REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NUMBER 162 OF 2010

BETWEEN

JULIUS MAMICA NDIBA……..APPELLANT

AND

THE REPUBLIC OF KENYA …… RESPONDENT

[An appeal against the Judgment of the Learned Senior Principal Magistrate Limuru, M.A. Murage in Criminal Case Number 1126 of 2010, dated 17th March 2010]

Appeal before Justices Monica Mbaru and James Rika

Mr. Anambo Advocate appearing for the Appellant

Mr. O'mirera Senior Assistant Director of Public Prosecutions appearing for the Respondent

JUDGMENT

1. The Appellant, together with one George Ndung'u Ndichu, were on 9th July 2010, charged before the Senior Principal Magistrate Limuru M.A. Murage, with three counts of the offence of robbery with violence, contrary to Section 296 [2] of the Penal Code. They pleaded not guilty and the hearing commenced on 30th July 2008. The trial came to an end on 17th March 2010, when the Learned Magistrate read a Judgment acquitting George Ndung'u Ndichu of all the three counts of robbery with violence, while convicting the Appellant Julius Mamica Ndiba on all the three counts. In each of the three counts, the Appellant was sentenced to suffer death.

2. The Appellant challenged that decision, in a Petition of Appeal dated 23rd March 2010. He argues his

appeal on two related grounds, namely-:

- **The learned trial Magistrate violated the Appellant's right to a fair trial by declining the Appellant's application to recall prosecution witnesses; and**
- **The learned trial Magistrate breached rules of natural justice by denying the Appellant the opportunity to conduct his defence**

The appeal was heard on 15th October 2013. The State concedes the appeal, the only issue left for the determination of the Court, being whether the Appellant should be set free forthwith, or subjected to retrial before another Magistrate.

3. Senior Assistant Director of Public Prosecutions Mr. O'mirera explains that the Appellant did not get a fair trial before the Magistrates Court. The Appellant did not participate in the proceedings at every turn. On 28th January 2009, the Appellant refused to participate in the proceedings, on the ground that he had not been availed all the prosecution witnesses' statements. On 11th March 2009, the Appellant informed the trial Court he would not proceed with the hearing, until the complainant was recalled. The Learned Magistrate rejected the application by the Appellant, and advised the Appellant to appeal against her ruling within two weeks in default of which the hearing would resume. On 9th December 2009, nothing had been availed to the trial Court by the Appellant from the High Court. The Appellant was still adamant he would not participate in the proceedings unless trial started afresh. Exasperated, the Magistrate made a ruling contained in page 20 of the proceedings ordering-: *'' this case has been pending for long. Accused 1 [Appellant] cannot hold the Court at his convenience. He has no reason why the case should not proceed. It has been pending for almost a year. The case will proceed in his absence. ''*

4. The State concludes the decision by the trial Court violated the Appellant's right to a fair trial given by the old Constitution of Kenya. He was barred from the proceedings for allegedly being mischievous. He did not give evidence in his defence. His co-accused gave a sworn statement, and the Magistrate wrote a joint judgment, which was prejudicial to the Appellant. The trial Court should have sent the file to the High Court for directions.

5. The State applies for retrial of the Appellant. The offence was committed in 2008, about seven years ago, and is not an inordinately long time, considering the nature of the offence with which the Appellant was charged. He should be retried before a Court of competent jurisdiction. Witnesses are available, and the evidence gathered by the Police against both suspects was overwhelming. There are no gaps in the prosecution's case that the prosecution would be seeking to fill. Mr. O'mirera submits that the Appellant has a unique physical feature, which was easily identified by the complainants. The High Court as a first Court to which the appeal has been submitted, is entitled to re-evaluate the evidence and give directions. The State urges the Court to reverse the decision of the trial Court and order that there be a retrial before another Court of competent jurisdiction.

5. Mr. Anambo agrees with the explanation given by the State on why the decision of the lower Court should not stand, but does not agree with the application for retrial. The Appellant has been in prison for a lengthy period. The evidence marshaled by the prosecution in the lower Court was insufficient to sustain a conviction against any of the accused persons. The trial Court relied on the evidence of a single witness in the identification of the accused persons. The Court did not caution itself that corroboration was necessary. Such caution is not recorded. This was a strong ground for acquittal. Circumstances surrounding the commission of the offence were not conducive to identification. There was insufficient light, and little time to enable the complainant identify the assailants. Mr. Anambo urges the Court to set the Appellant at liberty.

6. The Court agrees with Mr. O'mirera and Mr. Anambo that this Appeal should be allowed. The Appellant was charged alongside George Ndung'u Ndichu with three counts of robbery with violence. The Appellant did not have the benefit of representation of Counsel at the trial before the lower Court. His co-accused was represented by Mr. Gitau Advocate. On the 30th July 2008 when the hearing started, the Appellant indicated he needed time to study the witness statement. He was granted time, but directed

to proceed with cross-examination on the same day after his co-accused had finalized cross-examination. He on the same day applied for other prosecution witness statements. The Court ruled: ‘’*Accused 1 may photocopy the witness statements.’’* On 11th March 2009, the Appellant brought it to the attention of the Court that he had not been provided with witness statements yet. The Prosecutor undertook to make the statements to the Appellant, and hearing was adjourned.

7. On 25th February 2009, the Appellant applied to be availed the identification parade form and police investigation diary. It is not clear if the witness statements had been availed to the Appellant by this time. He informed the trial Court on 11th March 2009 that he would not participate in the proceedings, as the Court had failed to give an order to recall the complainants. Again the record does not show when the application to recall the complainants was made by the Appellant. The Court did however, on 11th March 2009 record that: ‘’ *the proper procedure has been followed. Complainant testified and was cross-examined. There is no reason to recall him. The application is rejected. Accused is given two weeks to appeal or in default, Court will fix case for hearing.’’* Subsequently, the Appellant informed the Court he had filed an application at the High Court. The nature of the application was not disclosed to the High Court on Appeal, but presumably related to the denial by the trial Court to recall the complainant. On 5th August 2009 the Appellant informed the Court that his application to the High Court had been determined, but the orders made by the High Court are not disclosed in the record of appeal.

8. On 9th December 2009, the Appellant nonetheless protested again that he would not participate in the proceedings, unless the case was heard afresh. This led to the order by the Learned Trial Magistrate that the Appellant could not hold the Court at his convenience, and that the case would proceed in the Appellant’s absence. PW7 the Police Officer who conducted identification parade went on to give evidence the same day, but the Appellant did not cross-examine her. This was the same for PW8 and PW9. Hearing proceeded on the following day, the 10th December 2009. Notably, the Appellant was not in Court, Two Police Officers testified in the absence of the Appellant. The Court does not appear to have enquired the whereabouts of the Appellant. The Prosecution closed its case after the hearing of the evidence from these last two witnesses.

9. The Court ruled on 27th January 2010, in the presence of both accused persons, that both accused persons had a case to answer. Defence hearing was fixed for 10th February 2010. The Appellant continued to protest, stating: ‘’ *I decline to proceed with the case.’’* On 10th February 2010, the Appellant was absent. The Court noted: ‘’*Accused 2 absent. - In cells. Refused to attend Court.’’* Co-accused gave a sworn statement and called two other witnesses in his defence. The Appellant was absent when closing submissions were presented, and also on 17th March 2010 when he was convicted on all the three counts of robbery with violence, and sentenced to death on each count. The Court ordered that its verdict be communicated to the Appellant through the Officer In-Charge Kamiti Prison.

10. The history of this trial suggests that the Appellant was denied a fair and public criminal trial in the Court below. He asked for time to study witness statements; called for complete bundle of witness statements; applied to have the identification parade forms and the police investigation diary; and asked to recall certain prosecution witnesses. In all instances, there is little evidence that the trial Court facilitated the Appellant in accessing the documents and information he needed to conduct his defence. The Court appears to have become exasperated by the Appellant’s incessant applications for one order or the other. It concluded that the Appellant was bent on delaying hearing of the case, and made the order to proceed without his presence.

11. The Appellant’s right to a fair trial under Section 77 of the old Constitution of Kenya was violated. The right as enunciated in Article 14 of the International Covenant on Civil and Political Rights [ICCPR], requires that: ‘’ *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’’* An accused person must have adequate time and facility to conduct his defence. He must at all times during the hearing be present in Court, and given the chance to

defend himself, in person or through his lawyer. The State cannot go to Court, leave an accused person in the cells with the explanation that the accused person has refused to appear in Court. The Appellant was in the custody of the State, and did not have control over his own movement. He could opt to keep mute in Court when required to speak, but had no reason to remain in the cells. He should have been availed before the trial Court. The prosecution had a duty to bring him to Court, and the Court had an obligation to ensure the Appellant was physically in Court, and an obligation not to proceed with *ex parte* criminal proceedings. The Appellant had not on each occasion expressly consented that the trial takes place in his absence. His conduct was not such as to paralyze the proceedings. The Court seems to have sanctioned his absence from the proceedings, perhaps fortified by the provisions under section 77 of the old Constitution which would in exceptional circumstances allow the Court to proceed without the accused person. Section 77 of the old Constitution contemplated the presence of an accused person at his trial throughout, except in situations where- ***the accused person has consented to be absent, or where he conducts himself in a manner that renders the continuance of the proceedings in his presence impracticable, and the Court orders him to be removed, and the trial to proceed in his absence.*** Such exceptional circumstances did not exist so as to deprive the Appellant of his right to participate in his trial. The record does not show he consented to have the trial conducted while he was absent. He was not shown to conduct himself in a manner that made the continuance of proceedings in his presence impracticable. The trial Court is not on record as having ordered for the removal of the Appellant from any session. How did the Court for example, conclude that the Appellant had on occasion stayed in the Court cells and refused to attend Court for hearing? The Appellant's right to attend hearing; to be heard; to cross-examine witnesses; and to be treated equally with his co-accused were compromised. A fair hearing demands equality of arms between the defence and the prosecution, and also equality of treatment of accused persons within the same trial. These elements are well-established in our domestic as well as international criminal justice instruments.

12. Should the Appellant be set at liberty or subjected to re-trial? The Court of Appeal of ***Kenya in Nairobi C.A. Criminal Appeal Number 135 of 2004, between Richard Charo Mole v. the Republic of Kenya [2010] e-KLR*** stated that the guiding principle in answering this question is that each case must primarily depend on its particular facts and circumstances. Generally, the Court is required to consider the interest of justice; the likelihood of injustice being occasioned to the Appellant if a re-trial is ordered; the nature of the illegalities and defects in the initial trial; whether these illegalities and defects could be attributed to the Court or the prosecution; the time that has passed from the date of the Appellant's arrest and arraignment in Court; and the nature of the offence which the Appellant was charged with. In this Court of Appeal decision, an Appellant whose trial in the lower Court was declared a mistrial by the Court of Appeal was nonetheless ordered to stand retrial, notwithstanding that 17 years had passed from the date he was first arrested. The Appellant faced a charge of robbery with violence. In the ***Court of Appeal at Nakuru Criminal Appeal Number 297 of 2008 between Edward Maison and 2 Others v. the Republic of Kenya [2009] e-KLR,*** the Court considered that the mistakes in the initial trial and subsequent appeal at the High Court were occasioned by the Courts. The Courts had failed to comply with fundamental procedures. The prosecution argued that it was capable of re-summoning all the witnesses to mount a successful re-trial. The Court of Appeal took into account that the Appellants in that case had been charged with the serious offence of robbery with violence, and ordered retrial rather than setting of the Appellants free. ***In Joseph Macharia Miano & Others v. the Republic [2009] e-KLR,*** the Court of Appeal ordered the Appellants to stand retrial notwithstanding that they had served 8 years in prison. The Court avoided evaluating evidence, but took into account that from a proper consideration of the admissible evidence or potentially admissible evidence, conviction might result from retrial.

13. In the Appeal before us, the Appellant was arrested on 2nd July 2008, little over 5 years ago. The State submits, and we agree, that the Appellant faced serious, multiple counts of aggravated robbery. The Court has looked at the record, and agrees also, that there was credible evidence brought by the State to require the Appellant to explain himself. The Appellant, much as he was deprived of a fair trial at the lower Court, appears to have contributed to the derailment of orderly proceedings, by his adamant refusal to participate in the trial and his inconclusive detour to the High Court as the trial unfolded. This Court must be careful not to send the wrong message to criminal suspects that they can engineer mistrial whenever faced with serious capital offences in Magistrates' Courts, in the hope that the High Court would be inclined to declare mistrial and set such suspects at liberty. The Appellant appears to this Court, to have

by his conduct at the trial Court, encouraged the Prosecutor and the Learned Trial Magistrate into making the various procedural violations that culminated in mistrial. He was not overtly involved in disruptive conduct, but more subtle protestations aimed at delaying, confusing or derailing of his trial. When the trial Magistrate ordered the trial to proceed in the absence of the Appellant, it was against the background of a sustained campaign by the Appellant to delay and derail the trial. The elaborate rules of procedure prescribed under the Criminal Procedure Code Cap 75 the Laws of Kenya, presuppose that all the involved parties in a criminal trial, the accused persons, prosecution, witnesses and the presiding judicial officer, shall submit themselves to the rules, act rationally, and achieve orderly and fair proceedings, and a fair and expeditious outcome. Where one player acts in a manner that appears unruly and aimed at defeating the purpose of a criminal trial, it is possible such conduct infects other players in a ripple effect, with the result that it becomes difficult to achieve a fair trial. This Court is not unmindful of the difficult situation in which the trial Magistrate was placed. Judicial Officers operate in very stressful conditions, with constant pressure to dispense justice without delay, and are averse to any conduct therefore, that smacks of deliberate delay in concluding judicial proceedings. We must however be cautious not to fall into the trap of violating basic constitutional guarantees, in our haste to secure quick disposal of the matters that are daily brought to us for determination. As suggested by Mr. O'mirera, the trial Magistrate had the option of referring the file to the High Court for directions, rather than take the course she took, of proceeding with a criminal trial in the absence of an unyielding accused person. The circumstances that derailed fair trial in the lower Court can be attributed in some measure to the Appellant, the State and the trial Court. The conduct of the Appellant at the trial Court must be examined carefully, in determining whether he should immediately be set at liberty, or re-tried. The record suggests his conduct was not above board.

14. The sentencing of the Appellant to suffer death on each of the three counts was wrong. The Court of Appeal **at *Eldoret Criminal Appeal Number 258 of 2003 between Peter Gikonyo Nyoike v. the Republic*** clarified that where an accused person is convicted of multiple counts on a capital offence, the proper procedure would be to sentence such an accused person to death in one count, and leave sentence in other counts in abeyance.

15. We shall therefore allow the Appeal in terms proposed by Mr. O'mirera for the State. Consequently:-

a. ***Conviction is quashed and sentence set aside.***
b. ***The Appellant shall be re-tried before a Magistrate's Court of competent jurisdiction, which shall exclude the trial Magistrate M.A. Murage.***
c. ***In the meantime the Appellant shall be remanded in custody awaiting re-trial.***
d. ***It is further ordered that the re-trial shall be conducted expeditiously and as far as possible, be heard on a day to day basis.***

Dated and delivered at Nairobi this 19th day of November 2013

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Monica Mbaru James Rika

Judge Judge