REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL 70 & 71 of 2008

(From original SRM'S Court Winam in Cr. Case No. 821 of 2007)

CHARLES OUMA NDEGE & ANOR ……..... APPELLANTS

-VERSUS-

REPUBLIC ……..…….. RESPONDENT

Coram

Mwera, Karanja, JJ.

Musau for the State

Onsongo for the appellant

CC. Dianga.

JUDGMENT

The two appellants herein Charles Ouma Ndege, Charles, (CR. A. 70/08) and Evans Fredrick Odhiambo, Evans (CR. A. 71/08) were accused 2 and 1 in the lower court at Winam. They are appellant 1 (Charles) and appellant 2 (Evans) in their two appeals which were consolidated and argued together by Mr. Onsongo, Advocate. The pair was charged under S. 296 (2) PC in that on 7.4.2007 at Manyatta Area, Kisumu jointly with others not before court while armed with dangerous weapons namely pangas and rungus, they robbed Alfonse Onyango Ojwang of one mobile phone (Motorolla), Ksh 2200/= plus other personal effects all valued at Ksh 10,000/=. During the incident the robbers used actual violence on the said Alfonse Ojuang.

In a separate alternative count laid under S. 322 (2) P.C. appellant 2(Evans) allegedly dishonestly retained stolen goods namely a Motorolla phone, I.D, voters and students cards, knowing or having reason to believe them to be stolen. Following a trial the two were found guilty of the main count. They were sentenced to suffer death as by law established. That provoked the appeals.

Mr. Onsongo told us that he had eight grounds of appeal which he condensed into three to be argued as follows:

Ground 1: Legal points based on SS. 169, 211 and 150 CPC.

Ground 2: Contradictions in evidence regarding identification and recovery of stolen items.

Ground 3: Judgment vis a vis evidence.

Counsel submitted that the alleged offence took place at night and while the complainant (PW1) spoke of the scene being in a dark place PW2, Billy Odhiambo introduced an element of security lights being in the neighbourhood.

On legal points Mr. Onsongo told us that on/by 25.6.2007 Kowinoh Advocate appeared for the appellants. Invoking the provisions of S. 150 CPC, he applied and the court granted leave to recall PW1 and 2 (above) for re-examination. We heard that all the way to the end of the trial the lower court did not summon those witnesses as desired by the defence and that accordingly the appellants were prejudiced.

Moving to S. 211 CPC, counsel urged us to find that in his ruling the learned trial magistrate did not address each appellant as to his rights under that provision, requiring each to respond or appropriately and personally opt one way or the other – i.e whether to be heard on oath, to remain silent or give unsworn statement; whether to call witnesses or not. We were told that any position taken by Mr. Kowinoh on behalf of the appellants, fell foul of S. 211 CPC.

Mr. Onsongo then addressed us on S. 161 CPC to the effect that because the appellants did not call witnesses in their defence it was in error on the part of the learned trial magistrate to allow the prosecution to be heard in final submissions. And that S. 169 CPR was not complied with as regards setting out points of determination in the judgment and determining them with reasons.

When counsel moved to contradictions in evidence, he revisited the prosecution evidence on whether the scene of the crime was dark (PW1) or had security lights around (PW2).

Mr. Musau the learned Senior Principal State Counsel conceded the appeals on the basis that the lower court failed to summon PW1, 2 for further re-examination, after the defence had successfully so applied under S. 150 CPC. It was a fatal error. Coming to S. 211 CPC we heard that the court ought to have addressed each appellant on the rights thereunder and recorded their responses – not to let their advocate do that for them. Mr. Musau, however, prayed that a retrial be ordered because this was not an old matter and witnesses could be traced to testify. Mr. Onsongo left the issue of retrial to court.

It appears to us that this consolidated appeal is to be determined essentially on points of law. However, we shall go over the evidence, not to the detail/merits of the same, for the granting or refusing the order for a retrial.

We begin with S. 150 CPC:

"**150. A court may at any stage of a trial or other proceedings under this Code, summon or call any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:,"**

provided that the prosecution or defence shall have right cross – examine such a person. Reading S. 150 CPC may appear from the face of it that calling or recalling such a person as witness is at the option of the court. However to us, and for the sake of a fair trial, if a prosecutor or defence advocate or his client asks the court on sufficient ground to recall a witness as Mr. Kowinoh Advocate did in the lower court twice, the learned trial magistrate ought to summon that witness for re-examination. The defence wanted a recall of PW1, 2 for re-examination by its advocate who had come on record after their evidence had been heard. The advocate appears not to have given the reasons why he desired PW1, 2 recalled but quite probably because he had just come on record, he wanted to have a better grip on the whole case for the sake of his clients – the appellants. The lower court granted the prayer but did not summon those two witnesses to return for the sake of Mr. Kowinoh. No reasons were given e.g. that they could not be

traced, and to us that omission was, therefore in this particular case, a serious one.

As to S. 211 CPC a much - often used and applied provision of law not requiring reproduction, suffice it to set out its requirements thus: At the close of the prosecution evidence and submission if any, it appears to the court:

(i) that a prima facie case has been made out against the accused to require him to make a defence;

(ii) it shall explain the substance of the charge to the accused and

(iii) shall inform him that he has a right to give sworn evidence from the witness box whereupon he

(iv) will be subject to cross – examination or that he

(v) can make a statement from the dock (he will not be cross – examined or he can elect to keep silent) and

(vi) whether there is any witness to call or adduce other evidence.

All these must be directed by the trial court to a given accused person to answer personally and then proceedings roll accordingly.

This is a mandatory provision of law. In the case before the lower court, it does not appear that after the contents of S. 211 CPC had been set out in the ruling, the appelant's reaction/response was recorded. Mr. Kowinoh is recorded to have told the court:

"**Kowinoh; we shall give u/s and call no witness."**

We took "u/s" to mean unsworn statement because that is what each appellant put forth in defence.

We are obliged to find that it was the appellants themselves who ought to have reacted to the ruling under S. 211 CPC and not their counsel. Accordingly, at this point of the proceedings there was another serious defect.

While addressing S. 161 CPC, we were inclined to observe that it is more often overlooked:

"**161. In cases where the right to reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right to reply:"**

unless it was the Attorney - General himself or the Solicitor - General as advocate, appears for the prosecution. Then he has the right to reply in all cases. The reply is regarding the close of the whole trial. In the present case it appears that following Mr. Kowinoh's submission, the State prosecutor said"

"**Pros: I urge court to go as per evidence on record."**

That does not seem to amount to much but still it is a reply, when the appellants gave usnworn statements AND they called no witness (es). Although no prejudice appears to follow from that course, under S. 161 CPC the prosecutor should not have had the opportunity to so remark.

We perused the judgment. Even we as the first appellate court would have done the needful, the learned trial magistrate did not comply with S. 169 CPC – setting out in his judgment issues to be determined, and proceeding to decide them with reasons.

The above are quite a handful missteps under the Criminal Procedure Code. We therefore conclude that the trial in the lower court was a mistrial.

The State pressed for a retrial. And so without determining the merits or lack of them, of the evidence presented, we went over it, (PW1, PW2 and PW3) and were of the view that with the recent age of the case and that witnesses would be traced to testify, their evidence could probably lead to a conviction on a retrial.

Accordingly we order one. The two appeals are allowed; conviction quashed and sentences set aside. However the 2 appellants will remain in custody so that a retrial is arranged as soon as it is practicable before a different magistrate.

Judgment accordingly.

Delivered on 23.6.2009.

J. W. MWERA & J. R. KARANJA

JUDGE **JUDGE**

JWM/hao