th July 2009, he gave an unsworn statement. At the end of the trial the court found the accused guilty and sentenced him to suffer death.

14. From the above record, it is apparent that the court was fully aware that the appellant had not been supplied with witness statements when it proceeded to hear the matter. It is also clear that although the appellant requested to have two witnesses recalled for further cross-examination, the same was not done. In our considered view, this was a blatant violation of the accused's right to a fair trial. Under those circumstances, he could not have prepared his defence. He was not informed in advance of the evidence that the prosecution wished to rely on.

15. Whereas we do not wish to speculate on the procedure that was in place for the accused to access witness statements, we do not think that the order given by the trial court that the accused *'to get the statements from the police station'* was practical. The accused was in custody. There is no evidence that he was facilitated to visit the police station in question. The court ought to have directed the order at the prosecutor to provide the statements. Indeed it was the duty of the police to pass on the statements to the Attorney General who was the prosecuting authority and who in turn had the legal duty to disclose it to the appellant before this trial and throughout the trial where necessary. See the Cholmondeley case (supra). Taking all the circumstances of the present case into consideration, it is our view that the appellant's fair trial rights were in this case violated as a result of which he suffered prejudice. We must allow this appeal on that ground alone.

16. Having allowed the appeal should we order a retrial? **Mr. Kadembe** for the respondent urged us to order a retrial stating that the evidence against the appellant was strong. The appellant on the other hand beseeched us to consider the period of time he had been in custody and set him free. The principles upon which a court can order a retrial was set out in **Ahmedi Ali Dharamsi Sumar V. Republic 1964 E.A. 481** and restated in **Fatehali Manji V. The Republic 1966 E.A. 343** the Court of Appeal restated the principles, that guide a court when deciding whether or not to order a retrial as follows:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency 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; each case must depend on its particular facts and circumstances and an order for 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 accused person".

17. Applying these principles to the appeal before us, we consider that the mistakes of the court should not be visited on the accused. Secondly, we have considered that the appellant has been in custody for five years now. He must have received sufficient correction and rehabilitation. We are of the view that this is a proper case in which the court can temper justice with mercy. We decline to order a retrial.

18. In the result, we allow the appeal and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Judgment dated and delivered at Nairobi this 25th day of February, 2014.

……

R. LAGAT-KORIR

JUDGE

D.K. NJAGI MARETE

JUDGE

In the presence of:

……: Court clerk

……: Appellant

……: For the appellant

……: For the State/respondent