



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 14 & 15 of 2007

(From Original Conviction and Sentence in Criminal Case No. 455 of 2006 the Senior Resident Magistrate's Court at Voi: J.M. Gandani – S.R.M.)

CLAUDE MSUMIRI 1ST APPELLANT

BENSON MGHANGA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The two appellants namely **CLAUDE MSUMIRI** (hereinafter referred to as the 1st Appellant) and **BENSON MGHANGA** (hereinafter referred to as the 2nd Appellant) both filed their appeals against their conviction and sentence by the learned Senior Resident Magistrate sitting at Voi Law Courts. Both appellants had been arraigned before the lower court on 25th May 2006 and were jointly charged with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. Both appellants entered pleas of '**not guilty**' to the charge. Their trial commenced on 19th July 2006 and the prosecution led by **INSPECTOR MUNGA** called a total of five (5) witnesses in support of their case. The brief facts of the prosecution case as narrated by the complainant **DONALD KALA** were that on 18th April 2006 at about 6.00 p.m., he was returning from his daily occupation as a hawker carrying a blue bag containing clothes. When he got to a rocky place, two men accosted the complainant. One of the men was armed with a panga which he placed on the complainant's neck. A third man joined the two thugs and together they robbed the complainant of his mobile phone make Nokia, five (5) belts, bag of clothes and cash Kshs.2,000/-. The three men then led the complainant to a nearby cave where they abandoned him and then ran away. The next day the complainant went to report the incident to the village elder. Whilst there he spotted the 1st Appellant at a nearby kiosk and pointed him out. The 1st Appellant was apprehended and upon being questioned led authorities to the home of the 2nd Appellant whom the complainant also identified as one of the men who had robbed him. The two appellants were detained at Wundanyi Police Station. The next day the appellants led police to the home of one **JOHN** and pointed out the spot where the stolen goods were buried. The area was dug up and the complainant identified his stolen clothes buried underground and covered with a sack. Upon completion of police investigations both appellants were charged in court. Both appellants were ruled to have a case to answer and were placed on their defence. Each gave an unsworn defence and denied the charges. On 23rd January 2007 the learned trial magistrate delivered her judgement in which she convicted both appellants and sentenced each to death. Being dissatisfied with both the conviction and sentence the appellants filed this appeal.

The appellants who were not represented at the hearing of this appeal relied on their written submissions which with the leave of court had been duly filed. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State made oral

submissions opposing the appeal.

Before we begin to consider the merits or otherwise of this present appeal, we have carefully perused the charge sheet and have noted a major anomaly which to our surprise appears to have been overlooked by the learned State Counsel. The charge having been brought under S. 296(2) of the Penal Code, it is an essential ingredient that the particulars of the charge reflect that the alleged robbers were armed with dangerous and/or offensive weapons. The particulars of this charge as framed merely provided

“On the 18th day of April 2006 at Ilaku Village, Marugua S/location in Bura location in Taita Taveta District within Coast Province jointly with another not before court, robbed DONALD KALA of one hand bag, 4 lessos, one Baby Shawl, one Masai bedsheet, 3 T-shirts, one black skirt, one long trouser, 2 truck suits (Trousers), one vest, 2 paper bags, half a dozen of sports bag, 2 baby’s suit, one Baby short, one Baby monkey face, 12 pairs of socks, 10 men underwear, 15 ladies underpants, 4 Bras, 4 ladies Tops, 9 Ladies Bikers, 5 Belts, 3 Caps, 2 ladies supergate, one note book, one mobile phone make Nokia 1100 and wallet containing cash Kshs.2,000/- all valued at Kshs.16,320/- and at or immediately before or immediately after the time of such robbery beat the said DONALD KALA”

No indication is made that the attackers were armed with anything much less that they were armed with any dangerous and/or offensive weapon. Such an omission has severally been held to be a fatal defect in the charge sheet which renders any subsequent trial a nullity. In the case of **DANIEL MORARA MOSE –VS- REPUBLIC Criminal Appeal No. 86 of 2000**, the Court of Appeal in dealing with a case where the particulars of the charge failed to indicate that the appellant was armed with a dangerous or offensive weapon held at page 3 as follows:-

“... the omission referred to above constituted a defect in the charge which may have embarrassed the conduct of his [the appellants] defence with the resultant possible failure of justice. On this account, we think that such defect is not curable under S. 382 of the Criminal Procedure Code in the sense that the particulars of the charge did not disclose an offence known to the law under Section 296(2) under which the charge was laid. Consequently, we allow the appellant’s appeal, quash his conviction, set aside his death sentence and order that he be set at liberty forthwith unless held in custody for any other lawful cause”

In another case **DAVID ODHIAMBO & GEORGE OMONDI –VS-REPUBLIC Criminal Appeal 5 of 2005**, the Court of Appeal in dismissing an appeal where the particulars omitted any description of the weapons used to perpetrate the offence held

“The charge of robbery [under S.296(2) of the Penal Code] brought against the appellants was, with respect defective as it failed to allege a vital ingredient thereof, namely that the knife was a dangerous or offensive weapon. The conviction recorded against each appellant must accordingly be quashed”

The above cited decisions are binding on this court. In the present case the particulars totally fail to mention any weapon at all, much less give a description that it was dangerous or offensive. We note that in his evidence the complainant alleged that one of his assailants came up from behind him and laid a panga at his neck. No mention is made of a panga in the particulars of the charge rendering the evidence adduced greatly at odds with the charge sheet.

We have carefully and anxiously perused the record of the trial in the lower court and note that at no time was this anomaly corrected and at no time did the court prosecutor apply to amend the charge sheet. As stated in the **Daniel Morara** case, this is not an omission that is curable by applying S. 382 of the Criminal Procedure Code. It is an omission which is fatal to the prosecution case and renders the entire subsequent trial and conviction null and void. On this basis alone we do allow this appeal. The conviction of the two appellants by the lower court is quashed and the attendant death sentences imposed on both appellants are hereby set aside.

We have addressed our minds to the question of whether a retrial ought to be ordered. Generally, a re-trial would only be

ordered where there has been some defect in procedure for which the prosecution cannot be blamed. In this case there was no defect in procedure. The prosecution who draft and present charge sheets to court are entirely to blame for this fatal omission. Notwithstanding the fact that the offence of Robbery with Violence is a felony and inspite of the weight of evidence, to order a retrial would allow the prosecution a second bite at the cherry so to speak. They would in effect be granted an opportunity to seal the loopholes of the previous trial to the great prejudice of the appellants. For these reasons we decline to order a retrial in this matter. Both appellants are to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and Delivered in Mombasa this17th..... day of September 2010.

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M. IBRAHIM
JUDGE

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M. ODERO
JUDGE

Read in open court in the presence of:-
Appellant in person
Mr. Onserio for State

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M. ODERO
JUDGE
.17./09/2010