



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 392 of 2007

PETER MAINA MACHARIA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Murang'a in Criminal Case No. 452 of 2007 dated 4th December 2007 by S. Ndambuki – Ag. P.M.)

J U D G M E N T

The appellant, Peter Maina Macharia was charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. He pleaded not guilty to both counts, was tried and convicted however, for the offence of simple robbery contrary to section 296 (1) of the Penal Code and sentenced to 8 years imprisonment. He was aggrieved by the conviction and sentence, hence this appeal.

The prosecution case was that the appellant who was known to the complainant went to his house on the night of 30th October 2006 and robbed him of his money. Again on 4th November 2006 the complainant met the appellant as he walked towards Murang'a town where he again robbed him of his money. Three witnesses testified for the prosecution. PW1 stated that on 30th October 2006, the appellant in the dead of night came to his house whilst armed with a small axe and a sword and demanded money from him. He knew the appellant very well. He identified him very well as there was moonlight. He stated that the appellant covered his face and gagged his mouth with a blanket and took his Kshs.5,500/= from his jacket. The complainant thereafter reported the incident at Gaichanjeru Police Post. He went on to state that subsequently as he was walking towards Murang'a town on 4th November 2006 he met the appellant again who pounced on him, grabbed him by the neck gagged his mouth and took his Kshs.800/=. He said a passerby informed a certain lady who was nearby about the on going robbery but the appellant ran into a maize plantation and disappeared. The complainant reported the incident at Kaweru Police Patrol Base and was referred to Murang'a District Hospital after having been issued with a P3 form. He stated that the appellant was commonly known as Karuri, though it was possible that he was also known as Peter Maina Macharia.

PW2 testified that the appellant was arrested after the complainant had reported that the appellant who was known to him had robbed him. PW3 testified that he was at the CID offices Murang'a when the complainant reported that he had been robbed by the appellant. He had earlier reported a case of robbery at Gaturi police post involving the same appellant. He was one of the officers who arrested him. He stated that the complainant identified the appellant as Karuri the name he was commonly known by.

In his defence the appellant denied the charge and stated that the police officers arrested him for offences he knew nothing about. He stated that he was not Karuri as his identity card bears the name Peter Maina Macharia. He also went on to state that he was not found with the stolen items or the weapons he is alleged to have attacked the complainant with when he was arrested.

As a first appellate court, it is our duty to subject the evidence tendered to fresh and exhaustive evaluation so as to reach our decision as to whether the appellant was guilty as charged or not in terms of *Okeno v/s Republic* (1972) E.A. 32.

However in our view this appeal can easily be disposed off on a procedural irregularity committed by the learned magistrate. The appellant was initially charged with one count of robbery with violence. However after the complainant had testified and was being cross-examined by the appellant, the prosecution made a move to substitute the charge sheet. Under section 214 (1) of the Criminal Procedure Code, the trial magistrate was under a duty to read over the amended charge to the appellant and to ask the appellant whether he (appellant) wanted to have the witnesses who had previously testified to be recalled to testify afresh or for further cross-examination. The proviso to section 214 (1) of the Criminal Procedure code is in these terms:-

“Provided that –

- (i) Where a charge is so altered, the court shall thereupon call upon the accused to plead to the altered charge.
- (ii) Where a charge is altered under this sub-section 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.”

These two provisions are obviously for the protection of persons facing criminal trials and in paragraph (i) of the proviso, it is clear that a trial court has no option but to read the amended charge to an accused person. The expression employed in the proviso is that the court “*shall thereupon call upon the accused to plead to the altered charge.*” In the circumstances of the present appeal the trial magistrate did comply with the requirement since she called upon the appellant to plead to the amended charge. However she failed to comply with the more troublesome question of paragraph (ii) of the proviso. The trial court was clearly required to inform the appellant of his right to have the previous witnesses recalled either to give evidence afresh on the amended charge sheet 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 its record that she had informed the appellant of that right and to record further what the appellant said in answer to the information. All that the magistrate recorded the appellant as saying was “*Accused – The statements have not been given to me but I am ready to proceed with the case today even without them.*”

That statement was not intended to mean that the appellant had understood that he had a right to have the witnesses recalled to testify afresh or for further cross-examination, the statement does not show the position taken by the appellant on that issue.

We think the proceedings in the magistrate’s court were substantially defective. Failure to inform an accused person of his rights given to him by law is not a procedural irregularity which can be cured under the provisions of section 382 of the Code. Accordingly the appellant’s trial is substantially defective and we must allow his appeal on this ground alone. We accordingly allow the appeal against his conviction and set aside the conviction and sentence imposed on him. Relying on the principle set out in the case of *Wilson Washington Otieno & Another v/s Republic* [1988-1992] 2 KAR 251, it would not be appropriate or right for us to quash the conviction.

Where an appeal is allowed on the ground that the trial was either defective or was a nullity, the usual

order to make is one for retrial of the appellant on the same charge. Should we, in the circumstances of the case, order a retrial?

We think that in all the circumstances of the case, we ought not to order a retrial. The offence of which the appellant was convicted, took place on 4th November 2006, that is more than two or so years ago. The trial of the appellant in the subordinate court lasted from 28th February 2007 to 4th December 2007 when the magistrate convicted and sentenced him to 8 years imprisonment. His appeal to this superior court was heard on 21st October 2008. The appellant has thus been in custody in excess of 2 years. Even assuming that the witnesses for the prosecution can still be traced to testify, we think it would be unfair to subject the appellant to further waiting in prison pending a new trial. In any event the evidence led in support of the charge was not cogent enough to sustain a conviction. Accordingly we decline to order a retrial and instead order that the appellant shall be released from prison forthwith unless he is held for some other lawful cause.

Dated and delivered at Nyeri this 30th day of January 2009

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE