REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Appeal 152 & 153 of 2006

1. JOHNSON MUTINDA MUNYAO
2. KILONZO MUSYOKA KATITHI …….....APPELLANTS

VERSUS

REPUBLIC ……..…….RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 5204/04 by Hon. H.A Omondi-CM on 14/11/2006)

JUDGEMENT

The Appellants, **Johnson Mutinda Munyao** and **Kilonzo Nusyoka Katithi** were jointly charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code in that on 9th November 2004 at K[.....] location in **Machakos** with others not before court, being armed with arrows, simis and iron bars robbed **F.M.M** of his radio cassette/CD player make sony SN 0157999, cash Kshs. 15,000/=, two mobile phones make Nokia 7110 and Simens 540, one trouser, one jacket and remote control all valued at Kshs. 53,500/= and at or immediately before or immediately after such robbery used actual violence to the said **F.M.M.** Both Appellants denied the charge. During the trial in the Chief Magistrate's Court at Machakos, the 1st Appellant was the 2nd accused whereas the 2nd Appellant was the 1st accused. They had been charged alongside **Simon Makau Ndaya** and **Elijah Mwanzia Kyalo.** However on 2nd March, 2005 the case against the latter two was withdrawn by the State under section 87A of the Criminal Procedure Code.

The prosecution case in brief was that on 9th November, 2004 at about 1.00 a.m **F.M.M**, PW1 and "*the Complainant*" was in his house in K[.....]village with his wife, **A.N.M** (PW2), two of their children and a house help. He suddenly heard dogs barking and got up, went to the bedroom window, drew back the curtains and saw a gang of people in the compound. Though there was moonlight, he nonetheless switched on his security lights which were solar powered with 45 watts voltage so that he could see the people clearly. They were about two metres away from him and were armed with pangas, rungus, metal bars, arrows and simis. They began breaking the glass window and calling out his name saying "*Mutua open*" He rushed back to the bedroom and told his wife to scream as they were under attack.

The house is storeyed and has an exit on the storey. He ran up the stairs and told his wife to escape through the lower exit on the ground floor. He then locked himself upstairs and tried to find an escape route. Before running upstairs, he had switched off the security lights. He however, saw the robbers as they ran around the house shouting his name with their torches on. He opened the window in a bid to escape but the robbers saw him and shot at his elbow with an arrow which he pulled out and placed in a curtain box. He tried to hide in the ceiling of the house but the robbers had already forced themselves into the house and could hear his wife screaming as they assaulted her and saying that if the complainant did not open they would kill her and burn the house. The complainant begged them not kill her. Apparently the robbers had information that he had Kshs. 1,000,000/= inside the house which they demanded to be given or they would kill him also. PW2 kept calling out his name saying they had broken her arm and leg and had now placed an axe over her throat. The complainant offered to give them all the money he had in the house if only they could spare him and his wife which request the robbers acceded to. He opened the door to the room, and four young men came in, pushed him to the floor and used the blunt part of the axe to break his right arm. They pushed him downstairs still asking to be shown where the money was. They took him to the sitting room and switched on the lights. He told them that he did not keep money there. He saw the faces of some of the robbers at this juncture though they were all strangers to him. The light in the sitting room was bright and he kept pleading with them not to kill him. They dragged him to the bedroom where the lights were on and he noted that everything was strewn all over the floor and the bedroom had been ransacked. They kept assaulting him using rungus. On checking his briefcase, he found that it had already been emptied. He told them he had Kshs. 2000/= inside the pockets of the trousers he was wearing. They took the trouser, searched it and removed the money. They held him as they took him round the house and he saw their faces clearly. The appellants were among the robbers. He told them that he did not have a safe and they pushed him to the floor. He was cut on the left arm with an axe until his left arm broke. All the time the lights were on. Two men left the room and two remained and shortly the other two returned and announced *"Imeisha twende"* and they left carrying a radio cassette/CD player make Sony and speaker which was in the bedroom. ½ an hour after the gang had left, the complainant called out to his wife but she did not respond, so he called out his maid **Lucy Tabitha Wayua** (PW5) who came accompanied by his two young children and told her that he was hurt and could not walk and requested her to check on his wife. He later learnt that she too had been badly injured. He then sent PW5 to call for help from the neighbours and also to check for the phones. He realized that the phones, Nokia 7110 and Siemens S40 too were missing. When leaving the gang had asked for keys to his motor vehicles and motor cycle, Toyota Corolla Saloon, Peugeot 404 pickup and motor cycle which he gave. However, they never drove them away. When the neighbours and relatives came they used the duplicate key to one of the vehicles and drove the couple to hospital passing through Yatta Police Station where they made a report of the incident. He mentioned to the police that he had recognized **Simon Ndaya** and **Elijah Kyalo** outside his house during the robbery when he switched on the security lights. Otherwise he remained in hospital for 21 days and his wife spent 10 days. Upon being discharged, they were called to the police station for an identification parade. Police also told them that they had recovered some items which they showed them. They identified the radio cassette, speaker, remote control panel and a blue jacket which belonged to their son and an arrow which had been used to shoot the complainant.

The identification parade was conducted by **C.I.P Morris Okelo Guda** (PW9) at Yatta Police Station and in each separate parade the complainant and PW2 picked out the appellants. Both the complainant and PW2 had been with the robbers for long during the attack and at close range as they pleaded for their lives and lights were on. That is how they were able to identify them. For the 2nd appellant, the complainant even recognized him by voice as they spoke during the robbery. He was the one who broke his right arm. As for PW2 she identified the 1st appellant as the one who raped her for almost 20 minutes and when done he stood over her for almost 15 minutes.

Following their ordeal both complainant and PW2 were admitted and treated at **Avenue Hospital Nairobi**. Whereas the complainant remained in hospital for 21 days, PW2 was in hospital for 10 days. Upon recovery they were examined by **Dr Zephania Kamau** (PW4) for purposes of P3 forms. Both complainants and PW2's injuries were assessed as grievous harm.

I.P Sarah Koki was the deputy OCS, Yatta Police Station when on 9th November, 2004 at about 6

a.m she received a call from the area D.O. regarding a robbery at **Mavoloni**. Before she could proceed there the complainant and PW2 were brought to the station. As they were seriously injured she referred them to hospital and proceeded to the scene. Having confirmed the robbery she mounted a search for the suspects. In the process she received information that APs had arrested a suspect with stolen items. Indeed it was Administration Police officer **Isaac Kimani** (PW6) who was on patrol duties at **Sophia Town** on 9th November, 2004 at about 9 a.m. when he saw a suspicious person in the midst of a group of people. He approached the group and on asking what was going on he was told that the person was selling a radio. He posed as a buyer and agreed to buy the radio at Kshs. 5000/=. He asked for documents of ownership of the radio and when he failed to produce them, he arrested the suspect and escorted him to the camp after identifying himself as a police officer. The person so arrested was the 1st appellant. He also recovered from him a jacket which he had used to cover the radio. He later handed over the 1st appellant to **P.C Wafula Makani** (PW8). Upon interrogation the 1st appellant volunteered information which led to the arrest of the 2nd appellant in Nairobi. Infact he led the police officers to the house of the 2nd appellant and on being searched, a wet blue jacket was recovered hidden underneath a mattress. That jacket was subsequently positively identified by **G.M.M** (PW3) a son of the complainant as his. The appellants were subsequently arraigned in court over the offence.

The 2nd appellant in his sworn evidence stated that he was a mason and also sold changaa. He lived in Nairobi. On 10th October, 2010 he was admitted at Kenyatta National Hospital (KNH) for HIV/AIDs treatment and was discharged on 10th November, 2004 at 2.00p.m. When he arrived at home at about 3.00p.m he found his wife preparing changaa for sale who briefed him that they needed more brew because what was available could not last the rest of the day. So he took a jerry can and Kshs. 2000/= to go and replenish the stock from his usual supplier. He purchased changaa for Kshs. 1900/= and transported it to stage No. 10 Mathare. Within minutes a motor vehicle approached and two people in coats jumped out and went towards him. They asked him what was in the jerry can. He told them that it was changaa. They demanded Kshs. 1500/= from him and when he told them that he only had Kshs. 100/=, they rejected the offer and ordered him instead to board the motor vehicle and that is where he found the 1st appellant. When he talked to him he learnt that he had been arrested in connection with bhang in **Sophia Town**. They ended up in the police cells where they found **Elijah Mwanzia** and **Simon Ndaya**. He went on to state in his defence that the complainant never mentioned or described him in the first report; he only mentioned **Elijah** Mwanzia and **Simon Ndaya.** He produced his treatment cards from KNH to prove that on the dates of the alleged commission of the offence, he was actually admitted at KNH.

Dancan Shaffi (DW1) a medical records officer at KNH who is in charge of medical records was summoned by court at the 2nd appellant's request. He stated that the 2nd appellant's records were No. 1066046 and he first registered at KNH on 22nd December 2005 at 10.57a.m. KNH did not have any other records relating to him and specifically for the nights of 10th and 11th November, 2004. He presented the copy of the records to court for perusal. He also clarified to the 2nd appellant in cross-examination that even if he had started attending KNH when it was known as King George Hospital the records would still have been available unless he had used a different name and indeed there was no suggestion by the 2nd appellant that he had used such a different name.

On his part, the 1st appellant in his sworn evidence stated that he was a farmer and bhang seller at Mavoloni, Yatta. On 10th November, 2004 he had gone to Nairobi to get his supply of bhang and was travelling back to Mavoloni. When he alighted at Mavoloni, he was accosted by an Administration Police Officer, **Isaac Kimani** who arrested him, searched and recovered the bhang. The AP demanded Kshs. 1000/= or else he would be taken to the police station but he did not have the money readily so he was escorted to the police station and handed over to PW8, **P.C Wafula Makani** and suggested to the police officers that he should show them where he obtained the bhang. He found **Elijah Mwanzia** and **Simon Ndaya** in the cells who told him that they had been arrested in connection with a robbery that had taken place in that area. After ½ an hour, he was put in a police vehicle to go and show the police officers where he had got the bhang. They proceeded to Nairobi but did not find the supplier. On their way back, they passed through Mathare and stopped at No. 10 stage. The police officers got out of the motor vehicle and

returned with 2nd appellant carrying changaa in a black jerrican. They were all driven back to Yatta Police Station and were later charged with the offence.

The learned magistrate having carefully evaluated the evidence on record found the case against the appellants established. Accordingly, she convicted them and sentenced them to death as required by law.

The appellants were aggrieved by both conviction and sentence. Hence they each separately and individually appealed to this court. Both appeals raised the same grounds; that their identification at scenes of crime was doubtful; the identifying witnesses had not described them in their first reports, the identification parades were conducted in contravention of the force standing orders, crucial witnesses were not called, circumstantial evidence adduced was not sufficient to find a conviction, the prosecution evidence on the whole was shaky and above all their defences were rejected without cogent reasons being advanced.

The appeals were heard by us on 2nd May, 2012. Prior to that, the two appeals had been consolidated on 29th November, 2012. During hearing of the appeals, the appellants elected to rely on respective written submissions which they had authored. We have carefully read and considered them.

The appeal was opposed. **Mr. Mukofu,** learned State Counsel orally submitted that the appellants had been identified during the robbery. The circumstances obtaining favoured positive identification of the appellants. There was moonlight and security lights which were on. The appellants were identified while they were outside as well as inside the house. The 2nd appellant too had a bright torch which at some point he directed it to the face of the 1st appellant. The robbery took long affording the witnesses ample opportunity to identify the appellants. Finally the State relied on the doctrine of recent possession.

It is our duty as the first appellate court to review the whole case with a view to reaching our own decision on the evidence. The duty is cast upon us by such decisions as **Pandya vs Republic [1957] E.A. 336, Okeno vs Republic [1972] E.A. 32 and Kariuki Karanja vs Republic [1986] KLR 190**. In all these cases, it w as held that an appellant on a first appeal expects the appeal court to exhaustively examine the evidence afresh, remembering always though that the appellate court does not have the privilege of hearing and seeing witnesses who testified before the trial court. As we consider and evaluate the evidence afresh, we are also reminded not to ignore the judgment of the trial court, but should carefully weigh and consider it.

Having now carefully reconsidered and evaluated the evidence afresh as well as the record of the trial court we have the following to say; the trial court committed two fatal errors, the consequence of which rendered the proceedings a nullity. These fatal errors were not captured by the learned State Counsel in his response to the appellants' submissions. Yet those errors were raised by the appellants in their respective written submissions.

The first fatal error noted is that the plea was taken by a magistrate who did not have jurisdiction to do so. The original and typed records are in agreement that the appellants and 2 co-accused were brought to court on 6th December, 2004. The proceedings on that day recorded as:-

"***6/12/2004***

Magistrate – G.Ngenye-RM

Prosecutor –IP Mbula

Clerk -Nyalo

Accused present

The substance of the charge and every element thereof has been read and explained by the court to the

accused person in Kikamba language which he/she understands who on being asked whether he/she admits or denies the truth of the charge replies:-

Accused 1 - Not true

Accused 2 –Not true

Accused 3 – Not true

Accused 4 – Not true

Alternative charge – Accused 4 –Not true

Alternative charge – Accused 4 -Not true

G.W. Ngenya – R.M

Mr. Osoro – I wish to go on record for 1st and 2nd accused. I apply for witness statement and early hearing date.

Prosecutor – Witness statements and for early hearing date.

G.W. Ngenye-R.M

Plea of not guilty entered for all accused in respect of count 1 and also alternative charges in respect of accused 4. Hearing on 19/4/2005 court no. 3 10/12/2004 at Kamiti Prison".

It is self evident from the foregoing that the plea was taken by a Resident Magistrate. A magistrate of this rank has no jurisdiction to preside over an offence of this magnitude. As per the first schedule of the Criminal Procedure Code, such an offence of robbery with violence can only be tried by a subordinate court of the first class presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate or a Senior Resident Magistrate. **G. Ngenye,** R.M was none of the above. She therefore had no jurisdiction to take the plea. One may however argue that the omission aforesaid is not fatal and is curable by virtue of section 382 of the Criminal Procedure Code as it did not occasion the appellants any prejudice or failure of justice since they pleaded not guilty to the charges anyway.

We do not buy such an argument. There must have been a reason why the drafters of the statute decided on categories of offences to be tried by certain classes or levels of magistrates. It cannot therefore be an argument that the appellants did not suffer prejudice or failure of justice. They did. What is a nullity, is a nullity. Prejudice or no prejudice does not matter. If a court assumes jurisdiction which it does not have or act in excess of such jurisdiction, the resultant proceedings are a nullity. In any event section 382 of the Criminal Procedure Code is in these terms;-

"subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

It is instructive that the section talks of a court of competent jurisdiction. In this case however, the court which took the plea of the appellants had no jurisdiction and therefore incompetent. By entering a plea of not guilty against the appellants, that court made an order. That order must be reversed or reviewed in this

appeal on account of error, omission, irregularity and since it was made without or in excess of jurisdiction. If it is reversed, as it should then, there was no plea taken upon which the trial would have proceeded. Taking a plea is an essential step, indeed a must step in any criminal trial. It cannot be separated from the subsequent proceedings. If the taking of the plea was irregular, then the subsequent proceedings were equally irregular. The two cannot be separated. The appellants were not represented by counsel during the trial. So that the issue whether they should have objected to the trial proceedings on account of the above omission does not arise. They were laymen and would not have known. It is instructive again from the record that there was no other time that a plea was ever taken; even after the discharge of the appellants' co-accused under section 87A of the Criminal Procedure Code; which brings us to the 2nd fatal mistake committed by the trial court.

Initially, the appellants were jointly charged for the offence with 2 others who were subsequently discharged under section 87A of the Criminal Procedure Code. In the initial charge, the appellants were 3rd and 4th accused respectively whereas their co-accused, **Simon Makau Ndaya** and **Elijah Mwanzia Kyalo** were 1st and 2nd accused. Following the discharge of the aforesaid, the 2nd appellant became the 1st accused, whereas the 1st appellant became the 2nd accused. This meant that there was an amendment of the charge sheet. However, our close scrutiny of the record does not give us such comfort. Indeed following the discharge of the two who were in our view positively identified and or recognized by the complainants at the scene and should not have been discharged, there was no application for amendment and or substitution of the charge sheet. It is not therefore clear which between the two charge sheets were applicable. We are saying all these because from the original record, there are two charge sheets dated, 6th December, 2004 and 28th April, 2005 respectively. The accused in the charge sheet dated 6th December, 2004 are four –

§ Simon Makau Ndaya

§ Elijah Mwanzia

§ Kilonzo Musyoka Katithi and

§ Johnson Mutinda Munyao

whereas the accused in the subsequent charge sheet are only the appellants. However, there is nothing on record to show that the subsequent charge was ever read to and the appellants invited to plead to the same. This confusion is even evident in the record. Throughout the record, reference to accused alternates intermittently between 3rd and 4th accused and 1st and 2nd accused. This confusion of course brings forth ambiguity to the charges with the consequence that the evidence may as well be at variance with the charges. The confusion is further mirrored in the judgment of the learned magistrate. She starts off as though there was only one count facing the appellants. However, when concluding the judgment, she suddenly realises that there was a second count of rape contrary to section 140 of the Penal Code facing the 1st appellant where upon she merely glosses over it.

We have agonised over the decision of the prosecutor to enter a *nolle prosequi* against the appellants' co-accused. We doubt whether it was done in good faith. The two co-accused were positively identified at the scene of crime. Their names were in the first report. They were arrested and charged. However, they were mysteriously discharged. Is it possible that these two bought their freedom as claimed by the appellants? That possibility cannot be ruled out. The complainants were livid and candid in their evidence and even in cross-examination that they had seen the faces of the co-accused. We are certain that something untoward happened culminating in the underserved discharge of the appellants' co-accused. We shall say no more on this.

We appreciate that the fatal mistakes alluded to above were not addressed by the State Counsel; though raised by the appellants in their submissions. They are fundamental issues going to jurisdiction and we have had to grapple with them, the non-input of the state counsel notwithstanding. Perhaps had the State Counsel addressed the issues and pleaded for a retrial, we would have warmly embraced

it. However, as of now, we do not have the material upon which we can consider such possibility.

In the result, we allow the appeals, quash the conviction and set aside sentence of death imposed. The appellants should be set at liberty forthwith unless otherwise lawfully held.

JUDGEMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **JUNE 2012.**

ASIKE – MAKHANDIA **GEORGE DULU**

JUDGE **JUDGE**