REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 62 OF 2010

JACOB KYATHI MUKITI ……..…... APPELLANT

VERSUS

REPUBLIC …….……. RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate

C. Obulutsa PM delivered on 16/03/2010 in Kangundo Criminal Case No. 530 of 2008)

J U D G M E N T

The Appellant was charged with the offence of robbery with violence Contrary to Section 296 (2) of the Penal Code. The particulars of charge were that on 30th August 2008 at Kathama village in Mwala District of the Eastern Province jointly with others not before the court while armed with dangerous weapons namely clubs and iron bars robbed Simon Muisyo cash 40,000/= and two mobile phones valued at Kshs.6,000/= all valued at Kshs.46,000/= and at or immediately before or immediately after the time of such robbery wounded the said Simon Muisyo.

After a full trial, he was convicted and sentenced to suffer death. He has now appealed to this court against conviction and sentence. He has raised several grounds in his initial petition. He also delivered to court on the hearing date, amended grounds and written submissions.

At the hearing of the appeal, the learned Senior State Counsel, Mrs Gakobo, conceded to the appeal. The ground for conceding was that two magistrates conducted the trial in succession. The law required that Section 200 of the Criminal Procedure code be complied with. Counsel argued that though the succeeding magistrate was required to specifically inform the Appellant that he had a right to recall witnesses and record the same, he merely stated that Section 200 of the Act had been complied with. Counsel argued that this court being a court of record should not assume that the legal requirements were complied with. Counsel requested that the appeal be allowed and a retrial ordered. In her view, there was sufficient evidence to sustain a conviction, and witnesses were readily available.

The Appellant opposed a retrial as he had been in custody for long. He maintained that the charge sheet was defective and that he should be acquitted.

Indeed the particulars of the charge were at variance with the evidence tendered in court. The charge clearly states that the robbers were armed with **“dangerous weapons, namely clubs and iron bars”.** On the other hand, the witnesses who were at the scene, that is (PW1) MARY KALUKI MUISYO and (PW2) WAMBUA MUSYOKI gave a different story regarding the alleged weapons. MARY (PW1) talked of the possession of **“arrows”** for shooting, while (PW2) WAMBUA MUSYOKI testified to the weapons being a **“bow and arrows”.** Arrows were actually produced as exhibit 1. No. clubs or iron bars

were produced as exhibits. There was therefore a variance between the particulars of the charge and the evidence tendered.

Though Section 214 of the Criminal Procedure Code (Cap 75) allows the amendment of a charge where there is such variance, no amendment of charge was done. The Section provides:-

214. (1) Where at any stage of the 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 the charge is altered under this subsection the accused may demand the witnesses or any of them be recalled and give their evidence a fresh 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 witnesses on matters arising out of further cross-examination.

2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

3) Where an alteration of charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

It is clear to us from the above provisions of the law that amendment of the charge is not necessary only when the variance between the charge and the evidence relates to time. In this regard, we fully agree with what was stated by Ibrahim J (as he then was) in R –vs- TONY MUTAI (2007) e KLR, wherein the learned Judge stated:-

“Accordingly, I do find that under the provisions of Section 214 (2) the date at which the alleged offence herein was committed is not material and the charge need not have been amended.”

In our present case, the charge sheet should have been amended because the evidence tendered by the prosecution clearly differed with the particulars of the charge with regard to the alleged weapons. The charge herein which was not amended to be consistent with the evidence tendered was defective.

Does the fact that the charge is defective because the particulars differ with the evidence automatically mean that there must be an acquittal? In our view, an acquittal should result only when such variance of the particulars of charge and the evidence is so material as to occasion a failure of justice. This can happen where the difference would necessitate a plea to a totally different offence, or where the variance would adversely affect the defence of an accused person. We consider this to have been the reasoning in the case of YOSEFU AND ANOTHER –vs- UGANDA (1969) EA 236 at page 238 wherein Spry and Law JJA stated:-

“Mr Khan submitted that even if the charge were defective, no injustice had resulted, as it was clear the appellants had known and understood what was the allegation against them. Here again, we cannot agree. It is apparent from the record that the appellant’s defence, had they been properly charged and tried would have been that the trophies in question had been bought lawfully

in Kenya. If they could have proved that, they would have had a good defence to the charge under Section 14. The defect was therefore most material……"

The elements of the offence herein charged under Section 296 (2) of the Penal Code (Cap 63) are satisfied when it is proved that either the offender is armed with offensive or dangerous weapons, or he is in the company of others, or he threatens or uses actual violence. With the evidence tendered in the subordinate court, we find that the variance between the particulars of charge and the evidence tendered in court was not so material as to prejudice the Appellant in his understanding of the offence charged and in defending himself. Clubs and iron bars as well as bows and arrow could be offensive weapons depending on their use at the time. The learned magistrate was infact alive to the variance and considered it in the judgment and came to the conclusion that it was not material as the Appellant was in the company of others and violence was actually used on the victim who actually later died. We find no basis for the assertion that the appellant should be acquitted on this account.

The second point which we want to consider is with regard to the compliance with Section 200 of the Criminal Procedure Code (Cap 75 Laws of Kenya) by the succeeding magistrate. Learned Senior State Counsel, Mrs Gakobo, has conceded to the appeal on this point submitting that the magistrate did not fully comply with the mandatory requirements of the law.

From the record, the case was initially filed at the Kangundo court. When it came up for hearing in 2008, the magistrate in that station was D.O. Ole Keiwua RM. He did not have jurisdiction to hear the case and forwarded the file to the Chief Magistrate's Court Machakos. At Machakos the case was heard by J.M. Munguti SRM. Two witnesses testified. On 27/4/2009 the prosecutor indicated that the case had been transferred to Kangundo as there was now a magistrate there with jurisdiction. The appellant is recorded as having stated that he was not aware of such transfer of the case. Thereafter, on 29/4/2009 the Machakos SPM, Mr S Mungai, asked Mr Munguti SRM to consider dealing with the case, as it was part heard.

On 17/6/2009 the appellant stated in court that he wanted the case transferred to Kangundo, as his witnesses were there. The prosecutor objected, but the magistrate forwarded the case file to Kangundo, provided there was compliance with Section 200 of the Criminal Procedure Code (Cap 75). The case then came before Ole Keiwua now an SRM at Kangundo and the appellant elected that the case begins afresh. This was done.

However, before the last witness of the prosecution testified, Mr D.O. Ole Keiwua was transferred and the conduct of the case was taken over by C Obulutsa P.M. There was therefore a requirement to comply with Section 200 of the Criminal Procedure Code. On 23/2/2010 the court record with regard to such compliance is as follows:-

"Court: Section 200 of Criminal Procedure Code explained to theaccused as magistrate is on transfer.

Accused: I want to proceed from where it had reached.
Order: Section 200 of Criminal Procedure Code complied with

Case to proceed from where it reached."

After the above, evidence was tendered by the last prosecution witness DR KAIGA (PW7) and the appellant proceeded to cross-examine him. In examination in chief, the witness had testified to conducting the postmortem examination of the victim and produced the postmortem form as exhibit 3.

Before us on appeal, the appellant has submitted that he agreed to continue with the trial from where it had stopped because of the long delay in finalizing the case, while he was detained in custody.

Section 200 (3) of the Criminal Procedure Code (Cap 75) specifically provides as follows:-

200. (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

In MIGOT –v- REPUBLIC (1991) KLR 594, at 595, Gachuhi, Cockar JJA & Omolo Ag. JA had this to say:-

"…the Principal Magistrate had made a note in the following terms:-

The provisions of Section 200 Criminal Procedure Code are explained to accused who understands and replies that the matter proceeds where the former trial magistrate left through his counsel Mr Aluoch. This appeal is not dealing with the correctness or otherwise of the finding of non-compliance with Section 200 of the Criminal Procedure Code by the Judge but we cannot help in observing that we do not find anything fatally wrong in the way the Principal Magistrate dealt with the matter particularly in view of the fact that the appellant was represented by an advocate in whose presence he did that."

In our present case, the appellant was not represented at the trial by counsel. He now says on appeal that he agreed to proceed from where the trial had stopped because of delays while he continued to be in custody. In our view, the provisions of Section 200 (3) of the Criminal Procedure Code are mandatory, especially where an accused person is not represented. We note that when the case was sent from Machakos for hearing before Ole Keiwua SRM Kangundo, the appellant chose to have the trial start *de novo* in exercise of his rights under the same Section 200 of the Criminal Procedure Code. However, that notwithstanding he was unrepresented. In our view, where an accused is not represented by counsel, unlike the case of MIGOT –vs- REPUBLIC (above) he should be specifically informed of his right to recall witnesses. The words used under the section are mandatory. Failure to comply with the mandatory provisions of the law means that the accused in such criminal proceedings must be acquitted, as the trial is a nullity.

The third issue relates to the request for a retrial.

The learned Senior State Counsel has asked for a retrial. She contends the offence is serious, the evidence on record will sustain a conviction and the witnesses are readily available to testify afresh. We have perused the proceedings and in our view, the evidence on record is not adequate to sustain a conviction.

This is a case based on the identification of an accused by a single identifying witness at night. In ODHIAMBO –vs- REPUBLIC (2002) 1 KLR 241 at page 247 Chunga CJ , Lakha & Keiwua JJA stated:-

"The law on identification is not in doubt. It has been stated and restated in several judicial decisions of this court and the High Court. The court should receive evidence of identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where the evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which, the court may reasonably conclude that identification is accurate and free from the possibility of an error".

In our present case, the incident occurred at night. The single identifying witness (PW2) WAMBUA MUSYOKA testified that he identified the appellant through the moonlight. He was looking through the window of his house, which was near the house of the victim. He did not describe how bright the moon was. He did not describe any factors that would enable him to identify the appellant out of the group of eight attackers. He did not say whether he identified or recognized the appellant because he came towards his house, or his window, or whether he faced him at close range, or by his appearance or dress. He only refers to the name **"Jacob"** whom he knew earlier.

In our view, even though PW2 claims to have known the appellant before, the evidence of identification

is far from reliable. We find that the evidence on record cannot possibly sustain a conviction. There is therefore, no legal justification or basis for ordering a retrial. We take note that the appellant has already been in custody from 2008 which is about four (4) years now. Ordering a retrial in the circumstances of this case will either be an exercise in futility or, on the flip side, it may only give an opportunity on the prosecution to fill in the gaps in their case, which will not be in the interests of proper criminal justice.

We therefore, allow the appeal, quash the conviction and set aside the sentence. We decline to order a retrial and instead order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Machakos this **8th day** of **March** 2012.

George Dulu **Joel M Ngugi**

Judge **Judge**
In presence of:-