REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 25 OF 2011

NAFTAL NYANDEGA NDUKO …….. APPELLANT

-VERSUS-

REPUBLIC ……..……..……. RESPONDENT

(Being an Appeal from original conviction and sentence by Nyamira Senior Principal Magistrate's Court Hon. J. Wanjala in Criminal Case No. 329 of 2010 dated 3rd March, 2011)

JUDGMENT

1. The appellant herein, Naftal Nyandega Onduko, was charged before Nyamira Senior Principal Magistrate's Court in SPM Cri. Case No. 329 of 2010. He was initially charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code, cap.63 and one count of rape contrary to section 3(a) of the Sexual Offences Act No. 3 of 2006, Laws of Kenya.

2. Briefly, the prosecution's case is that on the 2nd May 2010 at around midnight, two people one of whom was armed with a sword gained access into the house belonging to BON (PW1) and his wife P M N (PW2), tied the PW1's hands from the back and beat PW2 while demanding Ksh.300,000/-. They robbed PW1 and PW2 of some money together with two mobile phones. One of the attackers then raped PW2 and thereafter escorted PW2 to another house in the same homestead belonging to her father- and mother-in–law, N M (PW3) and E O N (PW4) respectively, whom they beat and also robbed of money. PW1 recognized the voices of the people who attacked them as being those of the appellant and another person whom PW1 named. By use of torch light which the other attacker shone on the appellant during the incident, PW2 was also able to identify the appellant as the attacker who raped her, and she (PW2) had on the following morning, at a baraza called after the attack, identified the appellant to the area Assistant Chief George Magate Nyamango (PW5), leading to the appellant's arrest at the baraza. The appellant was subsequently charged with the offences before the court.

3. During the trial, and after the prosecution had led the evidence of two witnesses (PW1) and (PW2), the prosecution successfully applied to the court for leave to substitute the charge with one introducing a third count of robbery after the evidence of PW2 indicated such offence on the 4th complainant. The learned magistrate did not inform the accused who was unrepresented of his right under section 214 of the Criminal Procedure Code which allowed substitution of charge to recall witnesses who had already testified for fresh evidence or further cross-examination.

4. The proceedings for the 16th November 2010 when the substitution of the charge was made are set out below:

"16/11/2010

Before J. Wanjala – SPM

Pros. IP Kimitei

Cc – Omwoyo

Interpretation – English/Kiswahili/Ekegusii

Accused – present

***Prosecution**: I am ready with two witnesses*

J. WANJALA

SPM

At 2.35p.m.

Coram as in the morning

Accused present

***Prosecution:** Before we proceed, I have an application to make. I am applying to substitute the charge sheet. The current charge sheet the accused is charged with 3 counts. Two of which are robbing with violence and one of rape. In the substituted charge sheet we have 4 counts, 3 of which are robbery with violence and one of rape. I have the charge sheet.*

J. WANJALA

SPM

***Accused states**: How is the 4th count coming?*

J. WANJALA

SPM

***Prosecution:** The 4th robbery is involving a 4th complainant who has been mentioned on record and the charge had not been charged. The 4th complainant is one Eunice Osiri Nyandeka.*

J. WANJALA

SPM

***Court:** Substitution is allowed.*

J. WANJALA

SPM

Charge read over and every element explained to accused who states;

***Count 1**: It is not true. Plea of not guilty entered.*

J. WANJALA

SPM

***Count 2**: It is not true. Plea of not guilty entered.*

J. WANJALA

SPM

***Count 3**: It is not true. Plea of not guilty entered.*

J. WANJALA

SPM

***Count 4:** It is not true. Plea of not guilty entered.*

J. WANJALA

SPM''

5. After the plea under the new charge sheet, without recalling the two witnesses and without informing the unrepresented accused person of his right to recall them, the court proceeded to take the evidence of PW3 and PW4 on the same day and thereafter adjourned for further hearing on another date. The prosecution called 7 witnesses in support of the case against the appellant.

6. When put on his defence, the appellant gave a sworn statement without calling any witnesses. In his defence, he told the court that he did not know anything concerning this case. He recounted that he was at home weeding maize on 3rd May 2010 when at around 9.30am he heard a whistle blown and people went to PW3's compound. He went there and found PW5 and two askaris. He was arrested together with two other persons. Their respective houses were searched but nothing was recovered. The two other suspects were subsequently released while he was taken to Nyamira Police Station and later charged in court.

7. In her judgment, the learned trial magistrate, without referring to the substituted charge sheet, held as follows:

"I am therefore satisfied that the offences which the accused person is charged with were committed. The Accused was identified as one of the attackers and I have no reason to doubt that. I consider the accused's statement as a mere denial and his defence is not true. Hence I am satisfied that the prosecution has proved the charges in this case against the accused person as charged. Therefore, I find him guilty in all three counts as charged and convict him accordingly under section 215 of the Criminal procedure Code. "

The magistrate then sentenced the accused to suffer death regarding the 1st and 2nd counts and sentenced the accused to serve 15 years imprisonment regarding the 3rd count.

8. The accused was dissatisfied with the conviction and sentence and he filed a Memorandum of Appeal through his advocates, M/s Kerosi Ondieki & Co. Advocates. The grounds of appeal are *interalia* that the prosecution failed to make a prima facie case against the appellant; that the trial magistrate relied on uncorroborated evidence of an accomplice; that the trial magistrate shifted the burden of proof to the appellant; that the trial magistrate did not make a distinction between

identification and recognition; that by basing her conviction on identification, the trial magistrate failed in not considering the alibi defence of the appellant; and that the trial magistrate erred in handing down an excessive sentence.

9. When the matter came up for hearing on 13th March 2013, Mr. Nyagwencha, learned Counsel for the appellant, submitted that the appellant's conviction was unsafe for the reasons that the identification of the appellant was not clear throughout the hearing as PW1 stated in his evidence-in-chief he could not identify any of the attackers and the learned magistrate had so noted at page 42 of the record of proceedings; that the appellant did not have witness statements when PW1and PW2 testified and it was only on 16th November 2010 that court ordered he be supplied with the same, and that, despite this anomaly, court did not give appellant chance to recall the witnesses; that the substitution of the charge sheet did not give sufficient time for the appellant to go through the statements; that the trial magistrate relied entirely on the 1st charge sheet which was substituted; that the appellant's defence of alibi had not been discharged and that the arresting officer had not been called to give his evidence; and that the appellant was sentenced to suffer death twice and then to serve imprisonment for 15 years. Counsel therefore prayed that the Court allows the appeal, quash the conviction and set aside the sentence.

10. The appeal was opposed by the State. Miss Cheruiyot, learned counsel for the State, submitted that the appellant was positively identified by PW1, PW2 and PW3; that PW2 also identified the appellant at the chief's baraza and further submitted that this was a case of recognition as opposed to identification. Counsel however, admitted that the trial court used the withdrawn charge sheet and failed to convict on the fourth count. In reference to appellant's defence, she submitted that the appellant gave a sworn statement without calling any witnesses; and that there was no alibi with regard to the time of commission of the offence. On the grounds of appeal, she submitted that it was immaterial that appellant had an accomplice and that the witnesses could not identify the accomplice maintaining that the appellant had been positively identified. She further submitted that the fact that the arresting officer was not called was also immaterial because section 150 of the Criminal Procedure Code did not require the State to call any particular witnesses. Consequently, she urged the court to dismiss the appeal.

11. In reply, Mr. Nyagwencha cautioned on the difficulties of voice identification observing that the voice identified by PW1 is that of appellant and another person who was not arrested. He further submitted that by the time PW1 and PW2 testified no statements had been supplied and the trial court did not give appellant a chance to recall PW1 and PW2.

12. We are conscious of the duty of first appellate court to reconsider and evaluate evidence afresh with a view of reaching its own conclusions in the matter. However, where there are contentions of illegalities and breach of trial procedure which may call for retrial, the established judicial policy is for the court to determine whether such illegalities and procedural defects require a retrial to be ordered and in doing so to avoid making any analysis or findings on the evidence and submissions which may prejudice the retrial. While dealing with a similar situation, the Court of Appeal in ***Opicho vs. Republic*** (2009) KLR 369, 374 said:

> **"As we stated earlier, we have no intention of analyzing the evidence on record and will not therefore discuss the submission… We must first discuss whether, in view of the transgression of procedure evident in the trial, the appellant ought to be retried before another court. If so, any analysis of the evidence on record may well prejudice that retrial. Should we order one?**
>
> > ***"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 purpose 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***

own facts and circumstances and an order for retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;"

That was stated in *Fatehali Manji vs The Republic* [1966] EA 343. In many other decisions of this court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. See *Muiruri vs Republic* [2003] KLR 552, *Mwangi vs Republic* [1983] KLR 522, and *Bernard Lolimo Ekimat vs Republic*, Criminal Appeal No. 151 of 2004 (UR)."

13. We have noted the decision of the Court of Appeal in ***M'Obici & Anor. vs. Republic,*** (2006) 2 KLR 166, that *"a retrial should not be ordered unless the appellate court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."* In the present case, while we have not undertaken any analysis of the evidence so as not to prejudice the retrial, having considered the evidence, we are not prepared to hold that the evidence on record is unlikely to lead to a conviction for the offences charged if a retrial were ordered.

14. We have isolated for our consideration the issues of the non-recall of the two witnesses PW1 and PW2 after the substitution of the charge; the basing of the convictions on the old charge which was substituted with leave of the court in the course of the trial after the two witnesses had testified; and the late supply of the witnesses statements after the primary witnesses had testified without an opportunity for their cross-examination on their previous statements. The other issues raised in the appeal and in the submissions would require an analysis of the evidence which we cannot do without prejudicing the retrial if ordered.

15. We think that the trial of the appellant before the learned senior principal magistrate was, with respect, defective because the magistrate did not inform the appellant of his right after the substitution of the charge to recall the two witnesses, PW1 and PW2 upon whose recognition and identification evidence the conviction was based. In addition, as shown in the record of the trial, the appellant was supplied with the witnesses statements only after the two key witnesses had testified so that he had no opportunity to cross-examine them using the previously recorded statements made in their witness statements. These defect are not only breaches of the appellant's statutory rights under section 214 of the Criminal Procedure Code but also a violation of the appellant's unlimited constitutional right to a fair trial under Article 50 (2) (j) and (k) of the Constitution. The appellant's trial commenced on the 4th November 2010, well after the coming into force of the Constitution of Kenya 2010 on the 27th August 2010.

16. Section 214 of the Criminal Procedure Code is in these terms:

"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".***

17. As shown above, the trial court accepted midstream an amendment of the charges facing the appellant and required him to plead to the four counts of the new charge sheet. No opportunity was however given for the appellant to recall the two witnesses PW1 and PW2 who had already testified. It did not matter, in our view, that the two previous witnesses had testified largely on the Counts I and II relating to robberies on them, because some of their testimony did touch on the offence relating to the 4th complainant which was charged under Count No. 3 and it was, indeed, PW2's testimony that prompted the prosecution to seek the substitution of the charge. The appellant ought to have been given an opportunity to have the evidence of the two primary witnesses adduced afresh or at least to cross-examine them further with reference to their testimonies touching on the newly introduced charge. We venture to suggest that the court's obligation under the section 214 (1) Proviso (ii) of the Criminal Procedure Code to afford the accused the right to recall previous witnesses for evidence afresh or cross-examination is heightened in the case of unrepresented accused person such as the appellant in this case.

18. With regard to the late delivery to the appellant of witness statements, Article 50 (2) (j) and (k) of the Constitution provides that:

> **"50. (2) Every accused person has the right to a fair trial, which includes the right-**
>
> **(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;**
>
> **(k) to adduce and challenge evidence; …"**

The appellant was entitled to have access to the witness statements ahead of the trial to enable him to challenge their evidence before the court during cross-examination of the witnesses in defence of the charges facing him.

19. As regards the convictions on the three counts of the initial charge sheet, we take the view that upon substitution of the charge, the old charge ceased to exist and it must be plain that the court could not properly base the convictions on a non-existent charge.

20. Apart from the conviction on a non-existent charge, there are irregularities in the sentences for the three counts on which the appellant was sentenced. The appellant was sentenced to suffer death on Counts I and II and to an imprisonment term for 15 years in Count III. It has been held in many decisions by the Court of Appeal that a sentence of death once imposed shall not be accompanied by other sentences of death and or imprisonment terms in respect of other counts of which the accused may be convicted. In ***Boru & Anor. v. Republic***(2005) 1KLR 649, it was held that:

> ***"1. Where an accused person is convicted on more than one capital charge as was the case here the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment.***
>
> ***2. The reason for that is simple: in case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving the sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term.***
>
> ***3. Once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been***

imposed, the Court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed."

See also ***Gachuru v. Republic*** (2005) 1KLR 688.

21. We think that the illegalities and procedural defects highlighted above resulted in a defective trial. The prosecution is not to blame for the failure of the trial court to comply with Proviso (ii) of section 214 on the appellant's right to recall the witnesses who had testified before the substitution of the charge or for the improper basing of appellant's convictions on non-existent charge sheet. The offences herein were committed on the 2nd May 2010 and the appellant was arrested on the 3rd May 2010 for the offences for which he was convicted and sentenced on 3rd March 2011. We think that the period that has lapsed since the date of the offences is not such as to make it difficult to mount a retrial, and as we have said above, we do not consider that the evidence availed by the prosecution is incapable of supporting a conviction if a retrial is undertaken.

22. Accordingly, for the reasons set out above, we allow the appeal, quash the convictions of the appellant and set aside the sentences imposed on him. We further make an order that the appellant be retried before a court of competent jurisdiction other than J. Wanjala, SPM, and that for purposes of expeditious retrial the appellant be produced for appropriate directions before the Senior Principal Magistrate's Court at Nyamira within seven (7) days of this Order, that is to say on 5th June 2013.

Dated, Signed and Delivered in open court at Kisii this 30th day of May 2013.

..…… ……

RUTH N. SITATI **EDWARD M. MURIITHI**

JUDGE **JUDGE**

In the presence of: -

……..... for the Appellant

.....for the Respondent

..... Court Clerk