



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 343 of 2006

DENNIS CALVIN BIRUMBA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2655 of 2002 of the Chief Magistrate's Court at Nairobi by R.E. Ougo (Mrs) – Senior Principal Magistrate)

JUDGMENT

The appellant, **DENNIS CALVIN BIRUMBA**, was convicted on five (5) counts.

On Count 1, he was convicted for **robbery with violence contrary to section 296 (2) of the Penal Code**. He was then sentenced to death.

On Count 2, he was convicted **for attempted robbery with violence contrary to section 297 (2) of the Penal Code**. On that count, he was sentenced to death.

On Count 3, the appellant was convicted for **having possession of stolen property contrary to section 323 of the Penal Code**. For that offence, the appellant was sentenced to one-and-a-half years imprisonment. However, the sentence was suspended, in the light of the death sentences.

On Count 4, the appellant was convicted for **being in possession of a firearm without a firearm certificate, contrary to section 4(1) as read with section 4 (3) of the Firearms Act**. For that offence, the court sentenced him to seven (7) years imprisonment, but the said sentence was suspended because he had already been sentenced to death.

And on Count 5, the appellant was convicted for **being in possession of ammunition without a firearm certificate, contrary to section 4 (1) as read with section 4(3) of the Firearms Act**. For that offence, he was sentenced to two (2) years imprisonment, but that sentence was suspended by the trial court, because the appellant had already been sentenced to death.

Being dissatisfied with both the convictions and the sentences, the appellant lodged an appeal to this court. In his Petition of Appeal, the appellant raised five substantive grounds of appeal, which can be summarized as follows:

- (i) Section 214 of the Criminal Procedure Code was not complied with, thus rendering the proceedings a mistrial.**
- (ii) The DNA tests were not conducted procedurally. The results thereof were therefore not conclusive. They could not be relied upon to found convictions.**
- (iii) The identification was not positive: It was doubtful, as the circumstances prevailing at the time the offences were allegedly committed were not conducive.**
- (iv) The Identification Parades were of no evidential value as the Investigating Officer had had the appellant's Identity Card prior to having the parades conducted.**
- (v) The alibi defence was never given any consideration by the trial court. And section 211 of the Criminal Procedure Code was not invoked, thus denying the appellant his right to defend himself.**

When answering the submissions made by the appellant, Mr. Mulati, learned state counsel, said that the proceedings were not a mistrial. His reason for that submission was that although the original charge sheet was substituted, the trial court could not have explained to the accused that he could demand the re-call of the witnesses who had already testified because there were no witnesses who had already testified by the time the charge sheet was substituted.

Having carefully perused the record of the proceedings before the trial court, we have noted that the substitution of the original charge sheet was done on **22nd February 2006**. By that date, a total of twelve (12) prosecution witnesses had already testified. Therefore, the learned state counsel was factually incorrect to state, as he did, that by the time the charge was substituted, no witness had testified.

A perusal of the record of the proceedings before the trial court shows that the plea was taken anew, after the substitution of the original charge.

The need to have the accused take the plea afresh arose from the requirements set out in section 214 (1) (i) of the Criminal Procedure Code.

By dint of the proviso (ii) to that subsection;

“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.”

As far as the appellant was concerned, the trial court was obliged to notify him of his right to demand, if he so

wished, that any of the twelve witnesses who had already testified, be recalled to either testify afresh, or to be cross-examined further.

In that regard, the appellant cited the decision in **HARRISON MIRUNGU NJUGUNA V REPUBLIC, CRIMINAL APPEAL NO. 90 of 2004**, as authority for the proposition that the trial court was under an obligation to inform the accused of his right under section 214 (1) (ii).

He further submitted that the failure to notify him of that right was not a procedural defect which could be cured under section 382 of the Criminal Procedure Code.

However, the appellant did appreciate that if the trial was rendered defective, due to the failure by the trial court to comply with section 214 (1) (ii), this court could order for a retrial. But, in his view, an order for a retrial herein would be prejudicial to his right to a fair trial. That submission is premised on the fact that the appellant had already been in custody for over five years.

It was also the submission of the appellant that, in any event, the trial court erred in basing his conviction of the results of the DNA tests. As far as he was concerned, the said tests had not been conducted procedurally: so that the results thereof were not conclusive.

The third issue raised by the appellant was that the identification was not positive, as it was done in very difficult circumstances. The alleged robbery had taken place at night, and the victims were not only scared by the presence of a gun which was fired, but also because the victims were physically attacked by the robbers.

Next, the appellant pointed out that the Investigating Officer had readily conceded having been in possession of the appellant's Identify Card, prior to the time when the police conducted the Identification Parade. In those circumstances, the appellant submitted that there was a real possibility that the witnesses who allegedly identified him at the Identification Parades, had seen his photograph before they were called to the parade.

He expressed the view that that possibility was very real because none of the identifying witnesses had, at the earliest opportunity, given to the police, the description of the robber whom they had identified.

Finally, the appellant faulted the learned trial magistrate for not taking into account his defence. He had, in his said defence, indicated that the whereas the DNA tests showed that his blood was found on some items, the blood samples were not collected from anything that was found at the scene of crime. Instead, it was the appellant's contention that the blood samples were simply collected from the place where he was washing off his blood, after he bled due to an attack by his former partners in a "chama" of touts. His story is that he had not yet paid a loan which he had borrowed from the "chama". However, the Minister for Transport had forced the "chama" to close down, scattering the members thereof all over the country. But the former members still blamed him for running away with the money he had been lent.

The appellant testified that he did report the incident at Central Police Station a day before the police arrested him. In effect, the appellant's defence was that he was not at the scene of crime. He told the trial court about the

circumstances in which he suffered injuries to the forehead.

But the respondent herein was of the opinion that the evidence on record proved beyond any reasonable doubt that the appellant was not just at the scene, but also that the appellant was positively identified whilst he was actively participating in the robbery.

As is required of the first appellate court, we have re-evaluated all the evidence on record, and have drawn therefrom our own conclusions. We shall revert to those matters of fact later.

For now, we note from the authority cited by the appellant i.e. **HARRISON MIRUNGU NJUGUNA Vs REPUBLIC, CRIMINAL APPEAL NO. 90 of 2004**, that;

“The trial court was clearly required to inform the appellant of his right to have the previous witnesses recalled either to give evidence afresh or to be further cross-examined by him. This is not a procedural failure such as failing to ask him to plead afresh. The right to hear the witnesses give evidence afresh on the amended charge or to cross-examine the witnesses further, is a basic right going to the root of a fair trial and clearly it was the duty of the trial court to show in his record that he had informed the appellant of that right and to record further what the appellant said in answer to the information.”

That being the position in law, we must now conclude that the failure by the trial court, in this case, constituted a substantial defect to the trial proceedings. Accordingly, and for that reason, we do now quash the conviction and set aside the sentences.

In the case of **HARRISON MIRUNGU NJUGUNA Vs REPUBLIC** (above-cited), the Court of Appeal declined to order a retrial because the appellant had already been in custody for over five years.

The appellant before us has also been in custody, for over five years, since he was arrested on 14th October 2004. He therefore asks us to accord him the same treatment as was accorded to **Harrison Mirungu Njuguna**.

On our part, we note that apart from the length of time when the appellant had been in custody, the offence was committed at about 7.30p.m. And although some of the prosecution witnesses (such as **PW 7**) said that there was sufficient lighting at the scene, **PW 4** testified that those at the scene had to put on a light nearby, in order to retrieve the pistol which he had thrown into the garage, after snatching it from one of the four assailants.

Surely, if there was sufficient light that enabled **PW 7** to see what was happening, when he was about 30 metres away, there should have been no need to put on another light nearby, to enable those present, retrieve the pistol.

Secondly, whereas the appellant declined to participate in the Identification Parade, we hold the view that the reasons he advanced were sound. As the police had the appellant's Identity Card prior to their conducting Identification Parades, there was a real possibility that the identifying witnesses might have seen the photo of the appellant.

Of course, we note that the identifying witnesses denied having been shown any photograph of the appellant, but we are definitely not comfortable to assume that the photos were not seen by the said witnesses prior to the conducting of

the parades.

PW 2 confirmed that at the material time he was a tenant in a building owned by the father of the appellant. It is at the house occupied by **PW 2** that the appellant went to wash his bloodied fore-head and his blood-stained T-shirt. However, the question that arose is how the appellant got the injuries on his forehead.

The prosecution witnesses said that the injuries were inflicted during a struggle between them and the appellant. But the appellant stated, all along, that he was beaten up in town, by some matatu touts who had accused him of running away with an unpaid loan, which he had been given by their “chama”.

PW 14 conceded that the appellant had told him about that line of defence even before the appellant was charged.

Given the lengths to which the police went in demonstrating that the receipts which the appellant’s wife produced to prove ownership of various items, were not issued by registered companies; and also that the VAT numbers and the PIN numbers on the said receipts were non-existent at the Kenya Revenue Authority: we would have expected a witness to tell the court that the alleged loan was non-existent. But no such a witness was called by the prosecution. If anything, the Investigating Officer simply said that the area called “Commercial”, within the City of Nairobi was wide. That suggests that the police were overwhelmed, in their endeavour to disprove the alibi which the appellant had advanced.

Overall, the police officers who investigated this case did an outstanding job. Indeed, it does appear more probable than not that the appellant had a hand in the robbery.

In those circumstances, it would be prejudicial to the appellant to order a retrial as the prosecution might now seek to fill-up the loopholes. And, in any event, the respondent did not seek an order for a retrial. We were therefore not told whether or not the witnesses would be available to testify, if a retrial was ordered.

There shall not be a retrial.

Instead, we do now order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 9th day of March, 2010.

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FRED A. OCHIENG
JUDGE

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M.A. WARSAME
JUDGE