



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 152 OF 2012**

**PAUL THIBA NDUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 1107 of 2011 in the Chief Magistrate's Court at Milimani – Mr. P.C Biwott (PM) on 23<sup>rd</sup> May 2012)*

**JUDGMENT**

**Paul Thiba Ndungu** was charged with the offence of robbery with violence contrary to section **296(2)** of the **Penal Code**. It was alleged that on the night of the 29<sup>th</sup> July 2011 at the Hilton Hotel, within Nairobi Area Province, jointly with others not before the court, being armed with an offensive weapon namely a dagger robbed Wilfred Githua Mwangi a Motor Vehicle registration number KBL 448S Toyota NZE valued at Kshs. 800,000/= and immediately before or after such robbery wounded the said Wilfred Githua Mwangi.

At the close of the trial, he was convicted of robbery with violence and sentenced to suffer death.

Aggrieved by the said conviction and sentence, he filed this appeal.

A summary of the appellant's five grounds of appeal is firstly, that his conviction was unlawful as the charge sheet upon which he was convicted had been substituted and discarded. Secondly, that he was denied a fair trial as he was not provided with witness statements as he had requested. Thirdly, that the prosecution was at fault for relying on dock identification by PW3 which was irregular, fourthly, he urged that the evidence relied on by the prosecution was full of contradictions and fifthly that the Prosecution relied on hearsay evidence. Finally, he urged that the learned trial magistrate did not consider his defense. He filed written submissions to advance those grounds.

Miss. Ndombi the learned state counsel opposed the appeal on behalf of the respondent and relied on her written submissions on record.

As the first appellate court we have the duty to examine the record, evaluate the evidence and come to independent conclusions. The prosecution summoned a total of 6 witnesses whose evidence formed the basis for conviction.

We have examined the record of the proceedings noted that the Prosecutor did apply to amend the charge

sheet by adding the word “jointly”, which application the appellant did not object to. The appellant pleaded not guilty to the amended charge after it was read out to him in keeping with the requirement of Section 214 of the Criminal Procedure Code. We note that this is the charge sheet on record. The appellant’s complaint in that regard cannot be sustained.

We have examined the record and noted that the appellant did apply for copies of the charge sheet and witness statements after which the court ordered that he be supplied with them upon payment of costs. Subsequently, after PW1 had testified on 19<sup>th</sup> March 2012, that the appellant informed the court that he had not read the witness statements of the other witnesses and sought an adjournment so as to acquaint himself with them. This request was opposed by the prosecution on the ground that he was not the complainant, which objection the court upheld.

Under article 50(2), every accused person has the right to a fair trial, which includes the right;

(c) to have adequate time and facilities to prepare a defense, and

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is so fundamental in criminal justice system that it cannot be denied an accused person for whatever reasons. In fact at no time should an accused person be required to meet any costs associated therewith.

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 remaining witnesses. This in our view was a blatant violation of the accused’s right to a fair trial. Under those circumstances, he could not have prepared his defence well. He was not informed in advance of the evidence that the prosecution wished to rely on. It is our view that his rights were in this case violated as a result of which he suffered prejudice.

Having reached that conclusion we find that the conviction cannot be sustained. We have considered whether or not in the circumstances of this case a retrial should be ordered. An order for retrial is intended to meet the ends of justice. Before such an order is made the court should be satisfied that the witnesses who testified are available and their presence may be procured without undue delay and expense. The court is also required to examine the evidence to find out if a conviction can be sustained after such an order. The basic consideration however, is that no prejudice should be visited upon the appellant by the making of such an order.

The appellant was arrested on 15<sup>th</sup> August, 2011. The offence he faced was serious and we believe the witnesses can easily be recalled to give evidence. It is about two and half years since he was convicted and sentenced to death. Our overview consideration of the evidence is that a conviction may be sustained after a fair trial. We are therefore persuaded that this is a fitting case for a re-trial. Accordingly, this appeal is allowed, conviction quashed and sentence set aside. The appellant shall be released and escorted to central police station Nairobi for the retrial process to commence.

Orders accordingly.

**Dated and delivered at Nairobi this 9<sup>th</sup> Day of December, 2014.**

**A.MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**