



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 247 CONSOLIDATED WITH NO. 248 OF 2011

REPUBLIC .....RESPONDENT

VERSUS

PETER GITAU NJUGUNA.....1<sup>ST</sup> APPELLANT

GERVASO GITONGA .....2<sup>ND</sup> APPELLANT

*[Being an appeal from the original conviction and sentence by Hon. E.O.Obaga P.M. dated 20<sup>th</sup> September 2011 in Nairobi CMCCR Case No. 1692 of 2010]*

JUDGMENT

1. Peter Gitau Njuguna and Gervaso Gitonga hereinafter the appellants were 1<sup>st</sup> and 2<sup>nd</sup> accused respectively in Criminal Case No. 1692 of 2010 at the Chief Magistrate's Court, Nairobi. The accused persons Peter Gitau Njuguna and Gervaso Gitonga face a charge of robbery with violence contrary to section 296 (2) of the Penal Code. Particulars are that on the 25<sup>th</sup> day of September 2010 at Thigiri Ridge area in Gigiri within Nairobi area, jointly with others not before court while armed with dangerous weapons namely pangas robbed Winfred Mueni of one mobile phone make Nokia, one Erickson mobile phone, medal, jewelleryes and motor vehicle registration no. KBE 079L Toyota Runex silver all valued at approximately one million the property of Nasor Varji and at the time of such robbery used actual violence against Winfred Mueni Willah. They each faced an alternative charge to Count 1 of handling stolen property contrary to Section 322(1) of the Penal Code.
2. On Count II the 1<sup>st</sup> appellant faced a charge of rape contrary to section 3(1) as read with Section 3 of the Sexual Offences Act with the alternative charge of indecent assault contrary to Section 11(b) of the Sexual Offences Act. He was said to have raped one Winfred Mueni Willah.
3. At the conclusion of the trial, the two appellants were convicted on the 1<sup>st</sup> Count of robbery with violence and sentenced to suffer death. In addition, the 1<sup>st</sup> appellant was convicted on the second count for the offence of rape though the court held the sentence in abeyance.
4. Both appellants were aggrieved by the conviction and sentence and appealed to this court by filing respective homemade memorandum of appeal on 30<sup>th</sup> September 2011. Subsequently, **Mrs Rashid** their learned counsel now on record sought and obtained leave of the court to file amended petitions. The amended petitions filed on 30<sup>th</sup> September 2011 and 3<sup>rd</sup> August 2012 respectively for the 1<sup>st</sup> and 2<sup>nd</sup> appellants have eight identical grounds set out as follows:-

1. *The trial magistrate erred in law and in fact in convicting and sentencing the Appellant on 1<sup>st</sup> ground of robbery with violence when he didn't take a plea to it. (Ref. page 20 of proceedings*

- after substitution of charge)*
2. *The learned trial magistrate erred in law and in fact in convicting the Appellant in total contravention of Section 214 of the CPC. (After substitution from page 20, vital witness not recalled).*
  3. *The learned trial magistrate erred in both law and in fact in convicting and sentencing the Appellant on the basis of evidence of witnesses who had not testified after substitution of charge.*
  4. *The learned trial magistrate erred in law and fact in convicting and sentencing the Appellant on defective and faulty identification in difficult circumstances.*
  5. *That the learned trial magistrate erred in law and in fact in putting reliance on PW6 parade officer's evidence and whereas the same had not been conducted pursuant to identification parade rules under F.S.O. CAP 46.6(V)*
  6. *That the learned trial magistrate erred in law and in fact in accepting the evidence of PW1 and PW9 as safe, and whereas the same were inconsistent and contradictory in material particulars.*
  7. *That the learned trial magistrate erred in law and in fact in finding that the doctrine of recent possession of stolen property was applicable in the Appellant's case and whereas the legal requirement of proof had not been met or proved that is, proof beyond reasonable doubt.*
  8. *That the learned trial magistrate erred in law and in fact in failing to take into account and or failed to consider and or failed to give reason why he disregarded the Appellant's defence.*
5. The appeal has been conceded by the State on legal grounds. **Mr. Kadembe** the learned counsel for the Republic submitted before us that the record reveals a number of irregularities in the trial that violated the appellants' fair trial rights. He pointed out from the proceedings that the trial court proceeded with the trial on the basis of an amended charge sheet without requiring the 2<sup>nd</sup> appellant to plead to the 2<sup>nd</sup> Count for which he was subsequently convicted. Secondly, he submitted that both appellants had requested the court to recall 3 key witnesses for further cross-examination. The court however concluded the trial without recalling the witnesses despite having made an order requiring them to be recalled. In his view, the irregularities were so fundamental as to vitiate the trial. He urged us to set aside the conviction and sentence.
  6. **Mr. Kadembe** however argued strongly in favour of a retrial. It was his submission that there was a strong likelihood that another trial court would still arrive at a conviction owing to the availability of compelling evidence on record. Further, he indicated that the witnesses were still available to testify in the retrial.
  7. 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**.
  8. After considering the grounds of appeal aforesaid and the submissions of the parties, we consider that the two key issues which lend themselves for our determination are, firstly, whether the irregularities in the trial were so fundamental as to vitiate the trial; and whether we should order a retrial in the event that we set aside the conviction.
  9. We shall begin with the issue of irregularity of the proceedings. **Mrs. Rashid** raised two issues before us. First with respect to the 2<sup>nd</sup> appellant, she submitted that he was tried and convicted for the offence of rape yet he did not plead to the charge, when the court amended the charges in the course of the trial. Secondly, with respect to both appellants, she submitted that they were denied a chance to recall and re-examine the first three prosecution witnesses. It was her submission that the irregularities vitiate the trial. She referred us to Section 214(i) of the Criminal Procedure Code and a number of authorities namely; **Harrison Mirungu Njuguna –Vs- Republic – Criminal Appeal no. 90 of 2004; Rebecca Mwikali Nabutola –Vs- Republic – Misc. Criminal Appeal No. 445 of 2012; and, Joseph Lomis Echokule & 2 others –Vs- Republic – Criminal Appeal Nos. 205 & 312 of 2006**.
  10. The record shows that the appellants first took plea on 24<sup>th</sup> September 2010. Both appellants (then accused) pleaded not guilty to the 1<sup>st</sup> Count of robbery with violence. The 2<sup>nd</sup> appellant faced a 2<sup>nd</sup> count of rape to which he pleaded not guilty. The record reads as follows:-

*Count 1*

*Accused 1 – Not true*

*Accused 2 – Not true*

*Count 2*

*Accused 1 – Not true.*

*Court – Plea of not guilty entered for accused persons.*

11. The trial commenced on 20<sup>th</sup> December 2010 before Resident Magistrate E. Obaga. **Mr. Nyakundi** and **Mr. Jaleny** appeared for the 1<sup>st</sup> and 2<sup>nd</sup> accused respectively. On that day PW1 (Joram Oginda- security guard), PW2 (Nasor Verjee/owner of the house) and PW3 (Nilufer Verjee/wife) testified. Thereafter the trial was adjourned.

When the trial resumed on 3<sup>rd</sup> January 2011, the prosecutor applied to substitute the charge sheet. The defence indicated that it had no objection. The court allowed the prosecutor to substitute the charge and also allowed that the 3 witnesses who had testified be recalled. The record reads:-

*“Court – substitution allowed. Charge read over and explained to accused persons in Swahili.*

*Count 1 – 1<sup>st</sup> accused – Si kweli (not true)*

*Court – Plea of not guilty entered.*

*Alternative to count 1 for both accused*

*1<sup>st</sup> accused – Si kweli (not true)*

*2<sup>nd</sup> accused – Si kweli (not true)*

*Plea of not guilty entered.*

*Alternative to Count 1 in respect of 1<sup>st</sup> accused – Si kweli (not true)*

*Court – Plea of not guilty entered.*

12. It is clear from the record reproduced above that there were a number of errors of omission on the court record. First, we believe that the record should have read Count 2, it reads Count 1. Secondly, there is a total omission of the plea to the main count. In our view it is not comprehensible that the accused could have been required to plead to an alternative charge without pleading to the main charge. However, we have had recourse to the handwritten original record of the court and confirmed that the omission does indeed exist. Be that as it may, basing our observation purely on the record, we will reluctantly agree with defence counsel that the accused did not plead to the 2<sup>nd</sup> count and that therefore he could not legally be convicted on a charge that was in law non-existent.

13. The second complaint was raised by both appellants. In the submissions of their counsel, both appellants were denied the opportunity to have witnesses who had testified recalled for cross-examination. We have critically perused the record and agree with counsel on this submission. The record shows that the court allowed the prosecutor to amend charges on 3<sup>rd</sup> January 2011 after 3 key prosecution witnesses had testified. It also shows that after plea, the same court directed that the 3 witnesses be recalled for further cross-examination.

14. Subsequently however, when the trial recommenced on 14<sup>th</sup> January 2011 the prosecutor presented the 4<sup>th</sup> witness and 5<sup>th</sup> & 6<sup>th</sup> witnesses on 18<sup>th</sup> February 2011. On 25<sup>th</sup> March 2011, **Mr. Nyakundi** for 1<sup>st</sup> accused reminded the court of its order to recall PW1. He again raised the same issue on 26<sup>th</sup> April 2011. It appears from the record that the trial continued and after calling 12 witnesses the prosecutor closed his case on 1<sup>st</sup> August 2011 before recalling any of the first 3 witnesses who had testified prior to the amendment of the charges.
15. The record is clear that the court disregarded its own order and upon the close of the prosecution's case put the appellants on their defence. From our perusal of the record there is nothing to indicate why the witnesses were not recalled. With profound respect, we find the omission to give effect to the accused's right to have the witnesses recalled for further cross-examination a misdirection on the part of the court. We agree with both **Mrs. Rashid** and **Mr. Kadembe** that the failure of the court to prevent the assault on the appellant's fair trial rights vitiated the proceedings and the outcome of the trial. We must set aside both the conviction and sentence on this score.
16. In **Harrison Mirungu Njuguna V. Republic** (*supra*), the Court of Appeal held that *'the right to hear the witnesses give evidence afresh on the amended charge or to cross-examine the witnesses further is a basic right going to the root of a fair trial...'* The court found the proceedings substantially defective and explained that the failure of the court to inform an 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 Penal Code. We find in this case that the accused were fully aware of their right to recall witnesses but that the court did not heed their numerous calls to give effect to the law.
17. The final issue we must determine is whether or not to order a re-trial. **Mr. Kadembe** for the respondent urged us to order a retrial. **Mrs. Rashid** for the appellants on the other hand urged us to set them at liberty. We have considered this issue at length.
18. The principles upon which a court can order a retrial were 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** wherein the Court of Appeal offered guidance in the following terms:-

*"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".*

Applying these principles to this appeal, and considering the evidence on record, we are of the considered view that this is a proper case for retrial. We observe further that the appellants were convicted and sentenced barely 2 years ago which raises the possibility of the availability of witnesses and eliminates the risk of faded memory which are also key considerations.

19. In the result, we allow the appeal only to the extent that we quash the conviction and set aside the sentence. We however order an expeditious trial of the appellants by a different magistrate.

Orders accordingly.

**Judgment dated and delivered at Nairobi this 25<sup>th</sup> day of February, 2014**

.....

.....

**R. LAGAT-KORIR**

**D.K. NJAGI MARETE**

**JUDGE**

**JUDGE**

In the presence of:

.....: Court clerk

.....: Appellant

.....: For the appellant

.....: For the State/respondent